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PHD THESIS

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ANTITRUST AND TRADE REGULATION IN AGRI-FOOD
MARKETS

*A FOOD SOVEREIGNTY APPROACH AND A COMPARATIVE
ANALYSIS ON US AND EU REGULATION*

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legal trends

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Recommendation from the Supervisors

We met Martin when he was a third-year law student—a law student with serious dedication and who did his utmost to solve his tasks. During his undergraduate legal studies, he worked hard for two years to develop a scholarly work on a completely different legal issue than his current research, but this has meant a solid basis to acquire those skills—serious and deep knowledge of legal history and doctrine, good synthesising skills, ability to compare legal institutions and practices—which are crucial to carry out independent legal research. He used his brilliant knowledge of English and German to familiarise himself with the specificities of major legal systems and at the end of his research he has written a PhD thesis which may also be of interest to an international audience.

The value of this work is enhanced by the dual approach which not only takes into account agricultural law but also competition law, as well as by providing both public and private law analysis on the examined legal systems and shedding light on the issue's economic aspects. The thesis utilises both theoretical and practical works of the German and Anglo-Saxon literature that have an impact on competition law, and it takes a mixed public and private law perspective which is a characteristic of legal scholars specialising in agricultural law.

The analysis on agri-food competition law is established in three parts. After a discussion of doctrinal foundations mostly based on German legal scholarship in Part I, Part II is devoted to normative analysis covering the relevant legal sources of both the United States and the European Union, as well as its two Member States, Germany and Hungary. Comparing these jurisdictions, Martin not only focuses on conventional antitrust instruments, such as the exemption under the prohibition of anti-competitive agreements, but also trade regulation provisions, such as the legal regimes against unfair trading practices. As regards the latter, it becomes clear that Hungary has been a frontrunner in legislation, and with its sectoral regulation it preceded the EU with more than ten years. That is an important reason why we are delighted that the utterly complex analysis of this legal area has been performed by a Hungarian PhD candidate. In Part III, the thesis is engaged in a law-and-policy analysis using the food sovereignty paradigm's perceptions on competition as its benchmark. Through bringing the paradigm of food sovereignty and ordoliberal competition policy into line with one another, Martin formulates forward-looking proposals to develop the legal instruments of agri-food competition law.

There is no doubt that the thesis contributes to the development of legal scholarship, including legal theory. Martin's dedication is reflected in his 24 published studies, articles and book chapters. Most of his works deal with agri-food competition law, but he also has publications on environmental law and labour law.

As his supervisors, we warmly recommend the thesis to all those interested in this complex legal area and we are looking forward to participating in his official PhD defence.

Miskolc, 8 June 2022

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Summary

The thesis aims to provide comprehensive and complete insight about and analysis to those antitrust and trade regulation rules which have the goal of realising agricultural and food policy objectives. Identified as one of the most emphasised problems to be solved from an agricultural policy perspective, buyer power used against agricultural producers has to be treated more effectively in order to better contribute to the objectives of agricultural policy. To find the appropriate legal solutions, the thesis carries out an in-depth analysis of competition-related provisions applying to agri-food markets. It examines the rules in force of the United States and the European Union, as well as its two Member States, Germany and Hungary.

Part I elaborates the doctrinal context of agri-food competition law in order to identify those legal sources which are relevant to the competitive process in agri-food markets. Agri-food competition law is defined as the aggregate of legal instruments aiming to realise agricultural and food policy objectives, created and maintained to regulate the behaviour of undertakings in and the competitive process of the agricultural and food market. The definition not only includes conventional antitrust provisions, such as the exemption under the prohibition of anti-competitive agreements, but also trade regulation provisions, such as the legal instruments related to relative market power and those aimed at enhancing fairness in the food supply chain in B2B-relations.

Part II provides a normative analysis on those provisions of the examined jurisdictions, which are covered by the definition formulated in Part I. It not only serves as a starting point for the further development of rules in force in the respective jurisdictions, but also constitutes the basis for comparison carried out in the part of conclusions.

Part III uses the food sovereignty paradigm's perceptions on competition as benchmark against the rules in force. It aims to identify that competition policy school of thought which can be brought into line with food sovereignty, and finds that ordoliberalism is suitable for that.

Part IV, on one hand, assesses the regulation in force in light of food sovereignty, and, on the other hand, makes proposals for formulating a food sovereignty-based competition policy. As a consequence that ordoliberal competition policy is found to be in accordance with food sovereignty's perceptions on competition, the two alternatives for a food sovereignty-based competition policy are established in connection with the European Union which has been and is still influenced by ordoliberal notions, in particular in its competition policy.

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List of abbreviations and terms

Agri-Food Competition Regulation	Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products
UTP Directive	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
CMO Regulation	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
BKA	Bundeskartellamt [<i>German Competition Authority</i>]
BLE	Bundesanstalt für Landwirtschaft und Ernährung [<i>Federal Agency for Agriculture and Food</i>]
GWB	Gesetz gegen Wettbewerbsbeschränkungen [<i>Act against Restraints of Competition</i>]

UWG	Gesetz gegen den unlauteren Wettbewerb [<i>Act against Unfair Competition</i>]
Hungarian Competition Act (in the main text); Act LVII of 1996 (in footnotes)	Act LVII of 1996 on the Prohibition of Unfair Market Conduct and Competition Restriction
Hungarian Competition Authority	Gazdasági Versenyhivatal (GVH)
NFCSO	Nemzeti Élelmiszerlánc-biztonsági Hivatal [<i>National Food Chain Safety Office</i>]

Introduction

1 Starting point

The thesis aims to provide comprehensive and complete insight about and analysis to those antitrust and trade regulation rules which have the goal of realising agricultural and food policy objectives. Within the framework of the thesis, my starting point is the objectives of agricultural policy, the rules examined are those of competition law in a broad sense, and the lens through which I put those rules under scrutiny is that of the paradigm of food sovereignty. That is, I study competition rules from the standpoint of the food sovereignty paradigm's expectations about competition and trade in agri-food markets to discover whether this reading can contribute to the better achievement of agricultural policy objectives.

Agricultural policy primarily aimed at ensuring a fair standard of living for the agricultural community and the contemporary mainstream antitrust policy aimed at increasing economic efficiency in the form of consumer welfare have a complicated, unsettled and—in many cases—contradictory relationship. While agricultural policy seeks to improve the income of agricultural producers, and thus their standard of living, through any means at its disposal, mainstream antitrust policy has been influenced in the last four decades by pure efficiency-based considerations serving the interests of consumers. These two are often irreconcilable,¹ or as put by *Kirchner*, competition policy and other policies, such as agricultural policy, may have conflicting ends.² In other words, agricultural policy places more importance on producer surplus, which unambiguously runs counter to the antitrust goal of increasing consumer surplus.³ What serves the attainment of the goal of improving farm income may not serve in each case the welfare of consumers increased by, for example, lower consumer prices. How can the relationship be resolved between these two public policies? Simply put, with value judgment.

For lawyers, the realisation of a value judgment of policymakers becomes relevant, if it takes the form of legal provisions and/or influences law enforcement. In other words, legal

¹ This finding is formulated in general regarding antitrust exemptions by John ROBERTI–Kelse MOEN–Jana STEENHOLDT (2018) *The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law* [Online]. Available at: <https://www.justice.gov/atr/roundtable-exemptions-and-immunities-antitrust-laws-wednesday-march-14-2018> (Accessed: 14 February 2022).

² Christian KIRCHNER (2007) Goals of Antitrust and Competition Law Revisited. In: Dieter SCHMIDTCHEN–Max ALBERT–Stefan VOIGT (eds.) *The More Economic Approach to European Competition Law*. Tübingen: Mohr Siebeck, pp. 12–13.

³ Philip WATSON–Jason WINFREE (2021) Should we use antitrust policies on big agriculture? *Applied Economic Perspectives and Policy* [Online]. Available at: <https://doi.org/10.1002/aepp.13173>.

research is concerned with „the ethical and political acceptability of public polic[ies]” only in the case they are „delivered through legal instruments”.⁴

As to the value judgment whether antitrust/competition or agricultural policy objectives should be given priority in relation to each other, the decision has been made long ago. The agricultural sector, both in the European Union and in the United States, has its *sui generis* competition-related rules, be they in the form of antitrust or other (for example, trade) regulation. Do they function well? Not so it seems. Complaining voices from agricultural producers about their exploitation by their business partners are still with us;⁵ legal attempts to cure the anomalies still appear.⁶ Perhaps the question should be posed in a different way. Does and can regulating competition⁷ have the function, or rather the power, to mitigate the market failures in agri-food markets?

Having a value judgment benefitting agricultural policy over competition policy seems like an agreement on the policy aim that the agricultural sector and producers have to be supported even through the means of competition law. However, whenever I have talked with competition lawyers about the competition-related rules applying to agri-food markets, I have heard—in almost all cases—a position which deems these rules unjustified from the perspective of competition policy. The explanations I have been told are that competition policy instruments are not suitable for achieving agricultural policy objectives. I could not even refute that.

Nonetheless, we have agriculture-specific competition regulation, and the policy choice of preferring agricultural policy objectives to the full application of competition rules on agri-food markets has been decided. Even though—as far as I can see—most competition lawyers condemn this policy choice and are of the opinion that competition policy instruments should

⁴ Christopher MCCRUDDEN (2006) Legal Research and the Social Sciences, *Law Quarterly Review*, Vol. 122, p. 632.

⁵ See, for example, Roger D. BLAIR–Jeffrey L. HARRISON (2010) *Monopsony in Law and Economics*. Cambridge: Cambridge University Press, pp. 11–12; Mary K. HENDRICKSON–Harvey S. JAMES JR.–Annette KENDALL–Christine SANDERS (2018) The assessment of fairness in agricultural markets, *Geoforum*, 96(7), pp. 41–50; as well as the chapter titled ‘The Chickenization of the American Middle Class’ in Zephyr TEACHOUT (2020) *Break ‘Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money*. New York: All Points Books. The significance of the issue may also be indicated by the fact that „[i]n 2010, the U.S. Department of Justice, Antitrust Division, and the U.S. Department of Agriculture (USDA) held five joint public workshops to explore competition issues affecting the agricultural sector in the 21st century and the appropriate role for antitrust and regulatory enforcement in that industry.” See: <https://www.justice.gov/atr/events/public-workshops-agriculture-and-antitrust-enforcement-issues-our-21st-century-economy-10#information> (Accessed: 9 February 2022). As to the European Union, one of the set visions of EU stakeholders, the Committee of Professional Agricultural Organisations (COPA) and the General Confederation of Agricultural Cooperatives (COGECA) is fairness of the food chain, supply chains without unfair trading practices faced by agricultural producers. Furthermore, in the 2010’s intensive discussions took place as a consequence of the complaints raised by agricultural producers about unfair trading practices suffered by them.

⁶ It is enough to think of the 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.

⁷ Through antitrust or trade regulation rules.

not serve agricultural policy objectives, the privileged position of agriculture has existed since the beginnings of US and EU competition policy.

With my thesis I aim to induce a shift in perspective. As competition policy has surpassed itself—and its narrow efficiency-based approach—with the thematisation of, for example, sustainability in its framework,⁸ so should the agriculture-specific competition rules be accepted. It is manifest that competition policy does not provide primary means to fight for sustainability⁹ and agricultural policy objectives, but the attainment of both of these goals can be enhanced by competition-related provisions playing a *complementary* role. Just as the complementary role of competition policy has been accepted in realising sustainability objectives, the same should be recognised regarding agricultural policy objectives.

It seems that the acceptance of competition law as complementary means to achieve outcomes not related to efficiency does not depend on competition policy itself but the policy choice to which competition provisions should contribute as an additional instrument. Who would dare to question in the 21st century that environmental sustainability stands above all other objectives in the arena of law and policy? Not many. On the contrary, the „sustainability” of rural communities and areas—to which agricultural producers with small and medium-sized holdings necessarily contribute—is contested by most competition lawyers in a sense that competition-related regulation should not take it into consideration. Most would argue that it is an economic activity like any other and therefore does not deserve privileged treatment. Two things are forgotten. First, even sustainability has a social pillar: in the context of agriculture it means „support[ing] rural communities and facilitat[ing] the essential roles that agriculture and forestry play in wider society.”¹⁰ Second, agriculture can contribute to environmental sustainability, but—primarily—only if producers have appropriate financial background to get

⁸ See, for example, the latest developments: The Authority for Consumers & Markets (the Dutch Competition Authority) has published Guidelines on Sustainability Agreements (available at: <https://bit.ly/3y1vEUv>). The Austrian Federal Competition Authority has also published its Sustainability Guidelines (available at: <https://bit.ly/3SM05WR>). Sustainability agreements have also appeared in the European Commission’s revised horizontal block exemption regulations and guidelines. The Hellenic Competition Commission has launched its ‘Sustainability Sandbox’ initiative that is „a mechanism for the submission (to the HCC) of business proposals aimed at creating or enhancing the conditions for sustainable development and which, in order to materialize, necessitate greater legal certainty in relation to competition law enforcement. For proposals submitted on the basis of specific specifications and guidelines, the HCC may – in certain cases – issue a “no-enforcement action letter” to interested parties (following relevant analysis and evaluation)” (available at: <https://www.epant.gr/en/enimerosi/sandbox.html>).

⁹ Jurgita MALINAUSKAITE (2022) Competition Law and Sustainability: EU and National Perspectives, *Journal of European Competition Law & Practice* [Online]. Available at: <https://doi.org/10.1093/jeclap/lpac003>. This was also formulated by Margrethe Vestager during Renew Webinar on 22 September 2020: „So competition policy is not going to take the place of environmental laws or green investment. The question is rather if we can do more, to apply our rules in ways that better support the Green Deal.” Available at: <https://bit.ly/3SK9Tk5>.

¹⁰ See: https://ec.europa.eu/info/food-farming-fisheries/sustainability_en (Accessed: 19 April 2022).

engaged in sustainable agricultural production. Squeezed profit margins leave farmers „with few resources to improve environmental [...] conditions.”¹¹ In other words, as put by the International Fund for Agricultural Development in a much milder way, „without the necessary support and policy environment, smallholders operating near or under the poverty line may not always have the incentives to prioritize sustainable approaches.”¹²

Agricultural policy choices are to support producers in achieving fair incomes which is an important starting point for creating a solid financial background for them. We have known since Maslow’s seminal article on the hierarchy of needs¹³ that if one struggles with subsistence, they will not care about anything else, especially not about sustainability; they will do anything during production which may help them earn enough money.¹⁴ When physiological needs are not threatened, one can step further. That is to say, the issue of environmental sustainability, agriculture, producers’ fair income and the degradation of efficiency-based competition policy may all interrelate.

I have chosen food sovereignty as the benchmark against regulation in force exactly for this reason. The food sovereignty paradigm aims to contribute to and its advocates raise their voice for environmental sustainability and producers’ fair income in parallel. In the thesis, however, I concentrate only on the tension between, on one hand, food sovereignty’s aspect of fair income for producers and, on the other hand, competition policy and law.

Market failures in not a narrow economic sense but in a sense as understood by *Wolf* and as typically posed by agricultural policymakers appear as either economically inefficient or *socially undesirable (inequitable)* outcomes.¹⁵ That is to say, from the viewpoint of agricultural policy, market failures are not limited to the considerations of economics. On the contrary, with a dash of irony, certain market failures of agri-food markets which are market failures from an agricultural policy standpoint are only *perceived* market failures according to economics.¹⁶

¹¹ Sonja BRODT–Johan SIX–Gail FEENSTRA–Chuck INGELS–David CAMPBELL (2011) Sustainable Agriculture, *Nature Education Knowledge*, 3(10), p. 1.

¹² INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (2012) *Sustainable smallholder agriculture: Feeding the world, protecting the planet*, Thirty-fifth Session of IFAD’s Governing Council, p. 5.

¹³ Abraham MASLOW (1943) A Theory of Human Motivation, *Psychological Review*, 50(4), pp. 370–396.

¹⁴ See the same contention from another perspective: Judith JANKER–Stefan MANN–Stephan RIST (2019) Social sustainability in agriculture – A system-based framework, *Journal of Rural Studies*, 65(1), pp. 32–42.

¹⁵ Charles WOLF (1989) *Markets or Governments: Choosing Between Imperfect Alternatives*. Cambridge: MIT Press, pp. 19–20.

¹⁶ The German term ‘*gefühlte Marktversagen*’ was used by *Andreas Mundt*, President of the German Competition Authority (*Bundeskartellamt*) during the discussions on the implementation of the UTP Directive to German law. See: Deutscher Bundestag – Ausschuss für Ernährung und Landwirtschaft, Wortprotokoll der 72. Sitzung, Berlin, 22 February 2021, p. 12.

Volatile food prices, volatile and low incomes for agricultural producers, as well as buyer power issues are the most frequently mentioned problems which need to be addressed from the standpoint of agricultural policymakers. It is revealing, and I might not be the only one to feel it extremely low, that „farmers receive, on average, 27% of consumer expenditure on foods consumed at home and a far lower percentage of food consumed away from home.”¹⁷ Organic food supply chains are no different; producers „capture a relative small proportion of added value.”¹⁸ Unfair returns for the suppliers of agri-food products in the food chain are an evidence of injustice.¹⁹ That I am not the only one to feel the distribution in food chains unfair is evidenced by empirical research. For example, German consumers are of the opinion that farmers should be treated in a fairer way and should get more compensation.²⁰

The income of agricultural producers seems to dominate among the reasons as to why the sector should be supported. The volatility of incomes tends to be a concern both in the short and long run. Its root cause is embedded in the features of agricultural supply and demand. While the supply of agricultural products may drastically change year by year as a consequence of production risks, the demand stagnates. In general, when supply decreases and prices increase, consumers do not not buy and eat less food, because it is a basic necessity.²¹ With being uncertain about the quantity of production and prices, agricultural producers are challenged by the unpredictability of their income.²²

There has been a significant amount of fair trade initiatives regarding agricultural products.²³ One of the main tasks of these is the advocacy of fair trading practices, including that of fair payments for agricultural producers.²⁴ It was found, for example with regard to coffee trade, that these schemes do have a positive impact on the income of producers, in

¹⁷ Jing YI–Eva-Marie MEEMKEN–Veronica MAZARIEGOS–ANASTASSIOU–Jiali LIU–Ejin KIM–Miguel I. GÓMEZ–Patrick CANNING–Christopher B. BARRETT (2021) Post-farmgate food value chains make up most of consumer food expenditures globally, *Nature Food*, 2(6), pp. 417–425.

¹⁸ Jörn SANDERS–Danilo GAMBELLI–Julia LERNOUD–Stefano ORSINI–Susanne PADEL–Matthias STOLZE–Helga WILLER–Raffaele ZANOLI (2016) *Distribution of the added value of the organic food chain*. Braunschweig: Thünen Institute of Farm Economics.

¹⁹ Tim LANG–Michael HEASMAN (2004) *Food Wars – The Global Battle for Mouths, Minds and Markets*. London: Earthscan, p. 8.

²⁰ Gesa BUSCH–Achim SPILLER (2016) Farmer share and fair distribution in food chains from a consumer’s perspective, *Journal of Economic Psychology*, Vol. 55, pp. 149–158.

²¹ See the price inelasticity of food products: Tatiana ANDREYEVA–Michael W. LONG–Kelly D. BROWNELL (2010) The Impact of Food Prices on Consumption: A Systematic Review of Research on the Price Elasticity of Demand for Food, *American Journal of Public Health*, 100(2), pp. 216–222.

²² Robert ACKRILL (2000) *Common Agricultural Policy*. London: Bloomsbury Publishing, pp. 20–22.

²³ See, for example, the activity of the founder organisations of the Fair Trade Advocacy Office: *Fairtrade International*, *World Fair Trade Organization (WFTO)*, *World Fair Trade Organization Europe (WFTO-Europe)*. Available at: <https://fairtrade-advocacy.org/what-we-do/> (Accessed: 11 February 2022).

²⁴ See, for example: <https://wfto-europe.org/the-10-principles-of-fair-trade/> (Accessed: 11 February 2022).

comparison with trade not labelled and certified as fair.²⁵ However, it would be misleading to deem fair trade initiatives fruitful in all cases; only a thorough analysis of the respective sector in a given market situation can give proper answers to an initiative's likely impacts. Furthermore, it cannot be forgotten that economics is not well-equipped to assess what *fair* trading is; one should rather turn to moral philosophy to answer that question.²⁶

Approximately a third of the world's food (agricultural products for human consumption and as raw materials to foodstuffs) is still produced by small family farmers who have fewer than two hectares. There are more than 608 million farms, more than 90 per cent of which are family farms, in the world which produce roughly 80 per cent of the world's food in value terms.²⁷ In a narrower context, farms with less than 5 hectares of agricultural area constitute 67 per cent of all farms in the European Union.²⁸ If any of this enormous amount of market participants aims to sell their produce, it is a common occurrence that they find themselves in a situation where they are not price givers but price takers as the consequence of the particularity of food supply chains. Atomised producers are strongly dependent on their buyers because of their limited marketing alternatives and the nature of their produce.

On one hand, producers are vulnerable to weather and climatic conditions during production, and, on the other hand, they have to sell their produce quickly to any of the limited number of buyers. Producers of perishable agricultural commodities are in the worst situation.

That is to say, the market failures of agri-food markets to a significant extent result from the nature and characteristics of agriculture; there is no other sector which would be so vulnerable to natural, in particular weather and climatic conditions, and all the whims coming hand in hand with them. Besides production risks related to climate and weather, agricultural producers have to cope with and react to a whole range of other factors. Personal, market, institutional and financial risks may all result in adverse outcomes, such as lower incomes and yields.²⁹ Some suggest that the failures in agricultural markets have been worsened by globalisation and the neoliberal food policy underpinning it.³⁰ Although neoliberalism is most frequently labelled

²⁵ Bart SLOB (2006) *A fair share for smallholders – A value chain analysis of the coffee sector*. Amsterdam: SOMO – Centre for Research on Multinational Corporations, p. 40.

²⁶ Robbert MASELAND–Albert DE VAAL (2008) Looking beyond the cooperative: Fair Trade and the income distribution. In: Ruerd RUBEN (ed.) *The impact of Fair Trade*. Wageningen: Wageningen Academic Publishers, p. 236.

²⁷ Sarah K. LOWDER–Marco V. SÁNCHEZ–Raffaele BERTINI (2021) Which farms feed the world and has farmland become more concentrated? *World Development*, Vol. 142, pp. 1–15.

²⁸ Nuno GUIOMAR ET AL. (2018) Typology and distribution of small farms in Europe: Towards a better picture, *Land Use Policy*, Vol. 75, p. 785.

²⁹ Adam M. KOMAREK–Alessandro DE PINTO–Vincent H. SMITH (2020) A review of types of risks in agriculture: What we know and what we need to know, *Agricultural Systems*, Vol. 178, Article 102738.

³⁰ See, for example: Valeria SODANO (2012) Food Policy Beyond Neo-Liberalism. In: Dennis ERASGA (ed.)

as the enemy of the farmers in developing countries, „[f]or years now, neoliberal policies have also threatened the agricultural model and livelihoods of small and medium-size farmers in the global North, who cannot compete with agribusinesses that keep growing.”³¹

Moreover, many, if not most, family farms not only define themselves as agricultural producers, but also farming and rural life constitute the foundation of their lifestyle. They do not look at their produce only as a commodity that generates profit when sold but also as the core element around which their lifestyle revolves. These social, cultural and traditional aspects of agricultural production do not have to and should not be taken into account by antitrust legislation and enforcement, but I am of the opinion that competition policy as a broader notion has to have responsibility to leave room for non-efficiency-based considerations, if the derogation from general antitrust rules and the adoption of sector-specific trade regulation rules not only serve the interests of certain market players but also are connected to public interest in the form of socially sustainable agricultural production with inherent values, such as preserving the rural landscape and lifestyle, traditions and culture.

In my opinion, by stepping out of the efficiency box, that is to say, by not having a competition enforcement primarily guided by the „lighthouse” of consumer welfare, competition policy may become more suitable to reflect the reality which is not artificially separated into political, social and economic spheres. These spheres must be evaluated holistically in their interaction with one another, for they do not exist independently from each other. This makes possible to find complex solutions for complex problems, such as the anomalies in agri-food markets related to competition. The dilemmas lay in the interface between agricultural policy and competition policy, the first representing primarily social considerations,³² while the second efficiency-based aspects. These have to be balanced by evaluating which legal option comes with the least harm and the most benefits from a holistic viewpoint. A few questions are worth asking.

Is it worth sacrificing small farmers and family farms on the altar of maximum economic efficiency, or do these small farms, mostly located in rural areas, offer more traditional,

Sociological Landscape – Theories, Realities and Trends. London: IntechOpen, pp. 375–402.

³¹ Peter ANDREE–Jeffrey AYRES–Michael BOSIA–Marie-Josée MASSICOTTE (eds.) (2014) *Globalization and Food Sovereignty - Global and Local Change in the New Politics of Food*. Toronto: University of Toronto Press, p. 34.

³² Heinemann calls ‘the goal of ensuring a fair standard of living for the agricultural community’ a specific social objective. See: Andreas HEINEMANN (2019) *Social Considerations in EU Competition Law – The Protection of Competition as a Cornerstone of the Social Market Economy*. In: Delia FERRI–Fulvio CORTESE (eds.) *The EU Social Market Economy and the Law – Theoretical Perspectives and Practical Challenges for the EU*. Abingdon: Routledge, p. 124.

cultural and societal benefits? Do agribusinesses and retail chains, based on economies of scale and operating in principle with maximum efficiency, offer consumers products at a lower price by exploiting their superior bargaining position upstream? Who benefits from the increasing vertical integration and horizontal concentration of large agribusinesses and retail chains? Does this lower food prices? Who produces most of the world's food?

I do not submit that a well-established balance between agricultural and competition policy and law is a panacea for all anomalies, but it may mitigate the negative outcomes of the competition-related problems posited by agricultural policy. Furthermore, it may bring us closer to a more optimised solution. The necessity of finding balance between agricultural and competition policy objectives was also declared by Advocate General Wahl in the *Endives* case in EU context. He made his point as follows:

„The common agricultural policy (CAP) and European competition policy, both pillars in the construction of Europe, may at first sight appear difficult to reconcile. Whereas the first, which is supposed to remedy failings in agricultural markets, initially led to considerable public interventionism, particularly through the introduction of production quota systems and support for producers, the second, by contrast, is based on the idea that market liberalisation is the best way to ensure economic efficiency and, ultimately, consumer well-being.”³³

That is to say, the interventionist nature of agricultural policy and the liberalising approach antitrust takes towards competition regulation are at odds with one another.

Of course, contemporary antitrust law is only concerned with economically inefficient outcomes, such as monopsony or oligopsony power, but not with socially undesirable ones, such as low and volatile income of agricultural producers. Regulating competition in agri-food markets through antitrust means has the function and strength to catch inefficient market behaviours, but only in the case if it has something to do with market power and if it is inefficient for consumers. It is not excluded that a case like this may also prevent harm to producers. However, typically, the market failures posed and labelled by agricultural policy as market failures are not related to absolute market power and inefficient outcomes for consumers. That is why mainstream and contemporary antitrust provides a too narrow approach.

³³ See the Opinion of Advocate General Wahl delivered on 6 April 2017 in Case C-671/15: *Président de l’Autorité de la concurrence v Association des producteurs vendeurs d’endives (APVE) and Others*, [1].

In the opinion of *Lianos and Darr*, the reluctance of competition authorities to deal with cases in agri-food markets is mainly rooted in two reasons: on one hand, competition law has retreated from putting a great emphasis on vertical competition, and, on the other hand, economic efficiency as the primary goal of competition law has left the issues of distributive justice to other legal areas and tax policy.³⁴ These two grounds are highly relevant for this thesis. The main problem of agricultural producers is of vertical nature: buyer power and in particular bargaining power, or rather the lack thereof. At the same time, the main objective of agricultural policy is connected to the issue of distributive justice, since policymakers aim to enhance the standard of living of agricultural producers.

In sum, competition in agri-food markets—whose certain significant and distinctive features are not typical in other sectors—cannot and should not only be governed by antitrust rules but also by other forms of regulation, such as trade regulation. A strict and narrow antitrust approach is not enough to cure the failures of agri-food markets, because it only attacks economically inefficient outcomes and misses those market failures which are socially undesirable. This is the reason of including both antitrust and trade regulation in the analysis.

Against this background, the thesis seeks to explore and define the convoluted relationship between agricultural and competition policy, and their depositories, agricultural and competition law.

It does this by analysing two regulatory levels hand in hand with their respective policy approaches concerning both agricultural and food policy objectives, as well as competition policy objectives.

It does this in order to shed light on which competition-related legal instruments (which legal means of competition policy) *de lege lata* are deemed or are actually suitable to contribute to the attainment of agricultural policy objectives, such as the ensuring of a fair standard of living for the agricultural community, and which are not.

The thesis also examines and assesses whether—if certain competition-related legal instruments *de lege lata* are not suitable for objectives like these—*de lege ferenda* proposals can be formulated to put them at the service of agricultural policy, or this would require a drastic break-up with contemporary competition, and in particular antitrust, policy and law.

By taking a legal perspective, the thesis, on one hand, analyses the regulation of the European Union, and, on the other hand, that of three countries, which are the United States of America, Germany, and Hungary. The inclusion of the United States takes place because of its

³⁴ Ioannis LIANOS–Amber DARR (2019) *Hunger Games: Connecting the Right to Food and Competition Law*, *Centre for Law, Economics and Society Research Paper Series*, 2019/2, p. 9.

pioneering role in antitrust. Germany is involved because in Europe it has significantly determined the development of competition law, while Hungary is involved due to my nationality.

Furthermore, by using the perceptions of the food sovereignty's paradigm—i.e. that of the alternative paradigm to neoliberal food policy—on competition as benchmark against antitrust and trade regulation rules in agri-food markets, I necessarily examine the issue from the standpoint of agricultural (and food) policy and not that of competition policy. It does not mean that competition policy considerations would not be included in the thesis; quite the contrary, they have a significant presence and relevance in the study. However, the policy choice of adopting sector-specific competition-related rules for agri-food markets determines my viewpoint. With this choice it is implicitly recognised that there are agricultural policy considerations and objectives behind the competition-related rules of agri-food markets, because if there were not any, competition in agri-food markets would be purely governed by competition policy considerations and thus exclusively by general competition rules which unconditionally apply to all economic sectors. Sector-specific rules lead us to the direction that there are sector-specific—in this case agriculture-specific—considerations to be taken into account.

Therefore I am of the opinion that the analysis will only prove to be rewarding if I approach the issues raised from the perspective of agricultural policy. Approaching the issue and regulation of competition in agri-food markets from the standpoint of competition policy would not elucidate sectoral features, because, in general, competition policy is concerned with marking out the way of competing from a sector-neutral angle based on the assumption that competition and the way of competing are to a significant extent the same in all sectors. And it is true, but the prime example regarding which there are limitations of this approach is agriculture because of its dissimilarities in relation to industry. This is the reason I embark upon the analysis from the point of view of agricultural policy and law.

The question may arise as to what the primary impetus is to the thesis.

First and foremost, I aim to plug a vacuum in legal scholarship. I would like to systematise an area of law that is not in the spotlight and is neglected in legal scholarship but has relevance to approximately 884 million people worldwide who are connected to agricultural employment.³⁵ As a consequence of industrialised agriculture and globalised markets, many atomised agricultural producers as well as small and medium-sized agricultural enterprises

³⁵ Food and Agriculture Organization of the United Nations (FAO) (2020) *World Food and Agriculture – Statistical Yearbook 2020*. Rome, FAO, p. xii, <https://doi.org/10.4060/cb1329en>.

among these hundreds of millions of people are vulnerable against the trading practices of giant agricultural and food corporations, including food retail chains.

All over the world there are voices arguing against the industrialised food system because of its many discrepancies. Basically and simply put, one can see the confrontation of two paradigms: an approach based on neoliberal political philosophy and neoclassical economics, which seeks to minimise state intervention in competition,^{36,37} and the paradigm of food sovereignty, which seeks to question each and every inherent feature of the industrialised food system, including the dominance of agribusiness as well as the unfair trading system.³⁸ Neoliberal food system is the consequence of the ongoing structural transformation of agriculture in Europe and North America, dominated by some huge agri-food businesses.³⁹ One cannot also forget the rise of supermarkets and hypermarkets in the second half of the 20th century. They have entered the market and changed it completely. Smaller producers suffer the greatest losses who—in general—may find themselves in a much more difficult trading environment, given the demands of increased quantities and shorter deadlines.⁴⁰

„The struggle [of producers] to eke out a living has intensified each decade since 1950, because farmers have been locked into a system of low crop prices, borrowed capital, large debt, high land prices, and a weak safety net. Unchecked corporate mergers and acquisitions have increased the economic pressure, since fewer firms are competing to sell the seeds, equipment, and supplies that farmers use every day. At the same time, they have few choices where to sell their products.”⁴¹

Structural changes go hand in hand with horizontal concentration and vertical integration in agri-food markets. In fact, it has been found in several studies that rising retail concentration comes with higher food prices. Furthermore, mergers and acquisitions have not

³⁶ Hope JOHNSON (2018) *International Agricultural Law and Policy – A Rights-Based Approach to Food Security*. Cheltenham: Edward Elgar Publishing, p. 30.

³⁷ One of the three most important goals of economics (macroeconomics) based on neoliberal political philosophy is financial and trade liberalisation. See more: Joan MARTÍNEZ-ALIER–Roldan MURADIAN (eds.) (2015) *Handbook of Ecological Economics*. Cheltenham: Edward Elgar Publishing, p. 154.

³⁸ Alana MANN (2014) *Global Activism in Food Politics - Power Shift*. Hampshire, Palgrave Macmillan, p. 3.

³⁹ Peter ANDREE–Jeffrey AYRES–Michael BOSIA–Marie-Josée MASSICOTTE (eds.) (2014) *Globalization and Food Sovereignty - Global and Local Change in the New Politics of Food*. Toronto: University of Toronto Press, pp. 3–4.

⁴⁰ Simon MAXWELL–Rachel SLATER (2003) Food Policy Old and New, *Development Policy Review*, 21(5–6), pp. 535–536.

⁴¹ Wenonah HAUTER (2012) *Foodopoly – The Battle Over the Future of Food and Farming in America*. New York: The New Press [e-book].

served the purpose of utilising economies of scale but enhancing market power. These imply that it is crucial to take into account the likely adverse effects of mergers in the food industry.⁴² In the United States a bill has even been introduced in the House of Representatives to impose a moratorium on large agribusiness, food and beverage manufacturing, and grocery retail mergers, and to establish a commission to review large agriculture, food and beverage manufacturing, and grocery retail mergers, concentration, and market power.⁴³

One thing is certain. As a result of changes taking place in the food system, general structural developments causing higher concentration horizontally and more integration vertically in agri-food markets are having an impact on the marketing opportunities of agricultural producers throughout the world.

Rising concentration can be observed not only at the level of retailing but also of processing, the latter being a possible consequence of the former,⁴⁴ while producers are still atomised and fragmented, resulting in having the least bargaining power and being the most vulnerable operators of the food chain. The consolidation of retailing and processing levels mainly takes place through mergers and acquisitions⁴⁵ which do not have special regulation with regard to businesses engaged in the agricultural and food supply chain. Consolidation may result in the increasing market power of parties participating in the transactions of mergers and acquisitions, and this increases the likeliness of exclusionary and/or exploitative unilateral conducts *vis-à-vis* suppliers, which can be handled by either the conventional antitrust law toolbox or by the legal instruments outside antitrust law.

The hourglass-shaped food supply chain⁴⁶—with millions of farmers and consumers connected by a few companies—becomes more and more concentrated at retailing and processing levels. On one hand, higher retail concentration goes hand in hand with higher

⁴² Vardges HOVHANNISYAN–Clare CHO–Marin BOZIC (2019) The relationship between price and retail concentration: evidence from the US food industry, *European Review of Agricultural Economics*, 46(2), pp. 334–335. See more cited by HOVHANNISYAN–CHO–BOZIC 2019: Ville AALTO–SETÄLÄ (2002) The effect of concentration and market power on food prices evidence from Finland, *Journal of Retailing*, 78(3), pp. 207–216; Pierre BISCOURP–Xavier BOUTIN–Thibaud VERGÉ (2013) The effects of retail regulations on prices: evidence from the Loi Galland, *The Economic Journal*, 123(573), pp. 1279–1312; Emanuela CIAPANNA–Concetta RONDINELLI (2014) Retail Market Structure and Consumer Prices in the Euro Area, *European Central Bank Working Paper Series*, No. 1744.

⁴³ See: <https://www.congress.gov/bill/116th-congress/house-bill/2933> (Accessed: 1 March 2022).

⁴⁴ See this finding in detail: Panel 1 of the American Antitrust Institute Competition Roundtable titled ‘Taking Stock of Competition in Retail Grocery – Consolidation, Buyer Power, and Consumer Choice’ held on 21 July 2021; see also OECD 2013, pp. 14–21.

⁴⁵ See a list of mergers and acquisitions in the food sector having the greatest deal value: FOOD & POWER (n.d.) *Mergers & Acquisitions* [Online]. Available at: <https://www.foodandpower.net/mergers-acquisitions> (Accessed: 25 July 2021).

⁴⁶ See the term: Ignacio Herrera ANCHUSTEGUI (2017) *Buyer Power in EU Competition Law*. Paris: Concurrences.

consumer prices,⁴⁷ and, on the other hand, the concentrating retail sector which becomes either oligopoly downstream towards consumers or oligopsony upstream towards suppliers reduces the welfare of producers.⁴⁸

The root cause of consolidation—mergers and acquisitions—in agri-food markets is not handled appropriately in antitrust, however increased attention and scrutiny could have positive impacts on the food chain's two end points, i.e. producers and consumers. In 2008, The *American Antitrust Institute* recommended to develop „agricultural market guidelines for assessing buyer mergers” and challenge „buyer mergers whenever they are likely to result in the exercise of buyer power”.⁴⁹ There has been no progress on any sides of the Atlantic since then despite the fact that concentration and integration have not stopped.

As the Organization for Economic Co-operation and Development put it in its overview on the food industry:

„Food processing and retail chains often give rise to competition concerns especially due to recent trends of high and volatile commodity prices. The competition authorities are dealing with anti-competitive mergers, abuse of dominance, cartels and price fixing, vertical restraints and exclusive practices.

*Yet, for the overall functioning of the food sector, ensuring competition at different stages of the supply chain is essential. This chain is a complex series of inter-related markets where concentration, mergers and acquisitions are increasing and large multi-product retailers have a dominant role. Concerns over competition may relate not only to the issue of selling power but also of buyer power which in turn can relate to vertical relations between any of the stages of the food supply chain. Moreover, how retailers compete may also influence the overall functioning of the food supply chain.”*⁵⁰

In economic terms, the most chronic and emerging problem of agriculture and the food supply chain is buyer power, which is the result of rising market concentration not only at

⁴⁷ Lina M. KHAN–Sandeep VAHEESAN (2017) Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents, *Harvard Law & Policy Review*, 11(1), p. 255.

⁴⁸ Richard SEXTON–Mingxia ZHANG–James CHALFANT (2003) Grocery Retailer Behavior in the Procurement and Sale of Perishable Fresh Produce Commodities, *Contractor and Cooperator Report*, No. 2, p. 7.

⁴⁹ AMERICAN ANTITRUST INSTITUTE (2008) *The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44th President of the United States*, p. 283.

⁵⁰ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2013) *Competition Issues in the Food Chain Industry*, DAF/COMP(2014)16.

retailing but also processing level. Buyer power is not considered a problem unanimously.⁵¹ There are both economists and lawyers who do not acknowledge its restrictive effects on competition.

Antitrust does not aim to and does not have the function to „attack” buyer power when it appears as bargaining power and not as monopsony power, but the abuse—or rather the misuse—of bargaining power against agricultural producers can obviously be detected as a problem waiting for solution from a non-efficiency-based perspective. The regulation of unequal bargaining positions may bring improvement to the remuneration of agricultural producers, if there are prohibitions formulated in order to not use certain price-related trading practices by buyers, which syphon unjustified amounts away from producers. Still, it is not a concern for antitrust built on the considerations of economic efficiency.

In many instances, neoclassical economics neither considers these conducts a problem to deal with, nor seeks to capture the anti-competitive consequences resulting from them.⁵² National competition laws and the effectiveness of competition enforcement vary significantly state by state, as well as countries are also different in how they deal with typical anti-competitive behaviour in agriculture and the food supply chain, such as cartels, abuse of dominance or other abuse-type conducts.⁵³ It is also varied as to what extent jurisdictions lengthen the reach of their antitrust to catch unfair trading practices or whether they adopt and introduce legal instruments falling outside the toolbox of antitrust.

It is highly debated whether, and if yes, to what extent the law should address the conducts of undertakings beyond antitrust law. Of course, the conducts of undertakings having an impact on a given market as a whole set in motion antitrust law instruments, if anticompetitive objects or effects are suspected. Nevertheless, the intervention threshold is also influenced by antitrust law objective(s) followed by the respective legislation as well as by the respective authority’s enforcement priorities. Even more questionable is the assessment of conducts that do not directly have an impact on the market as a whole and are not considered anticompetitive from a conventional antitrust law approach, but—relatively—affect the position of another market player and thus indirectly the respective market as a whole.

However, it is worth emphasising that I do not aim to propose any kind of regulation which protects without frontiers from competition *inefficient* farmers and small and medium-

⁵¹ Peter C. CARSTENSEN (2017) *Competition Policy and the Control of Buyer Power*. Cheltenham: Edward Elgar Publishing, p. 11.

⁵² Valeria SODANO–Fabio VERNEAU (2014) Competition Policy and Food Sector in the European Union, *Journal of International Food & Agribusiness Marketing*, 26(3), p. 162.

⁵³ See Subchapter 2.2.2 for what I mean by the expression ‘other abuse-type conducts’.

sized food enterprises. I acknowledge and accept that from the perspective of the weakest market players even the slightest extent of competition is experienced as a harmful process. I rather aim to propose a kind of holistic competition regulation which is inclusive of sector-specific considerations, sectoral characteristics and values, which are even worth taking into account from the perspective of competition law and policy.

To sum up, there is a characteristic competition-related phenomenon of agri-food markets: buyer power against agricultural producers. It is disadvantageous from the perspective of agricultural policy which aims to increase the living standard of producers. Disadvantageous because buyer power may result in decreased profits for farmers when selling their produce *downstream*. Buyer power is attempted to be countervailed within the context of anti-competitive agreements by making possible for agricultural producers to combine forces and not violate the prohibition of anti-competitive agreements.

On the contrary, the other two antitrust instruments, abuse of dominance and merger control are not fully equipped to catch the harmful effects of buyer power from an agricultural policy standpoint. Abuse of dominance condemns certain practices only in the case when the perpetrator is in a dominant position, which is a rare occurrence regarding undertakings that buy agri-food products. Still, buyers without being dominant in antitrust sense may use their bargaining power against the suppliers of agri-food products in a detrimental way from the viewpoint of agricultural policy, because suppliers are in many cases economically dependent on their buyers. This situation is not, or at most marginally, addressed by antitrust.

Merger control also puts a peripheral emphasis on economic dependence within the antitrust assessment of mergers and acquisitions, thereby not preventing the creation of economic situations when merged undertakings seize more bargaining power which can later be abused against the suppliers of agri-food products.

All of these result that there are a great amount of competition-related conducts in agri-food markets which are denounced by agricultural policy but not addressed and caught by antitrust. It encourages agricultural policymakers to bolster the protection of agricultural producers and to contribute to the attainment of its ‘living-standard-enhancing’ objective through other forms of legal regulation than antitrust, such as trade regulation provisions. Both these antitrust and trade regulation provisions applying to the agricultural sector are dealt with in detail within the thesis.

All in all, the thesis—by combining the practice-oriented Anglo-Saxon and the doctrine-based German legal scholarship—aims to contribute to the better understanding of interrelations between agricultural and competition policy and law by (a) elaborating a doctrinal

system for competition-related rules applying to agri-food markets, (b) formulating a definition of agri-food competition law, (c) identifying those legal sources which comply with the definition and analysing them, (d) assessing as to how they function *de lege lata*, (e) comparing legal rules in force, (f) mapping up policy alternatives for competition regulation in agri-food markets, and (g) proposing *de lege ferenda* as to how these policy alternatives may be implemented in legislation. Points (a)-(c) are included in Part One, points (d)-(e) in Part Two, point (f) in Part Three, and point (g) in Part Four.⁵⁴

2 Delimitation

Although I take a totally different approach from *Gerber's*, I may quote his words: „my use of the term ‘competition law’ deserves comment.”⁵⁵ Within the framework of this thesis, by ‘competition law’ not only those rules are understood which are connected to the restrictions of competition (antitrust rules) but also—to a certain extent—those which aim to ensure the fairness of competition and which regulate trade between undertakings. The reason for the inclusion of both antitrust and trade regulation within the thesis is that they are strongly intertwined and they complement each other to control and direct competition in agri-food markets.

This implies that throughout the thesis competition law is used in a broader sense than antitrust law. That is to say, in the thesis, the term ‘competition law’ includes both antitrust and trade regulation rules. By antitrust, I mean the provisions on anti-competitive agreements, abuse of dominance and merger control. By the term ‘trade regulation’, I mean those provisions which do not necessarily require evidence of negative effects on competition to be proved but which are strongly related to the competitive environment. One example for this is the regulation on unfair trading practices (UTPs). Furthermore, in the interface between antitrust and trade

⁵⁴ See in more detail: Chapter 5 of Part One titled ‘Structure’.

⁵⁵ David J. GERBER (1998) *Law and Competition in Twentieth Century Europe*. Oxford: Oxford University Press, pp. 4–5. In his work, he declares that „[I] will not include regimes that protect competition only incidentally or indirectly. Principles of contract law may, for example, invalidate a contract on the ground that it harms one of the parties. Although this may incidentally eliminate a competitive restraint, it is not our concern, because the function of these principles is to protect a contracting party from unfairness, not to protect the process of competition from restraint. Similarly, unfair competition laws impose sanctions on conduct by one competitor that harms another. Here again the referent is harm to the competitor rather than to the process of competition, and, accordingly, such laws generally fall outside the scope of this study.” He proceeds: „We will also pay only passing attention to isolated norms that are directed to particular types of competitive restraints or to particular markets. Laws prohibiting the cornering of specific markets (such as grain) can be found at least as long ago as ancient Rome, for example, and are common wherever organized markets exist, but such isolated enactments are not our concern.” Despite taking a completely different approach, it can be seen that *Gerber* also felt the need to make it clear that his book does not deal with the rules mentioned above. He also acknowledges the competition relevance of these provisions. This also shows that there is certainly a link between the general competition rules (competition/antitrust law in a narrow sense) and the rules which *Gerber* ignores but which I aim to discuss.

regulation there are those provisions which aim to address relative market power, such as abuse of superior bargaining position and abuse of economic dependence. To this group one can also add the Hungarian legal instrument ‘abuse of significant market power’ despite its misleading name. It is extremely difficult, if not impossible, to draw a sharp dividing line between provisions concerned with relative market power and trade regulation rules, such as UTPs, given that UTPs emerge from business relationships in which one party has relative market power over the other party.

Therefore, ‘antitrust law’ and ‘competition law’ are not used as synonyms in the thesis. Antitrust law covers a narrower scope of conducts, while competition law a broader one, also including antitrust. Under the notion ‘competition law’ this thesis covers the following conducts: cartels and concerted practices, abuse of dominance, mergers and acquisitions (these first three constitute the conventional content of antitrust), abuse of significant market power, abuse of economic dependence, abuse of superior bargaining power/position, unfair trading practices, unfair practices of distributors. Not each and every conduct appears at each regulatory level and in each country analysed. The meaning and content of these legal institutions are discussed in detail in connection with those regulatory levels and/or countries where they are present.

These legal instruments are not presented through their general provisions. The thesis seeks to find their sector-specific provisions behind which agricultural and food policy objectives emerge.

It is crucial to delimit the scope of the thesis as to what I understand by the term ‘agri-food’ products, for the examination is limited to those competition rules that are in connection with agricultural and food policy objectives, and thus, with agri-food products. One of the starting points when determining these products is the list referred to in Article 38 of the Treaty on the Functioning of the European Union (TFEU).⁵⁶ The products in this list are those that are subject to the Common Agricultural Policy (CAP).⁵⁷ The other starting point is the definition of food in Regulation (EC) No 178/2002: 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. It also includes drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment. Nevertheless, it does not cover feed, live animals unless they are prepared for placing on the market for human consumption, plants prior to harvesting, medicinal products, cosmetics,

⁵⁶ TFEU, Annex I.

⁵⁷ TFEU, Article 38, 3.

tobacco and tobacco products, narcotic or psychotropic substances, residues and contaminants.⁵⁸ Although tobacco and tobacco products and those live animals which are not prepared for placing on the market for human consumption are not foodstuffs pursuant to Article 2 of Regulation (EC) No 178/2002, live animals in general, as well as unmanufactured tobacco and tobacco refuse can be found in Annex 1 of TFEU, therefore they are considered agri-food products and, thus, are included within the scope of the analysis. A further note shall be made: although Annex 1 of TFEU does not cover certain beverages, the Regulation (EC) No 178/2002 also means drink by the term ‘food’, therefore—in certain aspects—I also deal with trade regulation provisions on beverages (for example, the Hungarian regulation in connection with single branding agreements in the catering industry).

There is a serious limitation this approach has. Agricultural and food sectors are so diverse and complex that it is difficult to make generalised conclusions for *the* agricultural and food sector. More plausible findings could be made on a certain subsector, because it is not irrelevant that the discussions are about, for example, the poultry, wheat, coffee or tomato sector. Each subsector, which can be deemed agricultural, has its own peculiarities. The intensity and forms of competition, the vulnerability of producers, the extent of vertical integration and that of horizontal concentration all vary subsector by subsector. And still, agricultural antitrust exemptions both in the EU and the United States apply to agriculture in general, and not a certain subsector of it. There is no differentiation between subsectors. The US exemption generally refers to „the persons engaged in the production of agricultural products”, while the EU covers conducts related to „the production of, or trade in, agricultural products”. That is to say, my generalised approach to *the* agricultural and food sectors is based on the standpoint legislation has chosen. It does not, however, mean that there are no provisions only applying to certain subsectors; it is enough to think of the Packers and Stockyards Act in the United States, or some provisions of the single common market organisation on the milk and milk products sector in the EU.

One further remark is of high importance. The terms ‘agricultural producers’ and ‘farmers’ are used as synonyms in the thesis. Law is necessarily generalising in nature, therefore it is unfit to indicate, express and differentiate between the great variety of social groups which are covered by these terms. By the terms I mean people living in either rural or urban areas who make their living from agricultural production, operate—typically—small and medium-scale

⁵⁸ 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, Article 2.

farms, have their own land, market their produce for generating profit, irrespective whether or not they employ labourers working for them. In general, this lax limitation refers to—small and mid-sized—family farms in the context of the global North. My generalisation, however, evidently has defects, but legislation, law enforcement and legal doctrine are different from disciplines like agrarian political economy, political ecology, social anthropology, development studies or sociology. I need to treat producers as homogeneous to make the analysis easier; and I leave the task of scrutinising their heterogeneity for the above-mentioned disciplines.

The thesis does not address competition-related rules of public law nature, i.e. provisions on state aids. If one follows the terminology used by EU law, the thesis encompasses competition rules applying to undertakings⁵⁹ and further competition-related trade regulation rules, but does not involve competition rules on aids granted by states.^{60,61} The scope of the research exclusively covers sector-specific rules which regulate and control competition between undertakings and, in addition, behind which agricultural and food policy objectives appear. Therefore, rules on state aids with agricultural and food policy relevance are not discussed, since the amount of legal literature has continuously been increasing on this topic, in contrast with the scholarly publications on competition rules of private law nature. It also means that those state measures which, for example, provide for the purchase of agricultural surplus by the state from producers are out of the scope. The thesis neither covers those competition rules which are relevant for environmental policy objectives or sustainability.⁶²

In the thesis, consumer protection law is not dealt with in detail; it is present only in the stances where it has some kind of relevance in relation to competition rules.⁶³ Therefore the regulation on business-to-consumer (B2C) relations are not in the scope. I am only interested in business-to-business (B2B) relations. The thesis is neither concerned with the input markets

⁵⁹ In German literature, it is expressed by the term ‘*unternehmensbezogene Vorschriften*’. See Ines HÄRTEL (2013) § 7 *Agrarrecht*. In: Mathias RUFFERT (ed.) *Europäisches Sektorales Wirtschaftsrecht*, 1st edn. Baden-Baden: Nomos Verlag, p. 437.

⁶⁰ Throughout the thesis the term ‘competition rules of private law nature’ is used as a synonym for competition rules applying to undertakings. The term ‘competition rules of public law nature’ means the rules on aids granted by states. The norm addressees of competition rules of public law nature are states, while of private law nature are undertakings.

⁶¹ In German literature, it is expressed by the term ‘*staatsbezogene Vorschriften*’. See HÄRTEL 2013, p. 437.

⁶² See in connection with this: Simon HOLMES–Dirk MIDDELSCHULTE–Martijn SNOEP (2021) *Competition Law, Climate Change & Environmental Sustainability*. New York: Concurrences. Although one must not forget that exploitative abuses analysed later are – to a certain extent – relevant to the social dimension of sustainability. See: Organisation for Economic Co-operation and Development (2020) *Sustainability & Competition Law and Policy* (by Julian Nowag). Background Note for Item 1 at the 134th Meeting of the Competition Committee held on 1-3 December 2020. DAF/COMP(2020)3, 4.

⁶³ For example, when the scope of unfair commercial practices against consumers is extended to the relations between enterprises, as one can see it in a few countries.

of agricultural production, such as seeds and machinery, because these sectors are *industrial* and not *agricultural* markets, in spite of the fact that they supply input for the agricultural sector.

All of the above result that—based on the conducts covered by the research—the thesis aims to position itself in a system which, on the one hand, addresses antitrust and its shadowy concepts connected to relative market power, and which, on the other hand, deals with trade regulation. Boundaries are not clear, for trade regulation has competition relevance,⁶⁴ and *vice versa*, antitrust law is no other than a subsystem of trade regulation.

I must also mention that the thesis does not cover those provisions which are ‘crisis measures’, that is to say, which only apply in crises (for example, the pandemic or serious animal diseases) with such impacts on markets that do not come to the fore under general economic circumstances, „in peacetime”.⁶⁵

Moreover, I neither deal with nor analyse the detailed rules on the recognition and functioning of producer organisations; I take it for granted that they are a means of significant importance to strengthen the bargaining power of agricultural producers when it comes to selling agri-food products downstream. I concentrate on those competition-related rules which are relevant for them when they appear as suppliers on the relevant market. That is, I concentrate on substantial and not procedural provisions.

⁶⁴ For example, in Hungary, abuse of significant market power which has a lower intervention threshold than that of abuse of dominance is regulated in Act CLXIV of 2005 on Trade. Nevertheless, rules on abuse of significant market power refer back to rules on abuse of dominance which – manifestly – are codified in the national competition act. The relationship between competition law and trade regulation is not completely clear-cut. The interconnection at international level is analysed by Ernst-Ulrich PETERSMANN (1996) *International Competition Rules for Private Business: A Trade Law Approach for Linking Trade and Competition Rules in the WTO – The Institutional and Jurisdictional Architecture*, *Chicago-Kent Law Review*, 72(2), pp. 545–582. Julian Epstein submits that „[t]rade laws [...] are aimed at public behavior, whereby governments create tariff and non-tariff market barriers thereby protecting domestic producers at the expense of foreign competitors.” See JULIAN EPSTEIN (2002) *The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?* *American University International Law Review*, 17(2), p. 345. I do not consider this approach fully correct: Epstein distinguishes competition law and trade law along the line that competition law is aimed at private, while trade law at public behaviour. It is contradictory because, for example, EU competition law can be divided into the group of rules applying to undertakings (private rules) and the group of rules on state aids (public rules). Furthermore, as shown by the Hungarian example, it may happen that a trade law act consists of rules aimed at constraining the behaviour of private undertakings through the notion of abuse of significant market power. If an author does not consider conducts, such as abuse of significant market power, abuse of economic dependence, and abuse of superior bargaining position, as part of competition law, then it is necessary to position them elsewhere. Since these legal instruments regulate trade relations between two or more market actors as well as they proscribe for the market actors how to trade with each other, it is reasonable to handle them as part of trade law or trade regulation. This contradicts the viewpoint and strict distinguishing of Epstein between competition law and trade law.

⁶⁵ For a crisis cartel, see: C-209/07 – Judgment of the Court (Third Chamber) of 20 November 2008: Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.

3 Benchmark against antitrust and trade regulation rules of agri-food markets

The thesis applies the perceptions of food sovereignty on competition as its benchmark. In short, it is no other than a standpoint propagating a level playing field for each market participant in agri-food trade, that is to say, fairer and more balanced competition rules with the help of strong supervision exercised by the state through adopting protective provisions for producers.

There are two contemporary approaches in the current academic and political discourse on agricultural and food issues, which can be posed as conflicting paradigms. Choosing from these two alternatives—neoliberal food policy and food sovereignty—this thesis is based on the core elements of the latter and aims to strengthen its acceptance and application both at national and EU level. Although the paradigm of food sovereignty first came to the fore in the framework of the global South, there has also been attempts recently to „translate and situate the ideologies and goals of food sovereignty into contexts in the global North.”⁶⁶ It has also been proposed that „food sovereignty needs to be more explicit about [...] the conditions of trade that could prove beneficial for small-scale producers [and] family farmers.”⁶⁷ Part III, as a consequence of this, aims to put forth a food sovereignty-based competition policy in the context of the global North, namely the European Union and the United States.

The research carried out in connection with the antitrust and trade regulation rules of the agricultural and food supply chain has the objective of reconciling the paradigm of food sovereignty with the rules on agri-food competition. Based on the assumption of their compatibility, the thesis attempts to give new directions and development goals to agri-food competition law.

The broader aim of this work is no other than „making the world less unjust rather than attempting to articulate a grand theory of justice.”⁶⁸ Complementing this thought by a declaration of *La Via Campesina* which says that „[a]gricultural trade must be subject to justice between all the economic actors”,⁶⁹ the thesis aims to contribute to the development of agri-

⁶⁶ M. Jahi CHAPPELL–Mindi SCHNEIDER (2017) The new three-legged stool: agroecology, food sovereignty, and food justice. In: Mary C. RAWLINSON–Caleb WARD (eds.) *The Routledge Handbook of Food Ethics*. Abingdon: Routledge, p. 424.

⁶⁷ Alberto ALONSO-FRADEJAS–Saturnino M. BORRAS JR–Todd HOLMES–Eric HOLT-GIMENEZ–Martha Jane ROBBINS (2015) Food sovereignty: convergence and contradictions, conditions and challenges, *Third World Quarterly*, 36(3), p. 440.

⁶⁸ Amartya SEN (2008) The Idea of Justice, *Journal of Human Development*, 9(3), p. 337.

⁶⁹ La Via Campesina Policy Documents (2009) 5th Conference, Mozambique, 16th to 23rd October, 2008, p. 61.

food competition law by proposing such rules that are able to create a fairer competition-related regulation. In short, food sovereignty claims more equal economic relations.⁷⁰

In order to write from a food sovereignty approach, it is important to lay down the definition of food sovereignty.⁷¹ The following definition (or rather paraphrase) means the foundation of the thesis:

„Food sovereignty is the right of peoples to define their own food and agriculture; to protect and regulate domestic agricultural production and trade in order to achieve sustainable development objectives; to determine the extent to which they want to be self-reliant; to restrict the dumping of products in their markets; and to provide local fisheries-based communities the priority in managing the use of and the rights to aquatic resources. Food Sovereignty does not negate trade, but rather it promotes the formulation of trade policies and practices that serve the rights of peoples to food and to safe, healthy and ecologically sustainable production.“^{72,73}

⁷⁰ Kees JANSEN (2014) The debate on food sovereignty theory: agrarian capitalism, dispossession and agroecology, *The Journal of Peasant Studies*, 42(1), p. 214.

⁷¹ Obviously, I am aware of that different definitions are given as to food sovereignty, nevertheless I aim to establish a starting point to this thesis. This does not mean that I argue against or reject all of the other definitions of food sovereignty.

⁷² People's Food Sovereignty Network (2002) is cited by MICHAEL WINDFUHR–JENNIE JONSÉN (2005) *Food Sovereignty – Towards democracy in localized food systems*. Bradford: ITDG Publishing, p. 1.

⁷³ The metamorphosis of the definition of food sovereignty is analysed in detail by RAJ PATEL (2009) What does food sovereignty look like? *The Journal of Peasant Studies*, 36(3), pp. 663–673; as well as by BINA AGARWAL (2014) Food sovereignty, food security and democratic choice: critical contradictions, difficult conciliations, *The Journal of Peasant Studies*, 41(6), pp. 1247–1249. In connection with the changing definitions, Agarwal (2014, pp. 1247–1248) draws the attention to its continuous broadening. In its 1996 definition, it concentrated on national self-sufficiency, given that food sovereignty was defined as the right of each nation; then in 2002, it moved to the direction where it is „the rights of people to define domestic production and trade, as well as determine the extent to which they want to be self-reliant“, and subsequently in 2007, it „embraces everyone who is involved in the food chain – from producers to distributors to consumers.“ Of the three most known definitions of food sovereignty from the year 1996, 2002 and 2007, I have chosen the one from 2002. The 2007 definition included in the Nyéléni Declaration has much more contradictions than the earlier versions. As Patel (2009, p. 666) puts it, „[t]he diversity of opinions, positions, issues, and politics bursts through in the text“, being a prime example of „big tent politics“, in which a wide variety of groups can express their views and interests, resulting in contradictions „a little more fatal.“ Nevertheless, of the 1996 and 2002 definitions, the former one has another distinctive feature already mentioned in comparison with the other two. In the 1996 definition, one may read that food sovereignty is the right of each *nation*, not of peoples. Given that in Part Three I aim to examine food sovereignty from the viewpoint of EU institutions as well as to reconcile the notion of food sovereignty with ordoliberalism, the theoretical foundation of EU (and German) competition policy, I have cast our vote for the 2002 definition which provides a broader scope than the one from 1996. Having in mind that the notion ‘the right of peoples’ also includes ‘the right of each nation’ to define their own agricultural and food policy, I do not run into the problem of that the European Union would not have this right, since it is not a nation. My choice is further supported by that the EU has a Common Agricultural Policy. However, this approach does not mean that I reject the right of any nation to define their own agricultural and food policy, but I would also like to acknowledge the possibility of the European Union to define its own agricultural and food policy through the legal instruments of Common Agricultural Policy positioned in primary EU law. As presented in Part Three, the food sovereignty of the European Union can be best perceived as the aggregate of national food sovereignties of Member States brought under the common notion of European food sovereignty. The reason for why not the 2007 definition was chosen lies in its contradictory phrase that food

In this definition there are certain elements which are of paramount importance to me. A key to understand the intention behind the thesis is to emphasise that the food sovereignty approach represented by *the thesis does not negate trade*. It does not want to return to any type of planned economy; it would only like to contribute to a market economy in which the producers of agricultural and food products are valued and in which the commodification of food is considered obsolete.⁷⁴ The contribution of the thesis to this appears in the form of competition rules which fully take into account the value added by food producers and smaller market participants of the food supply chain.

Although the main emphasis is put on international agricultural trade within the framework of food sovereignty, the thesis deals primarily with EU and national rules of competition and trade with regard to the agricultural and food supply chain. There are no competition rules of private law nature at international level, therefore it may be a possible development goal of international level to adopt such rules. By analysing the whole vertical of antitrust and trade regulation rules regarding agri-food products, I have the opportunity to spot the strengths and weaknesses of the rules in force at the EU and national level, and—based on this analysis—one may formulate forward-looking conceptions to make international agricultural trade more reconcilable with the approach of food sovereignty and, thus, with the interests of agricultural producers as well as small and medium-sized enterprises.

All in all, the thesis aims to analyse sector-specific antitrust and trade regulation rules as to the agricultural and food supply chain and it makes conclusions in connection with the possible improvement of these rules, having in mind that the analysis may serve as a starting point for further scrutiny concentrating on international level.

One must not forget, however, *Fiona Smith's* thoughts: „[h]ow each commentator/negotiator chooses to describe the problem is not neutral, but is instead based on their own understanding of what ‘trade’ is [...]. This understanding is itself shaped by each

sovereignty „puts those who produce, distribute and consume food at the heart of food systems and policies”. Although the second part of the sentence excludes the demands of markets and corporations, that is, transnational corporations, this formulation is quite shadowy. Not all corporations have to be condemned even from a food sovereignty approach, and as *Patel* (2009, p. 667) submits, „one might interpret ‘those who produce, distribute and consume food’ as natural rather than legal people,” the problem still remains that „even between human producers and consumers in the food system, power and control over the means of production is systematically unevenly distributed.” Regarding the 2007 definition of food sovereignty, one may feel that sometimes less is more.

⁷⁴ It is one of the six pillars of food sovereignty adopted by the FORUM FOR FOOD SOVEREIGNTY (2007) Nyéléni 2007. Sélingué, Mali, February 23-27, 2007. See: https://nyeleni.org/DOWNLOADS/Nyeleni_EN.pdf.

person's cultural values, or 'morality' broadly defined."⁷⁵ This finding on cultural and moral determination when analysing a problem is undoubtedly true with regard to each and every phenomenon in my thesis.

4 Methodology

The methodology used throughout the thesis is primarily the analysis of authoritative texts (legal sources, such as legislation and case law),⁷⁶ hand in hand with the agricultural and competition policy behind them. Law and policy are strongly intertwined regarding the regulation of trade in agricultural and food products, therefore regulation and the policy approaches appearing as the foundation of regulation are not sharply separated during the analysis.

During my research, I faced two difficulties. First, the quantity of academic scholarship that directly scrutinises competition rules (law or policy) applying to agri-food markets—be it doctrinal or practical analysis—is limited. Of course, there are some publications on unfair trading practices and agricultural antitrust exemptions, the findings of which have been used extensively in my thesis, however I must be honest: the issue plays a marginal role in competition law discourse. Second, the food sovereignty paradigm puts a great emphasis on fairer trade and competition in its agenda, but so far it has not elaborated the details of it, and moreover, its implications for *legal regulation*. The reason for this is simple. Food sovereignty proponents in academia are not lawyers; they are the representatives of other disciplines, such as sociology, political economy, agrarian studies, rural politics, development studies etc. All of these could have resulted in that the amount of scholarship cited—be it legal or non-legal—in the thesis is relatively low, but quite the contrary. Besides the sources directly relevant to my issue, to a significant extent I have used general scholarship on competition law and policy, agricultural law and policy as well as food sovereignty, which have been of great use to my niche topic. This, ultimately, culminated in the use of almost half a thousand sources in the thesis.

As a consequence of the limited amount of scholarship on competition issues in agri-food markets, I aim to provide a modest contribution to, on one hand, academic scholarship on

⁷⁵ Fiona SMITH (2009) *Agriculture and the WTO – Towards a New Theory of International Agricultural Trade Regulation*. Cheltenham: Edward Elgar Publishing, p. 11.

⁷⁶ Philip LANGBROEK–Kees VAN DEN BOS–Marc Simon THOMAS–Michael MILO–Wibo VAN ROSSUM (2017) Methodology of Legal Research: Challenges and Opportunities, *Utrecht Law Review*, 13(3), p. 2.

agriculture-specific competition law and policy, and, on the other hand, the discourse on food sovereignty.

The thesis is doctrinal in its Part One and Part Two, while Part Three is concerned with policy alternatives. By the adjective ‘doctrinal’, I mean that Part One aims to analyse, define, redefine and systematise basic legal concepts related to agri-food law and competition law.⁷⁷ Legal research is to a great extent dominated by doctrinal research which seeks to answer the question of „what the law is in a particular area.”⁷⁸ That is, as lawyer, in the thesis I cast my vote in favour of a method which can be labelled as the „distinctly legal approach to research”.⁷⁹ The analysis in Part One is connected to that of Part Two as foundation works are connected to building a house. Foundation is necessary because walls have to have solid and massive ground under them. It is not rational to build houses on soil.

Part Two and Part Three have a completely different relationship. The location and placing of walls in a house, that is to say, the layout of the house is mostly at the discretion of the owner or the construction company. By analogy, the question ‘How?’ (the layout) is decided by policymakers; it is not as rigid as the foundation but may vary owner by owner. It is a different question whether bricklayers (legislators) have built up the walls appropriately, or the owner (policymakers) has chosen the layout and design well and it proves to be comfortable and unproblematic. However, periodically, if the layout fails to serve the comfort of the owner, or the owner wishes to create one room by knocking out the wall between two rooms, or *vice versa*, to divide a room into two parts by building up a new wall, the layout shall be revised.

Part Three constitutes this process of revision, and this is the reason it comes after Parts One and Two. The regulation in force, i.e. the positioning of walls, has to be assessed in order that it could be decided whether the owner wants them to become more comfortable or her/his preferences have changed. Of course, the foundation (Part One) binds the hands of the owner and aims to provide a solid basis against witless and hasty modifications, but walls (Part Two) can be re-positioned, built up, destroyed and/or carved with new windows based on the new or slightly/significantly modified layout imagined by the owner (Part Three).

The analysis of legal doctrine is rooted in the systemising endeavour of German legal scholarship, which has also been taken over by Hungarian law. As put by *Busse*, it is advisable

⁷⁷ See the critical acclaim of András Jakab to the book *Legal Doctrinal Scholarship* authored by Mátyás BÓDIG (published by Edward Elgar Publishing in 2021). Available at: <https://www.e-elgar.com/shop/gbp/legal-doctrinal-scholarship-9781788114059.html> (Accessed: 7 February 2022).

⁷⁸ Ian DOBINSON–Francis JOHNS (2007) Qualitative Legal Research. In: Mike MCCONVILLE–Wing Hong CHUI (eds.) *Research Methods for Law*. Edinburgh: Edinburgh University Press, pp. 18–19.

⁷⁹ Terry HUTCHINSON (2013) Doctrinal research – Researching the jury. In: Dawn WATKINS–Mandy BURTON (eds.) *Research Methods in Law*. Abingdon: Routledge, p. 7.

to collect and order an area of law before it is analysed in detail.⁸⁰ The in-depth analysis in Part Two is also doctrinal in nature as it is the primary and main method in legal scholarship.

The doctrinal analysis—which is of hermeneutic and argumentative nature⁸¹—in Part Two is the basis of comparison in Part Four. The comparative method is applied, on the one hand, between the United States and the European Union, and, on the other hand, between the two EU Member States analysed, Germany and Hungary. Comparing the US regulation with that of the two EU Member States would not be rewarding, since the United States and the two EU Member States have totally different legal regimes, and this does not provide us with useful considerations. On the contrary, a US-EU comparison greatly shows us the similarities and differences between common law and civil law legal systems on the issue, being aware of the fact that the European Union has dominantly Member States with civil law legal systems deeply embedded in Roman law traditions.

By ‘comparative method’ I mean the functional, structural and hermeneutical methods used in comparative law. The functional one, as the name implies, aims to examine as to which function a certain provision fulfills in a legal system, and how this function is fulfilled in another legal system. Functionality is „the basic methodological principle of all comparative law.”⁸² As put by Husa, „[i]nstead of concentrating on studying particular material and isolated provisions, emphasis should be on the comparison of those specific solutions that each state makes in situations that are practically identical.”⁸³ The structural method is concerned with the question as to in which structure a legal norm is embedded in a legal system, and how it differs from the structure of another legal system built around a similar legal norm. The hermeneutical method concentrates on textual interpretation of laws, nevertheless with having continuously in mind that the interpretation is necessarily situated when one turns to foreign legal systems. It is situated because I see legal provisions outside Hungarian law through the pre-understanding of law as I have absorbed my knowledge on law during Hungarian legal education. Furthermore, in a broad sense, my comparison is necessarily related to a given socio-political context⁸⁴ which

⁸⁰ Christian BUSSE (2018) Die Sonderrechtstheorie im Agrarrecht – Konzeptionelle Überlegungen zu ihrer Weiterentwicklung. In: José MARTÍNEZ (ed.) *Reichweite und Grenzen des Agrarrechts: Gedächtnisschrift für Dr. Wolfgang Winkler*. Baden-Baden: Nomos Verlag, p. 19.

⁸¹ Mark VAN HOECKE (2011) Legal Doctrine: Which Method(s) for What Kind of Discipline? In: Mark VAN HOECKE (ed.) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* Oxford: Hart Publishing, p. 4.

⁸² Konrad ZWEIGERT–Hein KÖTZ (1998) *An Introduction to Comparative Law*. 3rd edn. Oxford: Oxford University Press, p. 34.

⁸³ Jaakko HUSA (2011) Comparative Law, Legal Linguistics and Methodology of Legal Doctrine. In: Mark VAN HOECKE (ed.) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* Oxford: Hart Publishing, pp. 215–216.

⁸⁴ Ioanna TOURKOCHORITI (2017) Comparative Rights Jurisprudence: An Essay on Methodologies. Special Issue

shows similarities in all analysed jurisdictions: the market participants of the agricultural sector could successfully lobby for their competition-relevant alleviations because of their unique social role in guaranteeing the population the appropriate quantity of food of appropriate quality.

While the comparison between the two EU Member States, Germany and Hungary is a genealogical comparison because the respective countries have a common ancestor, Roman law, and a common ‘influencer’, EU law, the comparison between the EU and the United States is analogical which may rather result in weaker conclusions.⁸⁵ Of course, functional, structural and hermeneutical methods all interrelate in the course of comparison, therefore it may be difficult to draw a strict dividing line between the methods. The US-EU comparison is rather based on the functional and structural methods than the hermeneutical one, while the German-Hungarian comparison may further show relevant findings on their differences and similarities when taking a hermeneutical approach.

It is important to mention that in several cases references to economics appear in the thesis owing to the strong relationship between antitrust law and economics. Nevertheless, the purpose of this thesis is not and cannot be to elaborate the incontestable economic foundations of agri-food competition. I leave this task to economists. The research behind the thesis has been carried out through the prism of a lawyer’s spectacles, having all along in mind the commonplace that the central idea of law is justice in general. It does not mean that the thesis ignores economics, but the approach to the issue of agri-food competition is from the viewpoint of a lawyer who gives more significance to justice than to profit-maximisation. To summarise, by using and taking over *Ignacio Herrera Anchustegui*’s words: „mindful of my limitations as a non-economist, I have decided to resort to an economically informed legal analysis”, however it does not imply that „economics should be used with a normative effect”.⁸⁶ Differently from *Anchustegui*, my thesis does not concentrate on one phenomenon but aims to summarise and synthesise the whole system of a field of law with doctrinal methodology, normative and policy analysis. Therefore it is even less concerned with economics, since the aim of mapping up the complete competition economics in agri-food markets is rather the task of general and agricultural economists.

- Comparative Law, *Law and Method* [Online], p. 2. Available at: <https://doi.org/10.5553/REM/000030>.

⁸⁵ Geoffrey SAMUEL (2014) *An Introduction to Comparative Law Theory and Method*. Oxford: Hart Publishing, pp. 57–58, 65–120.

⁸⁶ ANCHUSTEGUI 2017, p. 12.

5 Structure

The thesis proceeds in four parts, as well as several chapters and subchapters. Parts One and Two encompass doctrinal analysis, while Part Three provides a law-and-policy scrutiny, Part Four concludes. Each of these main parts – notwithstanding Part Four – accounts for roughly a third of the thesis as a whole.

Part One deals with the doctrinal context of antitrust and trade regulation in agri-food markets. There are several reasons as to why the first third of the whole thesis is so concerned with legal doctrine and systematisation. First, the area of law is not in the spotlight of English-language academic literature, and there are only a few publications on its system and elements, therefore I think it is advisable to start with the basic building blocks. Each legal provision constitutes part of a comprehensive legal system, and finding the right place in the system may take us closer to find the characteristics of the respective area of law. That is why I am concerned in many cases with, for example, the definition of agricultural law and food law, as well as the legal instruments of competition law in a broad sense. Moreover, that is why I attempt to formulate the definition of agri-food competition law. The definition is crucial to determine as to which rules constitute part of this area of law and which do not, and this is necessary to delimit the scope of the research appropriately. Second, there are significant differences in the use and content of those areas of law with which I aim to work: agricultural law, food law and antitrust/competition law.

I find exactly determined terminology important, because it is necessary for the correct delimitation of an area of law so long not being in the spotlight. Third, there are many shadowy concepts in competition law which vary country by country. I am of the opinion that these have to be systematised, because they are to a significant extent related to the issue. Primarily, not conventional antitrust legal instruments are those which give peculiarity to the agricultural and food sector's competition-related regulation, but these provisions lack clear-cut legal doctrine that would underpin them. That is another reason for dealing with theoretical questions protractedly. Fourth, the general analysis on the conducts regulated by antitrust and trade regulation is relevant because it serves as a reference point to map the sectoral rules applying to agriculture and the food supply chain. The findings on the question as to what extent legislation adopts sector-specific competition-related rules on agriculture have far-reaching implications. To find the answers, it is unavoidable to identify the general rules to which sector-specific rules can relate. Furthermore, it is also telling, if there are no general equivalents behind sector-specific rules. That is the reason why Chapter 2.2 of Part Two may seem lengthy. Fifth,

the method is embedded in legal traditions. Hungarian legal scholarship is greatly influenced by German law and literature, therefore we tend to put great emphasis on doctrinal questions.

In the thesis, sector-specific antitrust and trade regulation rules applying to agri-food products constitute the umbrella term ‘agri-food competition law’. The term is used for two reasons. First, it aims to simplify the readability of the thesis by avoiding the continuous use of the lengthy expression ‘antitrust and trade regulation rules applying to agri-food markets’. Second, it is used because of the assumption that behind the legal sources of agri-food competition law as a whole there are the same agricultural and food policy objectives which aim to ensure the better protection of agricultural producers in markets. Therefore, agri-food competition law is primarily analysed from the viewpoint of agricultural law and food law and secondarily from that of competition law.

Moreover, the term ‘agri-food competition’ is not as unique as it seems. In a book edited by *Harvey S. James* the same term is used consequently, with the difference that the authors aim to analyse the ethics and economics of agri-food competition,⁸⁷ and not its law.

Part One is further divided into three main chapters: the first one deals with agricultural law and food law (Chapter 1), the second one with antitrust law, competition law and unfair competition law (Chapter 2), and the third one with the synthesis of the previous two (Chapter 3). In the end of Part One, a table is presented within which all relevant legal sources of agri-food competition law are collected. Both Chapter 1 on agri-food law and Chapter 2 on competition law consist of a subchapter on underpinning the choice as to why the terms ‘agri-food law’ and ‘competition law’ are used in the thesis (Subchapter 1.1 and Subchapter 2.1). Furthermore, Chapter 1 includes a subchapter on the definition of agri-food law (Subchapter 1.2), and Chapter 2 consists of subchapters on the three regulatory units I analyse under the term ‘competition law’. Subchapter 2.2.1 is concerned with antitrust, Subchapter 2.2.2 with conducts related to relative market power, and Subchapter 2.2.3 with conducts related to unfairness. Chapter 1 and Chapter 2 are necessary to find the interface between the content of agri-food law and that of competition law. If found, the definition of the area of law, i.e. that of agri-food competition law, can be formulated, and as its consequence, the relevant legal sources can be identified. Subsequently, Chapter 3, first, includes the definition and its analysis (Subchapter 3.1), second, the historical antecedents of the area of law (Subchapter 3.2), and, third, the earlier mentions of the interface between agricultural (agri-food) law and competition law in literature (Subchapter 3.3). Chapter 4 includes the concluding remarks of Part One, as

⁸⁷ Harvey S. JAMES, JR. (ed.) *The Ethics and Economics of Agrifood Competition*. Dordrecht: Springer.

well as, as the most important element it draws up the structure of agri-food competition law and collects the relevant legal sources in both the United States and the European Union and its two Member States, Germany and Hungary.

Readers uninterested in pure doctrinal analysis on a certain area of law may wish to skip Part One based on the assumption that it may and does include analyses that possibly do not provide new to scholars versed in—either competition law or agricultural law—literature respectively. I am also aware that most readers will be familiar with the terms used in Part One. Though, an in-depth understanding of the layout and foundations of the concept of agri-food competition law is advisable, if not imperative, for the forthcoming analysis in Parts Two and Three. Nonetheless, chapters related to agricultural and food law may offer fresh insights to competition lawyers about the decision on delving into competition rules from an agriculture-specific perspective, and *vice versa*, chapters related to competition law may shed light on the basic structure of antitrust and competition law for agricultural lawyers dealing with agricultural market organisation. Furthermore, the doctrinal analysis of this area of law is vital to show why competition-related rules applying to agri-food markets are examined from an agricultural law and policy standpoint. The doctrinal structure of agri-food competition law seems to imply and shows that agriculture-specific competition rules are not worth addressing—primarily—from a competition/antitrust law and policy perspective.

Part One is necessary for a further reason—to ensure that my terminology used throughout the thesis (could) be understood as intended and, thus, to avoid any misunderstandings stemming from the terms used.

In Part Two, the legal sources of agri-food competition law collected in Part One are put under scrutiny level by level. Obviously, the regulation of the different states and the level of the European Union are described in separate chapters. In Chapter 1, first, I outline the economic justifications behind agri-food competition laws. When analysing the regulatory levels, a permanent sequence has been chosen. The first level to be analysed is always that of the European Union (Chapter 2) and the second is that of the different states (Chapter 3). The level of the European Union is put in the first place because EU law has a significant influence on national legislation, therefore initially it is important to outline the EU foundations of the topic. First, the primary law of the EU is analysed (Subchapter 2.1), second, its secondary law (Subchapter 2.2). Within the framework of EU secondary law, I deal with Council Regulation (EC) No 1184/2006 (Subchapter 2.2.1), the relevant parts of Regulation (EU) No 1308/2013 (Subchapter 2.2.2), and Directive (EU) 2019/633 (Subchapter 2.2.3). Agri-food competition law at national level (Chapter 3) is divided into three units based on the countries analysed:

Hungary (Subchapter 3.1), Germany (Subchapter 3.2), and the United States (Subchapter 3.3). Each subchapter is further divided into two parts: one dealing with exception norms and the other one with specific norms. The countries analysed at national level are two EU member states, namely Hungary and Germany. The odd one out is the United States which is dealt with because of its pioneering role in adopting general and sector-specific competition-related rules and by reason of its key role in forming the policy approach toward competition laws all over the world.

Part Three is concerned with the paradigm of food sovereignty, that is to say, the benchmark of the thesis. Given that „food sovereignty is a political project”,⁸⁸ one must necessarily be engaged in the analysis of public policies, such as agricultural and competition policy, because they are formed within political decision-making bodies. The law-and-policy analysis aims to map contemporary competition policies to find that one that is the most appropriate to factor in the perceptions of food sovereignty on competition and trade.

After the general introduction of food sovereignty presented as an alternative to neoliberal food policy and the notion of food security, and after extracting the food sovereignty’s perceptions on competition (Chapter 1), antitrust/competition law objectives are presented (Chapter 2). Chapter 2 follows the same order as the doctrinal analysis in Part Two. First, the objectives of EU antitrust law (Subchapter 2.1), second, the objectives of national antitrust/competition law are put under scrutiny (Subchapter 2.2). Chapter 2 on antitrust/competition law objectives is crucial to understand as to why a narrow antitrust approach concentrating exclusively on economic efficiency and consumer welfare is not suitable to handle failures in agri-food markets. It is also of primary importance to examine whether there is any antitrust/competition law regime with certain objectives at its centre which could be more appropriate to capture and mitigate agri-food market failures. Subchapter 2.3 outlines some proposals formulated earlier in connection with a more inclusive competition policy. Subchapter 2.4 includes the conclusions drawn from antitrust/competition law objectives, and it finds that ordoliberal competition policy and its objectives are appropriate to take into account the competition-related discrepancies of agri-food markets. Based on these considerations, subsequently, it is presented how ordoliberalism looks at agriculture (Chapter 3). Having in my mind the finding that ordoliberal competition policy aims to realise a wider variety of objectives and is suitable to take into consideration aspects other than economic ones, I attempt to conceptualise and reconcile food sovereignty with ordoliberalism at theoretical

⁸⁸ ALONSO-FRADEJAS–BORRAS JR–HOLMES–HOLT-GIMENEZ–ROBBINS 2015, p. 432.

level (Chapter 4). Given that they are found reconcilable, it is much easier to defend the concept of food sovereignty-based competition policy because I have to work with an existing and influential competition policy which has formed the whole system of EU competition law. Chapter 5 maps up those EU documents which mention food sovereignty, in order to gain some insights on the approach of the EU towards food sovereignty. The choice of mine that I aim to reconcile an unambiguously European (German) competition policy framework, i.e. ordoliberalism, with food sovereignty, and not a US one, such as the Chicago School of antitrust, is in parallel with the finding of *Patel* that the EU is closer to the considerations of food sovereignty than the United States.⁸⁹

Part Four consists of the summarising thoughts and conclusions drawn up regarding agri-food competition law. Chapter 1 consists of the summarising thoughts on competition in agri-food markets, while Chapter 2 includes the general conclusions. Chapter 3 is concerned with the comparison of the regulation in force of the United States and the European Union. Chapter 4 assesses the regulation in force in light of food sovereignty, while Chapter 5 outlines food sovereignty-based alternatives for regulating competition in agri-food markets. In Chapter 5, I formulate my proposals in connection with EU regulation based on the finding that EU competition policy and the perceptions of food sovereignty on competition are compatible with one another.

In a nutshell, the logic of the thesis proceeds in the following way. Based on legal definitions and literature, I determine what I mean by agri-food competition law. Then, I identify those legal sources that correspond to my definition. After the evaluative analysis of these legal sources in the jurisdictions examined, I turn my attention to policy. I outline the different schools of thought in competition policy and their standpoint to the goals of competition law. In parallel with this, I aim to explore the approach the food sovereignty paradigm takes to competition and trade. After the scrutiny, I look at the competition schools of thought to find which of them seems the most appropriate one to factor in the perceptions of the food sovereignty paradigm on competition and trade. Given that ordoliberal competition policy is considered the best option for the perceptions of food sovereignty on competition, I aim to harmonise ordoliberal competition policy with food sovereignty. Ultimately, taking into account that ordoliberal competition policy has influenced European competition law from the beginning of European integration, I propose my food sovereignty-based competition policy alternatives in the context of EU competition law. Besides this main chain of analysis, I

⁸⁹ Raj PATEL (2009) What does food sovereignty look like? *The Journal of Peasant Studies*, 36(3), p. 663.

formulate my *de lege ferenda* proposals in connection with each jurisdiction, and I compare the regulation of the United States with that of the European Union, and – within the EU – the regulation of Germany with that of Hungary.

Part One: Doctrinal Context

Part One aims to lay down the doctrinal foundations and context of agri-food competition law. It is based on the approach that this area of law consists of two constituting parts: agri-food law and competition law. Therefore, agri-food competition law is analysed from the viewpoint of both constituting parts. The primary approach towards agri-food competition law comes from the viewpoint of agri-food law for two reasons. First, the cohesive force of agri-food competition law is based on its regulatory object. What unites agri-food competition law is its regulatory object—agri-food products. The provisions of agri-food competition law all refer and apply to those market actors which are engaged in some kind of agricultural activity related to agri-food products (for example, primary production, processing etc.) and/or which interact with market actors engaged in some kind of agricultural activity related to agri-food products (for example, food retail chains as buyers against agricultural producers or processors as suppliers). Second, analysing agri-food competition law from an agri-food law perspective is not an arbitrary choice but—because of the main emphasis being put on EU law within this thesis—derives from EU legal acts. Albeit the internal market, including competition rules adopted by the EU,⁹⁰ shall extend to agriculture, fisheries and trade in agricultural products,⁹¹ and the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products, there is a further condition: these rules shall only apply unless otherwise provided in Articles 39 to 44.⁹² And Article 42 TFEU (ex Article 36 TEC) provides otherwise and establishes the well-founded *raison d'être* of the approach followed in this thesis:

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

Therefore the CAP is given priority over the EU rules on competition. In other words: the objectives of CAP are the primary considerations when identifying the relationship between agri-food law and competition law. No other economic sector enjoys such an exemption from

⁹⁰ The EU has exclusive competence in the establishing of the competition rules necessary for the functioning of the internal market. See Article TFEU, Article 3, 1(b).

⁹¹ TFEU, Article 38, 1.

⁹² TFEU, Article 38, 2.

the general competition rules of the EU.⁹³ The exemption ensured by the primary law of the EU is further elaborated by secondary law.⁹⁴

The priority given to agricultural policy over competition rules has also been stressed in the case law of the Court of Justice of the European Union (CJEU) on several occasions. As early as 1980, it was pointed out that the Court *„recognizes the precedence the agricultural policy has over the aims of the Treaty in relation to competition and the power of the Council to decide how far the rules on competition should apply to the agricultural sector. The Council has a wide discretion in the exercise of that power as it has in the implementation of the whole agricultural policy.”*⁹⁵

In its 1994 judgment the CJEU reaffirmed the following:

*„Recognition is thus given to both the priority of the agricultural policy over the objectives of the Treaty in the field of competition and the power of the Council to decide to what extent the competition rules are to be applied in the agricultural sector.”*⁹⁶

Two years later the principle was reiterated and further elaborated:

*„The first paragraph of Article 42 of the Treaty, which acknowledges that the Common Agricultural Policy takes precedence over the objectives of the Treaty in the field of competition, makes it clear that any application in this field of the Treaty provisions relating to competition is subject to account being taken of the objectives set out in Article 39 of the Treaty, namely those of the Common Agricultural Policy.”*⁹⁷

In its 2002 and 2003 judgment the principle was referred to as an undisputable and unambiguous pillar of the relationship between agricultural and competition policy:

⁹³ Jörg GÜNDEL (2019) Agrarpolitik und EU-Kartellrecht: Welche Spielräume hat der Unionsgesetzgeber? In: Markus MÖSTL (ed.) *Das Lebensmittelrecht zwischen Verbraucherschutz und Agrarpolitik – Kennzeichnung, Überwachung, Vermarktung*. Frankfurt am Main: Deutscher Fachverlag, p. 104.

⁹⁴ Jan ACKERMANN (2020) *Wohlgeordnetes Agrarwettbewerbsrecht mit Blick auf Erzeugerorganisationen und unlautere Handelspraktiken*. Baden-Baden: Nomos Verlag, p. 143.

⁹⁵ Case 139/79 – Judgment of the Court of 29 October 1980: *Maizena GmbH v Council of the European Communities*, [23].

⁹⁶ Case C-280/93 – Judgment of the Court of 5 October 1994: *Federal Republic of Germany v Council of the European Union*, [61].

⁹⁷ Case C-311/94 – Judgment of the Court of 15 October 1996: *IJssel-Vliet Combinatie BV v Minister van Economische Zaken*, [31].

„Furthermore, as is clear from the Court’s case-law, Article 36 EC recognises the priority of the Common Agricultural Policy over the objectives of the Treaty in the field of competition.”⁹⁸

and

„Secondly, it is also clear from settled case-law that, even in regard to the competition rules of the Treaty, Article 36 EC gives precedence to the objectives of the common agricultural policy over those in relation to competition policy.”⁹⁹

It can be seen from the above-mentioned implications that the principle of the priority of CAP over competition policy and rules are beyond doubt. Not only the primary law of the EU and the case law of the CJEU recognise this principle, but also it can be discovered in other secondary legal acts:

„By virtue of Article 36 of the Treaty one of the matters to be decided under the Common Agricultural Policy is whether the rules on competition laid down in the Treaty are to apply to the production of, and trade in, agricultural products.”¹⁰⁰

In the CMO Regulation the specific situation of the agricultural sector and food supply chain with regard to competition rules is clearly stated, and it is declared that a good functioning food supply chain presupposes the effective application of competition rules:

„In view of the specific characteristics of the agricultural sector and its reliance on the good functioning of the entire food supply chain, including the effective application of competition rules in all related sectors throughout the whole food chain, which can be highly concentrated, special attention should be paid to the application of the competition rules laid down in Article 42 TFEU.”¹⁰¹

⁹⁸ Case C-456/00 – Judgment of the Court of 12 December 2002: French Republic v Commission of the European Communities, [33].

⁹⁹ Case C-137/00 – Judgment of the Court of 9 September 2003: The Queen v The Competition Commission, Secretary of State for Trade and Industry and The Director General of Fair Trading, ex parte Milk Marque Ltd and National Farmers’ Union, [81].

¹⁰⁰ Council Regulation (EU) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products, Recital (2).

¹⁰¹ 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, Recital (172).

This approach of EU law has been considered as a guiding principle worth following throughout the thesis, in particular when exploring the relationship between agri-food law and competition law. Thus, the thesis is rather of agri-food law than of competition law in nature.

Against this background, Part One analyses the doctrinal foundations and context of agri-food competition law by taking an approach which presents its direct and indirect historical antecedents and the different national ways of thinking on the relationship between agri-food law and competition law. With regard to the historical roots, the regulation of the United States of America is presented, because the beginnings of antitrust are traced back to the States. In the first half of the 20th century not only general antitrust rules but also sector-specific provisions appeared in the land of opportunity. Since the United States has a common-law legal system where practical considerations are more essential than that of theory, the emphasis in connection with doctrinal and theoretical foundations is put on a European pioneer country, Germany.

1 Agri-food law

Chapter 1 deals with the Hungarian and German foundations of agricultural law and food law. The Hungarian and German trends regarding the development of agricultural and food law are not described separately because of the significant German influence on Hungarian agricultural law. Chapter 1 is divided into two subchapters: Subchapter 1.1 underpins my choice of using the term ‘agri-food law’, while Subchapter 1.2 aims to define this term.

With Chapter 1, I aim to contribute to the formulation of a coherent definition of agri-food law which can also be used as a starting point to formulate the definition of agri-food competition law.

1.1 Underpinning the choice of using the term ‘agri-food law’

Throughout the thesis the term ‘agri-food law’ is used. It has been taken over from *Ines Härtel*. The notion includes both agricultural law and food law, as well as their intersections. The reasons are as follows.

First, although these two areas of law were strictly separated in the past, nowadays „[t]his legal separation of spheres has been losing its clarity in the face of more complex interfacing in the field of foodstuffs (agricultural products and further processed foods).”¹⁰² The strong connection between agricultural law and food law can be illustrated from the viewpoint

¹⁰² Ines HÄRTEL (ed.) (2018) *Handbook of Agri-Food Law in China, Germany, European Union – Food Security, Food Safety, Sustainable Use of Resources in Agriculture*. Springer International Publishing, p. 2.

of food law. According to a secondary EU legal act, ‘food law’ means the laws, regulations and administrative provisions governing food in general, and food safety in particular, whether at Community or national level; it covers *any stage of production*, processing and distribution of food, and also of feed produced for, or fed to, food-producing animals.¹⁰³ By looking at it through the lens of agricultural law, it is obvious that primary agricultural production is the first step towards food, and—in many cases—integrated value chains do not make the separation of vertical levels possible.

Second, in Hungarian literature it is a common standpoint that food law is one part of agricultural law.¹⁰⁴ An interface between agricultural and food law can be drawn up from the viewpoint of Hungarian agricultural law doctrine. It is generally accepted that Hungarian agricultural law distinguishes four (or five) regulatory objects.¹⁰⁵ These are the following: (a) agricultural activity, (b) agricultural producer, (c) agricultural holding, (d) agricultural product and food,¹⁰⁶ as well as (e) rural areas.^{107,108} As can be seen, agricultural products are grouped together with food. These two categories are mentioned separately as one of the regulatory objects, but they have many overlaps.¹⁰⁹

Third, pursuant to Article 38 TFEU, the term ‘agricultural products’ means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products. Besides this definition, Annex I of the TFEU enumerates the products referred to in the CAP determined by the TFEU. As already mentioned, Regulation (EC) 178/2002 defines the term ‘food’. It means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans.¹¹⁰ As can be seen from, on one hand, these two definitions and, on the other hand, the

¹⁰³ Regulation (EC) No 178/2002, Article 3, 1.

¹⁰⁴ HORVÁTH Gergely (2007) A környezetjog és az agrárjog közeledése, találkozása és metszete a magyar jogrendszerben [The approaching, meeting and overlapping of environmental law and agricultural law in the Hungarian legal system], *Állam- és Jogtudomány*, 48(2), p. 335.

¹⁰⁵ In this thesis under the term ‘regulatory objects’ I mean those issues at which agricultural law regulation is targeted.

¹⁰⁶ FODOR László (2005) *Agrárjog* [Agricultural law]. Debrecen: Kossuth Egyetemi Kiadó.

¹⁰⁷ SZILÁGYI János Ede (2016) Változások az agrárjog elméletében? [Changes in the theory of agricultural law?], *Miskolci Jogi Szemle*, 11(1), pp. 41–42.

¹⁰⁸ Defining agricultural law through its regulatory objects is also used in Italian legal literature: See e.g. Antonio CARROZZA (1975) L’individuazione del diritto agrario per mezzo dei suoi istituti, *Rivista di diritto civile*, Vol. 21, pp. 107–178 cited by Mariagrazia ALABRESE (2017) Agricultural Law from a Global Perspective: An Introduction. In: Mariagrazia ALABRESE–Margherita BRUNORI–Silvia ROLANDI–Andrea SABA (eds.) *Agricultural Law – Current Issues from a Global Perspective*. Springer International Publishing, p. 5.

¹⁰⁹ HOJNYÁK Dávid (2019) Az agrárszabályozási tárgyak megjelenése az EU tagállamainak alkotmányaiban, különös tekintettel a Magyar Alaptörvényben megjelenő agrárjogi szabályozási tárgyakra [Regulatory objects of agricultural law in the constitutions of EU member states, in particular in the Hungarian Fundamental Law], *Miskolci Jogi Szemle*, 14(2), p. 64.

¹¹⁰ Regulation (EC) No 178/2002, Article 2.

list in Annex I, agricultural products and foodstuffs are overlapping categories. From the above-mentioned, a conclusion can be made that handling agricultural law and food law under the common term ‘agri-food law’ is well-founded both from the perspective of agricultural law and that of food law. This approach has strong EU law foundations, but it can also be underpinned from the perspective of Hungarian agricultural law.

Fourth, the term ‘agri-food law’ is not an isolated expression. Among others, it has increasingly been used by Italian legal literature,¹¹¹ and the phrase has appeared in Germany, too.^{112,113} In Hungarian agricultural law scholarship, the term is not used at all, given that the area of agricultural law also covers food law based on the doctrine which builds the realm of agricultural law upon four (or five) regulatory objects.¹¹⁴

Fifth, applying the term ‘agri-food law’ does not mean that I argue against maintaining the possibility of separating agricultural law and food law from each other. The common term ‘agri-food law’ is used because the thesis aims to give insights to not only specific competition-related rules applying to agricultural products but also to foodstuffs. In the literature it is also a recognised proposition that both agricultural law and food law have to be maintained as autonomous from one another, but—in addition—it cannot be forgotten that their boundaries are getting more difficult to determine.¹¹⁵ This statement is in parallel with that of the German author, *Ines Härtel*, and by choosing the term ‘agri-food law’, I express my agreement with these findings. Regarding agri-food law, it must be noted that „agriculture also produces non-food products, which means that agricultural law cannot be dissolved into food law.”¹¹⁶

Nevertheless, as already described, the examination provided by the thesis does not cover the whole domain of agri-food law. It is only concerned with competition-related rules applying to undertakings engaged in agricultural activity or which bargain with market actors engaged in agricultural activity. These competition-related rules are considered primarily as

¹¹¹ See for example Donato CASTRONUOVO–Antonio DOVAL PAIS–Luigi FOFFANI (2014) *La sicurezza agroalimentare nella prospettiva europea – Prevenzione, prevenzione, repressione*. Milano: Giuffrè Francis Lefebvre; Alberto GERMANÒ–Maria Pia RAGIONIERI–Eva Rook BASILE (2019) *Diritto agroalimentare – Le regole del mercato degli alimenti e dell'informazione alimentare*, 2nd edn. Torino: G. Giappichelli; Ferdinando ALBISINNI (2020) *Diritto agroalimentare innanzi alle sfide dell'innovazione*, *Rivista di BioDiritto*, 2020/2, pp. 25–42; or see the journal titled *Diritto agroalimentare* published by Giuffrè Francis Lefebvre.

¹¹² During the European Congress on Rural Law held in Lucerne (Switzerland) on 11–14 September 2013, in the Commission III the term ‘*Agrarlebensmittelrecht*’ was used in the German national report. Furthermore, see the journal titled *Blätter für Agrarrecht* whose declared aim is to deal with the legal issues of ‘*Agrarlebensmittelrecht*’ (<https://tinyurl.com/5y8pjnyd>).

¹¹³ If an order should be established intuitively regarding the frequency of using the term ‘agri-food law’, it is most commonly used by Italian legal literature, followed by the English-language and German-language literature.

¹¹⁴ In the Hungarian language agri-food law can be translated as *agrár-élelmiszerjog*.

¹¹⁵ Luigi RUSSO (2011) *Dal diritto agrario al diritto alimentare (e viceversa)*, *Rivista di diritto alimentare*, 5(2) [Online]. Available at: <http://www.rivistadirittoalimentare.it/rivista/2011-02/RUSSO>, p. 18.

¹¹⁶ ALABRESE 2017, p. 10.

being part of agri-food law because of the priority given to CAP over competition rules. Although, secondarily, they are also analysed from the viewpoint of competition law.

1.2 The definition of agri-food law

Subchapter 1.2 aims to formulate the definition of agri-food law. First, it maps up definitions of agricultural law and food law already adopted in legal acts and literature, then attempts to merge them. The scope of the definition aims to exceed national level by synchronising the literature of countries examined not only with each other's approach but also with that of the EU. By raising the definition of agri-food law above national level, I aim to emphasise the fact that agri-food supply chains cross national borders and become increasingly globalised.¹¹⁷ Besides the definitions, I also analyse some relevant historical developments.

First of all, it is worth mapping the definitions of agricultural law in the German-language legal literature. The examination covers German, Austrian and Swiss approaches. As a first step, one can speak about two different paradigms: on the one hand, the functional notion of agricultural law (*funktionaler Agrarrechtsbegriff*)¹¹⁸ and, on the other hand, agricultural law as a special area of law (*Agrarrecht als Sonderrechtsgebiet*)^{119, 120}. The latter one refers to a narrower category than the former, yet none of the two above-mentioned standpoints provide clear-cut boundaries for agricultural law.¹²¹ According to the Swiss literature, the choice is a

¹¹⁷ Globalisation is one of the sources of several problems faced by the agricultural and food sector. See, for example: Charles B. MOSS–Gordon C. RAUSSER–Andrew SCHMITZ–Timothy G. TAYLOR–David ZILBERMAN (eds.) (2002) *Agricultural globalization, trade, and the environment*. New York: Springer Science+Business Media; Tony WEIS (2007) *The Global Food Economy: The Battle for the Future of Farming*. London–New York: Zed Books; Per PINSTRUP-ANDERSEN–Peter SANDØE (eds.) (2007) *Ethics, Hunger and Globalization – In Search of Appropriate Policies*. Dordrecht: Springer; Wynne WRIGHT–Gerard MIDDENDORF (eds.) (2008) *The Fight Over Food – Producers, Consumers, and Activists Challenge the Global Food System*. Pennsylvania: The Pennsylvania State University Press; Guy M. ROBINSON–Doris A. CARSON (eds.) (2015) *Handbook on the Globalisation of Agriculture*. Cheltenham: Edward Elgar Publishing; Antoine BOUËT–David LABORDE (eds.) (2017) *Agriculture, Development, and the Global Trading System: 2000– 2015*. Washington DC: International Food Policy Research Institute.

¹¹⁸ See the representatives of this approach cited by Roland NORER (ed.) (2005a) *Handbuch des Agrarrechts*. Wien: Springer, p. 4; Maximilian Eichler (1975) Land- und Forstwirtschaftsrecht. In: Viktor HELLER (ed.) *Rechtskunde*, 1st edn. Wien: Manz, p. 9; Gottfried HOLZER (1982) Zum Begriff und Standort des Agrarrechts in der österreichischen Rechtsordnung, *Juristische Blätter*, 1982/11-12; Gottfried HOLZER (1982) Agrarrecht heute. Versuch einer Gegenstands- und Standortbestimmung, *Agrarische Rundschau*, 1982/1; Gottfried HOLZER (1981) *Agrar-Raumplanungsrecht*. Wien: Österreichischer Agrarverlag, p. 20.

¹¹⁹ See the representatives of this approach cited by NORER, 2005a, p. 4: Hans Karl ZEBNER-SPITZENBERG (1930) *Das österreichische Agrarrecht für Studium und Praxis im Grundriss systematisch dargestellt samt Rechtsquellenverzeichnis*. Wien: Agrarverlag; Wolfgang WINKLER (1981) Agrarrecht. In: Volkmar GÖTZ–Karl KROESCHELL–Wolfgang WINKLER (eds.) *Handwörterbuch des Agrarrechts, Band I – Abfallbeseitigungsrecht*, Berlin; Christian GRIMM (2004) *Agrarrecht*, 3rd edn. Munich: C.H. Beck; Rolf STEDING (1994) *Das Agrarrecht: Bedenkllichkeiten und Notwendigkeiten seiner Entwicklung, Neue Landwirtschaft – Briefe zum Agrarrecht*, 1994/7.

¹²⁰ Roland NORER (2017) *Handbuch zum Agrarrecht*. Bern: Stämpfli Verlag, p. 8.

¹²¹ Roland NORER (2005b) *Lebendiges Agrarrecht – Entwicklungslinien und Perspektiven des Rechts im ländlichen Raum*. Wien: Springer, p. 136.

value judgment rather than it could be based on strong theoretical foundations.¹²² The thesis does not aim to provide detailed analysis on these two approaches¹²³ but presents their basic concepts.

Based on the functional notion of agricultural law, each and every provision can be considered being part of agricultural law which—from a functional point of view—has a specific effect with regard to agriculture and forestry, be it from an area of law determined by typical agricultural interests, or be it from an area of law which has or predominantly has interests other than agricultural ones. With this approach those norms are also pulled into the domain of agricultural law which have no specific nature.¹²⁴ For example, within the framework of this standpoint, the general social obligations of property ownership pursuant to Article 14 of German Fundamental Law¹²⁵ are also important when one analyses the rules on agricultural holdings.¹²⁶

By contrast, in the opinion of the representatives of the paradigm ‘agricultural law as a special area of law’, only those rules are included in agricultural law which primarily aim to regulate the relations connected to agriculture. These specific provisions applying to agriculture can be divided into two parts: exception norms (*Ausnahmenormen*, i.e. *ius singulare*) and specific norms (*Spezialnormen*, i.e. *ius proprium*). Exception norms are those provisions which deviate from general norms because of the particular circumstances of agriculture,¹²⁷ meanwhile specific norms are those provisions which are solely and exclusively adopted for agriculture^{128, 129}

Furthermore, another interpretation must be noted from the Hungarian literature, which follows an instrumental approach. According to this, agricultural law is the aggregate of norms aiming to realise agricultural policy objectives. This definition refers to a factor which goes

¹²² Adolf PFENNINGER (1988) Schweizerisches Agrarrecht: Begriff, Gliederung und Stellung in der Rechtsordnung, *Blätter für Agrarrecht*, 1988/2, p. 94.

¹²³ For detailed analysis and further development possibilities of these two concepts see José Martínez (ed.) (2018) *Reichweite und Grenzen des Agrarrechts: Gedächtnisschrift für Dr. Wolfgang Winkler*. Baden-Baden: Nomos Verlag.

¹²⁴ NORER 2005a, pp. 4–5.

¹²⁵ Fundamental Law of the Republic of Germany [*Grundgesetz für die Bundesrepublik Deutschland*], Article 14 [Artikel 14].

¹²⁶ GRIMM 2004, p. 15.

¹²⁷ For example VAT provisions applying to only agricultural producers which deviate from the general provisions on VAT.

¹²⁸ For example land acts.

¹²⁹ GRIMM 2004, p. 15.

beyond law: agricultural policy. Therefore agricultural law is an instrument of realising agricultural policy objectives.¹³⁰

The thesis does not argue for or against any of the two above-mentioned German approaches. *However, it is indispensable to declare that the starting point for formulating the definition of agri-food law, and later that of agri-food competition law, is the approach which perceives agricultural law as a special area of law.* As a consequence of this, the thesis provides a summarising chart of exception norms and specific norms of agri-food competition law. Besides *Sonderrechtstheorie* of the German literature, I also use the Hungarian instrumental definition of agricultural law when construing the definition of agri-food law and that of agri-food competition law.

Let us turn now to food law. The reference point for the definition of food law can be found in Regulation (EC) No. 178/2002. Food law means the laws, regulations and administrative provisions governing food in general, and food safety in particular, whether at Community or national level; it covers any stage of production, processing and distribution of food, and also of feed produced for, or fed to, food-producing animals.¹³¹ This definition is not fully consistent with the use of the term in German food law. In Germany, food law has been understood as meaning all legal norms concerning the extraction, production, composition, nature and quality of foodstuffs as well as their designation, presentation, packaging and labelling. Nevertheless, not only foodstuffs but also tobacco products and cosmetics were assigned to German food law.^{132,133} As already mentioned, in Hungarian literature food law is considered as one part of agricultural law.¹³⁴

Since both Germany and Hungary are EU Member States, the definition of Regulation (EC) No. 178/2002 on food law is of primary importance to all countries examined.

Based on the above-mentioned conceptions of agricultural law and of food law, I formulate the definition of agri-food law by applying the German *Sonderrechtstheorie* of agricultural law, the Hungarian instrumental approach towards agricultural law, and the EU's definition of food law.

¹³⁰ SZILÁGYI János Ede (ed.) (2017) *Agrárjog – A magyar agrár- és vidékfejlesztési jogi szabályozás lehetőségei a globalizálódó Európai Unióban* [Agricultural law – Regulatory possibilities of Hungarian agricultural and rural development law in the globalising European Union]. Miskolc: Miskolci Egyetemi Kiadó, p. 22.

¹³¹ Regulation (EC) No 178/2002, Article 3, 1.

¹³² Kurt-Dietrich RATHKE (2020) EG-Lebensmittel-Basisverordnung Art. 3, Rn. 4. In: Walter ZIPFEL–Kurt Dietrich RATHKE (eds.) *Lebensmittelrecht*. Munich: C.H. Beck.

¹³³ See for example the work of Peter BÜLOW whose multi-volumed handbook's title is *Lebensmittel – Kennzeichnungsrecht und Produktwerbung für Lebens-, Genuss-, Arzneimittel und Kosmetika*, and despite its main title including the word 'foodstuff', it also deals with luxury goods, medicines and cosmetics.

¹³⁴ HORVÁTH 2007, p. 335.

Establishing the definition of agri-food law onto these concepts, *agri-food law is the aggregate of norms aiming to realise agricultural and food policy objectives*. Agri-food law is conceived as a special area of law (*ein Sonderrechtsgebiet*) that *includes only those rules which primarily aim to regulate the relations connected to agriculture and the food supply chain*. This is important to be laid down in order that the examination provided by *the thesis does not exceed the territory of exception norms and specific norms*. By applying the German functional notion of agricultural law I should unavoidably deal with provisions which are general in nature; expanding the analysis so much is not the goal of this thesis. Of course, when analysing exception norms I must consider those general rules to which these exception norms mean the deviation, but I do not aim to provide a detailed analysis on these general provisions. Taken over from the EU's definition of food law, agri-food law comprises not only laws and regulations, but also administrative provisions governing agri-food products in general, whether at Community (EU) or national level. The definition applied reflects the primary aim behind the thesis: concentrating on EU and national regulation adopted for controlling trade and competition in agri-food products.

2 Competition law

Chapter 2 deals with competition law. The scrutiny covers the basic concepts (definition, structure and regulated conducts) of competition law in the European Union and its two Member States, in Hungary and Germany.

With Chapter 2, I aim to contribute to the better understanding of competition-related conducts outside the reach of conventional antitrust to draw up an appropriate system for antitrust and trade regulation rules applying to agri-food markets. The reason for this is that most sector-specific competition-related rules of agriculture and the food supply chain—with the exception of agricultural antitrust exemptions—can be found outside conventional antitrust. Trade regulation rules in the form of legal instruments related to relative market power and unfairness establish those sectoral provisions which give the uniqueness of competition regulation in agri-food markets. Nevertheless, these trade regulation rules lack clear legal doctrine that would underpin them, thus I aim to systematise them in a way which is also appropriate to find their sector-specific provisions.

2.1 Underpinning the choice of using the term ‘competition law’

Subchapter 2.1 aims to explain why the term ‘competition law’ has been chosen within the thesis and what content I mean by this term. In Introduction a vague reference has already

been made regarding this matter: it was declared that by ‘competition law’ I mean not only antitrust but also trade regulation rules.

There are significant differences between, on the one hand, the countries analysed, and, on the other hand, the EU and the United States, when it comes to laws (legal acts) on competition and trade as well as to the question as to under which umbrella term they should include these laws.

The term ‘antitrust’ in the United States involves laws on agreements in restraint of trade, monopolisation, and mergers and acquisitions. Regarding their structure, these are equivalent to the elements of the notion ‘competition law’ in the European Union (anti-competitive agreements, abuse of dominance, and mergers and acquisitions),¹³⁵ however, there is a crucial dissimilarity. EU law also means state aids granted by Member States when it mentions ‘competition law’.

Differences as to the use of the term ‘competition law’ can also be detected, if one compares EU law with the national laws of Member States. The greater dissimilarity arises in relation to Hungary where by ‘competition law’¹³⁶ not only anti-competitive and competition-restrictive market behaviours (by using the US term: *antitrust*) but also unfair conducts are understood. That is, the Hungarian translation of the term ‘competition law’ also covers unfair competition law. The problem is slighter regarding German terminology. Although earlier the German translation of the term ‘competition law’¹³⁷ included both anti-competitive and competition-restrictive market behaviours (by using the US term: *antitrust*) and unfair conducts, since the time Germany entered the EU, they have used *Kartellrecht* (cartel law) for anti-competitive and competition-restrictive market behaviours and *Lauterkeitsrecht* (unfair competition law) for unfair conducts. More details on these differences are presented below.

The title of the thesis does not contain the expression ‘competition law’ because in the EU this notion also covers state aids, however the thesis is not concerned with them. Using the term ‘antitrust’ clearly indicates that state aids do not constitute part of the research. Besides ‘antitrust’, the title also includes the expression ‘trade regulation’ because there are legal instruments to be analysed which do not fall under conventional antitrust law. For instance, the Directive on sector-specific unfair trading practices in the EU is not antitrust, and, moreover, there are also shadowy concepts in connection with relative market power, such as abuse of

¹³⁵ Paul CRAIG–Gráinne DE BÚRCA (2015) *EU Law – Text, Cases, and Materials*, 6th edn. Oxford: Oxford University Press, p. 1001.

¹³⁶ In Hungarian: *versenyjog*.

¹³⁷ In German: *Wettbewerbsrecht*.

superior bargaining position and abuse of economic dependence, which cannot be unequivocally marked as antitrust laws. Some countries, such as Germany, regulate abuse of relative market power within the framework of antitrust law (that is, within the framework of *Kartellrecht* in Germany), while regarding Hungary, the issue is more problematic.

Besides the two reasons mentioned in the Introduction—first, better readability/simplicity, and, second, the same policy objectives behind them as a connecting point—the aggregate of antitrust and trade regulation rules applying to the agricultural and food sector is referred to as ‘agri-food competition law’ because not only antitrust but also *trade regulation rules affect competition*. If not directly but indirectly for sure. Antitrust and trade regulation rules are competition-related rules, that is, they are rules which have relevance to competition as such. A brief example: if an agricultural producer (Producer I) becomes victim of an unfair trading practice against a buyer (Buyer I) with superior bargaining position to whom he/she supplies, Producer I possibly tries to compensate his/her losses suffered because of Buyer I’s bargaining power in another business relationship with another buyer of his/hers (Buyer II), if Buyer II has less bargaining power against Producer I than Buyer I has. It means that the competition between Buyer I and Buyer II are necessarily influenced by the legal prohibition of unfair trading practices. The competition between Buyer I and II takes place *downstream* (procurement market) from the perspective of Producer I. If Producer I cannot compensate his/her losses in another business relationship, he/she is worse off than his/her competitor (Producer II) with relatively higher bargaining power against Producer II’s buyers. Therefore the competition between Producer I and Producer II (sales market) is also affected by the legal regulation on unfair trading practices. Obviously, competitive harm in its antitrust sense does not necessarily arise, but competition is manifestly affected by trade regulation rules.

This is the reason I name antitrust and trade regulation rules collectively competition law. That is to say, the term ‘competition law’ is not used in its conventional sense but as an umbrella term for both antitrust rules and trade regulation rules with the feature of having relevance to the competitive process.

In addition, some brief comments must be made on the relationship between antitrust and regulation. A form of regulation is trade regulation, but now I aim to formulate general thoughts on the relationship between antitrust and regulation. However, these findings also apply to the relationship between antitrust and trade regulation. Both antitrust and regulation are a form of government intervention to govern markets. Their interrelation is unsettled and complex. In certain cases they have an impact on competition in different directions and in other

cases they complement one another.¹³⁸ As *Carlton and Picker* greatly put it, „antitrust and specific regulatory statutes have jostled and combined and sometimes even competed in establishing a framework for controlling competition.”¹³⁹ Sector-specific regulation can either limit or promote and protect competition. One thing is certain, competition policy is not exclusively implemented by antitrust agencies but also by regulatory agencies.¹⁴⁰ A prototype of this is the agricultural sector. Trade regulation in agri-food markets is not aimed at promoting economic efficiency in antitrust terms; it is rather concerned with considerations of fairness and the competitive process. There may be some overlaps between antitrust and trade regulation in agri-food markets. Trade regulation rules, such as the UTP Directive in the EU, aim to ensure the fair standard of living of agricultural producers directly; antitrust rules, such as the limited exemption of the agricultural sector under the prohibition of anti-competitive agreements, help agricultural producers through the general recognition that if certain conditions are met, their agreements do not endanger economic efficiency. While the former are a direct means to achieve agricultural policy objectives, the latter are indirect to do the same in the sense that they help agricultural policy objectives be reached by acknowledging that exception norms provided for the sector do not risk the attainment of antitrust objectives but may—to a certain extent—contribute to agricultural policy objectives, for example, by raising the bargaining power of agricultural producers.

All in all, the term ‘agri-food competition law’ has been chosen to (1) enhance readability, (2) indicate that behind these laws similar agricultural and food policy objectives appear, and (3) emphasise the competition relevance of these laws.

Next, I take a glance at national approaches towards the issue’s terminological aspects.

In Hungarian literature competition law is divided into two segments. There are rules of competition law which are in some way connected to the state (*competition law of public law nature / state-related competition law*), and there are rules of competition law which regulate business relationships between undertakings (*competition law of private law nature*).¹⁴¹ The latter deals with the legal relations of market participants as operating under the scope of private

¹³⁸ Howard SHELANSKI (2018) Antitrust and Deregulation, *The Yale Law Journal*, 127(7), pp. 1922–1960.

¹³⁹ Dennis W. CARLTON–Randal C. PICKER (2014) Antitrust and Regulation. In: Nancy L. ROSE (ed.) *Economic Regulation and Its Reform: What Have We Learned?* Chicago: University of Chicago Press, p. 25.

¹⁴⁰ SHELANSKI 2018, p. 1923.

¹⁴¹ VÖRÖS Imre (2000) Állami támogatások és a versenyjog kapcsolata az európai jogban [The relationship between state aids and competition law in the European law], *Jogtudományi Közöny*, 55(9), p. 353; TÓTH András (2016) *Versenyjog és határterületei – A versenyszabályozás jogági kapcsolatai* [Competition law and its border areas – Competition regulation’s correlations with different branches of law]. Budapest: HVG-ORAC, pp. 26–30; ZAVODNYIK József (2012) A szabályozás-rendszertani modellalkotás alapvető összefüggései a versenyjogban. In: PÁZMÁNDI Kinga (ed.) *Magyar versenyjog* [Hungarian competition law]. Budapest: HVG-ORAC, p. 15.

law, meanwhile the former includes provisions on state monopolies, governance of state-owned companies and state aid. This dichotomy can also be found in EU competition law. Rules on competition in the TFEU are divided into two sections. The first section includes the rules applying to undertakings,¹⁴² meanwhile the second is concerned with the aids granted by states.¹⁴³ In the following, I concentrate on competition law provisions of private law nature.¹⁴⁴ There is some debate as to which conducts can be considered the elements of *competition law of private law nature*. Behaviours conventionally regulated by competition law, i.e. anti-competitive agreements, abuse of dominance and mergers, are manifestly an integral part of *competition law of private law nature*. These can be conceived as the part of competition law which deals with anti-competitive restraints, or – using the US term – it is *the* antitrust law. However, from the viewpoint of Hungarian competition lawyers, the position which classifies unfair competition law (conducts such as trade libel,¹⁴⁵ boycott or trademark infringement¹⁴⁶) as part of *competition law of private law nature* can also be defended. A textbook declares the following: „by competition law we mean the rules of competition law in the narrowest sense, such as the Competition Act and Articles 101 and 102 of TFEU, as well as the regulations directly related to them, and the decisions and judgments in individual cases applying them.”¹⁴⁷ Given that this cited thought mentions the Competition Act generally, and in Hungary one and the same act, namely the Act LVII of 1996¹⁴⁸ (throughout the thesis referred to as ‘the Hungarian Competition Act’), contains the rules on restrictions of competition and unfair competition, it is a valid and right finding that both areas of law constitute part of Hungarian competition law. The sharp separation of these two areas of law (law against restrictions of competition/antitrust law and unfair competition law) is not always unambiguous because unfair competition law also protects competition and antitrust law protects not only competition but also its fairness.¹⁴⁹ That is to say, Hungarian legal literature does not follow a strict

¹⁴² See TFEU, Articles 101-106.

¹⁴³ See TFEU, Articles 107-109.

¹⁴⁴ BOYTHA Györgyné (2004) A magyar versenyjog, versenyszabályok [Hungarian competition law, competition rules], *Közjegyzők közlönye*, 51(1), p. 13.

¹⁴⁵ Otherwise known as rumour-mongering.

¹⁴⁶ See for example DARÁZS Lénárd (2007) „Jellegbitorlás” a tisztességtelen verseny elleni jogban [Trademark infringement in unfair competition law], *Gazdaság és jog*, 15(11), pp. 19–23; MISKOLCZI-STEURER Annamária (2017) A „jellegbitorlás” komplex megítélése a magyar jogban [The complexity of trademark infringement in Hungarian law], *Themis*, June 2017, pp. 110–136.

¹⁴⁷ BOYTHA-TÓTH (ed.) 2004, p. 27.

¹⁴⁸ Act LVII of 1996 on the Prohibition of Unfair Market Conduct and Competition Restriction [1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról].

¹⁴⁹ BOYTHA 2004, p. 13.

separation, hence by the term ‘competition law’ most Hungarian competition lawyers mean both antitrust law and unfair competition law.

In Germany, the situation is similar in one respect and different in another one. Competition law (*Wettbewerbsrecht*) is used in a narrower and in a broader sense. Competition law in a narrower sense (*Wettbewerbsrecht im engeren Sinne*) is equal to unfair competition law. Its main legal source is the *Gesetz gegen den unlauteren Wettbewerb*¹⁵⁰ (throughout the thesis referred to as ‘UWG’). It constitutes the difference compared to Hungary. Competition law in a narrower sense is rather equated with antitrust law in Hungary and not with unfair competition law.

By the term ‘competition law in a broader sense’ the German literature means both unfair competition law and antitrust law. It is the similarity with the Hungarian approach. The German expression used for antitrust law is slightly misleading. The term ‘cartel law’ (*Kartellrecht*) is used but it also includes rules on abuse of dominance¹⁵¹ and merger control^{152, 153, 154}. The main legal source of German antitrust law is the *Gesetz gegen Wettbewerbsbeschränkungen*¹⁵⁵ (throughout thesis referred to as ‘GWB’), obviously, complemented by EU antitrust law.^{156, 157} Because in Community law Articles 81 and 82 of the Treaty establishing the European Community (TEC) were referred to as *competition law* increasingly in Germany, in order to avoid any misunderstanding, the German literature started to use the Swiss term *Lauterkeitsrecht* for unfair competition law. This enabled to not confuse the different shades of interpretation of the term *Wettbewerbsrecht*, which in its narrower sense meant unfair competition law in Germany but antitrust law in the EU. By introducing the term *Lauterkeitsrecht* for the area of German unfair competition law, this anomaly ceased to exist.¹⁵⁸

The English-language literature strictly distinguishes competition law (antitrust law) and unfair competition law from one another.¹⁵⁹ By looking at the following definition of

¹⁵⁰ In English: Act against Unfair Competition.

¹⁵¹ *Missbrauch einer marktbeherrschenden Stellung*.

¹⁵² *Fusionskontrolle*.

¹⁵³ Johanna KÜBLER–Josefa BILLINGER (2021) *Kartellrecht*. In: Constanze ULMER–EILFORT–Eva Inés OBERGFELL (eds.) *Verlagsrecht*. Munich: C.H. Beck.

¹⁵⁴ See also NAGY Csongor István (2021) *A kartelljog dogmatikai rendszere [The doctrinal system of cartel law]*. Budapest: HVG-ORAC, p. 16.

¹⁵⁵ In English: Act against Restraints of Competition.

¹⁵⁶ Manfred HEBE (2011) *Wettbewerbsrecht – Schnell erfasst*. Berlin–Heidelberg: Springer Verlag, p. 5.

¹⁵⁷ The term ‘EU cartel law’ is used in the same sense than the term ‘German cartel law’. EU cartel law not only includes cartels (TFEU, Article 101), but also abuse of dominance (TFEU, Article 102), as well as mergers and acquisitions. Thus, EU cartel law is the synonym of EU competition law. See Walter FRENZ (2015) *Handbuch Europarecht, 2. Bd. – Europäisches Kartellrecht*, 2nd edn. Berlin–Heidelberg: Springer Verlag.

¹⁵⁸ Reto M. HILTY–Frauke HENNING-BODEWIG (eds.) (2007) *Law Against Unfair Competition – Towards a New Paradigm in Europe?* Berlin–Heidelberg: Springer Verlag, p. 9.

¹⁵⁹ HILTY–HENNING-BODEWIG 2007, Preface.

competition law, it becomes clear that in the English-language literature competition law is equal to antitrust law and it does not include unfair competition law, contrary to the Hungarian and German approaches. „Competition law concerns the set of legal instruments created and maintained by governments to regulate the behaviour of firms that *restrict* competition in the market such as anti-competitive agreements, abuses by firms in a dominant position within a reference market, and mergers and acquisitions that adversely impact on competition.”¹⁶⁰ In their comprehensive and seminal book titled *Competition Law*, *Richard Whish and David Bailey* neither deal with unfair competition law at all.¹⁶¹ In the United States, the confusion cannot arise at all. The term ‘antitrust law’ manifestly refers to the area of law which deals with the restraints of competition. There are no anomalies regarding the terminology, since originally they do not use the term *competition law* but *antitrust law*.

As can be seen from the above analysis, Germany and Hungary use the term *competition law* (*Wettbewerbsrecht* and *versenyjog*) as a broader expression which includes both unfair competition law and antitrust law. On the contrary, the term *competition law* in the English-language literature only refers to antitrust law; in EU competition law to both antitrust law and state aids. In this respect, the thesis follows rather the approach of Germany and Hungary when it comes to the umbrella term *competition law*. The reason for this is that the classification of some provisions only applying to the agricultural and food sector, both at national and EU level, is doubtful. For example, some types of unfair trading practices may have not only exploitative but also exclusionary effects.¹⁶² As their name suggests, these practices are labelled as unfair, and at the same time, they may also exclude market participants from the respective market, and, thus, restrict competition. Since the thesis aims to cover all exception and specific norms with competition relevance applying to the agricultural and food sector, within its framework the term ‘competition law’ is used in a broader sense. It does not limit itself to conventional antitrust law; it also encompasses those conducts which are labelled as unfair but do not constitute part of conventional unfair competition law, such as trade libel, boycott or trademark infringement. Many aspects of conventional unfair competition law are in strong connection with the area of law regulating the protection of geographical indications and trademarks, and their inclusion in the thesis would stretch the boundaries.

¹⁶⁰ Billy A. Melo ARAUJO (2016) *The EU Deep Trade Agenda – Law and Policy*. Oxford: Oxford University Press, p. 179.

¹⁶¹ Richard WHISH–David BAILEY (2012) *Competition Law*, 7th edn. Oxford: Oxford University Press.

¹⁶² Victoria DASKALOVA (2019) The New Directive on Unfair Trading Practices in Food and EU Competition Law: Complementary or Divergent Normative Frameworks? *Journal of European Competition Law & Practice*, 10(5), p. 281.

The legal instruments ‘abuse of superior bargaining power’, ‘abuse of significant market power’ and ‘economic dependence’, as well as their likely consequence materialising in the form of unfair trading practices¹⁶³ are not issues conventionally handled by antitrust law, in contrast with cartels, concerted practices, abuse of dominance, and merger control. Meanwhile the latter are acknowledged as the conventional core of antitrust law, the former are viewed by many as only part of trade regulation, but not of antitrust law. However, the situation is not crystal clear. For example, in Germany the legal instrument ‘abuse of economic dependence’, which aims to control relative market power, is regulated in the Act against Restraint of Competition (hereinafter referred to as *GWB*), right after the provisions on abuse of dominance.¹⁶⁴ In Hungary, the Competition Act¹⁶⁵ does not address it at all. In contrast, the legal instrument ‘abuse of significant market power’¹⁶⁶ can be found in Act CLXIV of 2005 on Trade¹⁶⁷ whose rules only apply to the trade sector (retail, wholesale, and commercial agents).

The difficulty of drawing the boundaries of competition law is also raised by other authors. *Brook and Eben* speak about ‘provisions falling formally within antitrust law’ and ‘provisions outside the narrow antitrust framework’, and they find on unilateral conducts that „the extent to which these rules should be considered as competition law” is not always manifest.¹⁶⁸

In conclusion, the thesis uses the umbrella term *competition law* by which it means the following units:

1. antitrust law;
2. border-line cases from an antitrust’s viewpoint, such as rules on different types of relative market power (abuse of superior bargaining position, abuse of economic dependence, abuse of significant market power);

¹⁶³ The European Parliament also acknowledges the cause-and-effect relationship of other abuse-type conducts and unfair trading practices. In one of its resolution, it says: „UTPs occur where there are inequalities in trading relations between partners in the food supply chain, resulting from bargaining power disparities in business relations, which are the result of the growing concentration of market power among a small number of multinational groups, and whereas these disparities tend to harm small and medium-sized producers.” See EUROPEAN PARLIAMENT (2016a) *Resolution of 7 June 2016 on unfair trading practices in the food supply chain* (2018/C 086/05), I.

¹⁶⁴ *GWB*, Section 20.

¹⁶⁵ Act LVII of 1996 on the Prohibition of Unfair Market Conduct and Competition Restriction [1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról].

¹⁶⁶ *Jelentős piaci erővel való visszaélés* in Hungarian; it has a misleading name but it regulates relative market power.

¹⁶⁷ Act CLXIV of 2005 on Trade [2005. évi törvény a kereskedelemről], Sections 7–7/B.

¹⁶⁸ Or BROOK–Magali EBEN (2021) *Abuse without dominance and monopolisation without monopoly* [Online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3859916 (Accessed: 14 June 2021), p. 4.

3. conducts related to unfairness, such as unfair trading practices or unfair practices of distributors.

The conducts belonging to Point I are referred to in the title of the thesis as 'antitrust', while the conducts belonging to Point II and III as 'trade regulation'. For the three reasons already mentioned above, these two larger parts (antitrust and trade regulation) have been merged under the expression 'agri-food competition law'.

2.2 Regulated conducts

Subchapter 2.2 deals with general rules and does not involve exception norms and specific norms only applying to the agricultural and food sector. The reason for presenting general rules first is that they serve as reference point to specific and exception norms to be analysed later. That is to say, although it may seem lengthy and in some cases too evident, it is necessary to enumerate legal instruments applying to all economic sectors in order that I could find which of them has sector-specific equivalents, as well as I could explore whether there are legal instruments which have no general but only sectoral provisions. These findings may prove to be useful on their own because they foresee the extent, depth and intensity of regulation on competition in agri-food markets. If there are several legal instruments which have no general provisions, the regulation of competition in agri-food markets is more extensive than in other economic sectors; on the contrary, if there are no sectoral provisions, it implies that competition is controlled in agri-food markets as in any other sector. To find any of the two possibilities, however, it is necessary to outline the general rules.

Here the basics of the following phenomena are presented: anti-competitive agreements and concerted practices, abuse of dominance, mergers and acquisitions (Subchapter 2.2.1); abuse of significant market power, abuse of economic dependence, abuse of superior bargaining/position (Subchapter 2.2.2); unfair trading practices and unfair practices of distributors (Subchapter 2.2.3). Therefore the thesis is built upon the following legal instruments:

- I anti-competitive agreements and concerted practices, abuse of dominance, as well as mergers and acquisitions come from antitrust law;
- II abuse of significant market power, abuse of economic dependence, and abuse of superior bargaining power (different notions of relative market power);
- III unfair trading practices and unfair practices of distributors.

The clustering of conducts in these three groups is based on two considerations. First, antitrust law has clear regulatory content, so it is reasonable to include these conducts in a separate group. Second, as to the other two groups, my starting point has been the names of the respective

legal instruments: Group II comprises those legal instruments which have the word ‘abuse’ in their names, while Group III is concerned with those which have the word ‘unfair’ in their names. *Prima facie* the names of Group II’s legal instruments suggest that they are somewhat connected and similar to *abuse* of dominance. At the same time, the legal instruments of Group III seem, at first sight, to be connected to *unfair* competition law. Therefore, in this respect the division is formal and not material. Only an in-depth analysis of case law could provide the necessary information to be able to decide whether the names of respective legal instruments are „loyal” to their real content.

The starting point for each notion is EU law. Subsequently, the national rules of Hungary and Germany as well as the United States are presented. Regarding the latter, I exclusively deal with federal laws.

2.2.1 Antitrust conducts

This subchapter is concerned with the three pillars of antitrust law: anti-competitive agreements, abuse of dominance, and merger control.¹⁶⁹

In the European Union the primary source of competition law is Articles 101 and 102 TFEU (ex Article 81 and ex Article 82 TEC). I do not aim to analyse these provisions in detail.¹⁷⁰ The former one declares that all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are incompatible with the internal market.¹⁷¹ Pursuant to the latter one, any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between member states.¹⁷²

In Hungary the following conducts are prohibited: agreements and concerted practices between undertakings, as well as decisions made by undertakings’ organisations, public bodies, associations or other similar organisations, which prevent, restrict or distort economic competition, or have or may have such an effect.¹⁷³ With regard to abuse of dominance, the Hungarian regulation generally declares its prohibition, and then gives a list of the most

¹⁶⁹ Pinar AKMAN (2017) *International Report*. In: Pranvera KËLLEZI–Bruce KILPATRICK–Pierre KOBEL (eds.) *Abuse of Dominant Position and Globalization & Protection and Disclosure of Trade Secrets and Know-How*. Springer International Publishing, p. 4.

¹⁷⁰ For detailed analysis see CRAIG–DE BÛRCA 2015, pp. 1001–1116.

¹⁷¹ TFEU, Article 101, 1.

¹⁷² TFEU, Article 102, 1.

¹⁷³ Act LVII of 1996, Section 11(1).

frequent types of abuse. For example, it is prohibited to limit production, distribution or technical development to the detriment of business partners; to influence the economic decisions of the other party in order to obtain an unjustified advantage; or to unduly impede market entry. This list is not exhaustive; other non-listed conducts also may establish the abuse of dominance.¹⁷⁴

The Hungarian regulation is similar to Germany's. Pursuant to Section 1 of *GWB*, agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition are prohibited.¹⁷⁵ The same can be said about the regulation of abuse of dominance. There is a general prohibition, then there are practices enumerated.¹⁷⁶

In the United States, different terms are used. According to the Sherman Act, every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.¹⁷⁷ The equivalent of abuse of dominance in US antitrust is 'monopolisation', 'attempted monopolisation', and 'conspiracy to monopolise'.^{178,179}

Let us turn to the abuse of dominance in more detail, which is of high relevance to the thesis. „The prohibition of abuse of dominance is a controversial aspect of competition law since there is no apparent consensus across different prohibitions and different approaches of different jurisdictions such as the European Union and the United States of America. There are also no clear, general economic rules establishing when the exercise of unilateral market power is anticompetitive.”¹⁸⁰ During the analysis on abuse of dominance here, I put the emphasis only on one aspect of the complex assessment as to whether an undertaking has a dominant position, and if it has, whether it has abused it. This aspect is the market share which is one of the indicators of determining an undertaking's market power. Of course, a full competition law assessment method in connection with abuse of dominance requires many more, but I concentrate on the factor of *market share*, given that this *is an important demarcation aspect between the legal instrument 'abuse of dominance' and other abuse-type conducts*. „In competition law, market concentration, market shares and barriers to entry constitute central

¹⁷⁴ Act LVII of 1996, Section 21.

¹⁷⁵ *GWB*, Section 1.

¹⁷⁶ *GWB*, Section 19.

¹⁷⁷ 15 U.S. Code § 1 – Trusts, etc., in restraint of trade illegal; penalty.

¹⁷⁸ 15 U.S. Code § 2 – Monopolizing trade a felony; penalty.

¹⁷⁹ William C. HOLMES (1981) Conspiracies to Monopolize: A Decisional Model, *Ohio State Law Journal*, Vol. 48, p. 731.

¹⁸⁰ AKMAN 2017, p. 4.

elements of the analysis, while product differentiation, asymmetric information and client-specific investments deserve attention only occasionally and in addition to the former. The latter are nonetheless sources of market power. Although *the reliance on market shares as an indicator of market power is appropriate* [...].”¹⁸¹

Therefore, it is advisable to start the analysis with the EU definition of market power: „[it] is the power to influence market prices, output, innovation, the variety or quality of goods and services, or other parameters of competition on the market for a significant period of time.”¹⁸² In their analysis, *Jeffrey R. Church* and *Roger Ware* determines the notion of market power from two different approaches.

„In economics, market power is defined as the ability to profitably raise price above marginal cost. Any firm with a downward-sloping demand curve will have market power.

However, not all market power warrants antitrust concern. Antitrust enforcement is warranted if market power is significant and durable. Significant means that prices exceed not only marginal cost, but long-run average cost so that the firm makes economic profits.

Durable means that the firm is able to sustain its economic profits in the long run.”¹⁸³

Having some extent of market power from a legal perspective, i.e. having the ability to raise price above marginal cost in the long run is the basis for not only abuse of dominance but also all conducts with the feature of abuse. The differences of these conducts can be outlined based on the extent of market power necessary to establish that kind of abuse.

When speaking of abuse of dominance, one of the most, if not the most, important factor to be considered is the market share,¹⁸⁴ which „constitute[s] an intervention threshold that may lead competition authorities to neglect certain types of market power”.¹⁸⁵ I am aware that high

¹⁸¹ Pranvera KËLLEZI (2008) *Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence*. In: Mark-Oliver MACKENRODT–Beatriz Conde GALLEGÓ–Stefan ENCHELMAIER (eds.) *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* Berlin–Heidelberg: Springer Verlag, p. 60.

¹⁸² European Commission (2005) *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*, Brussels, December 2005, pp. 9–10. Available at: <https://ec.europa.eu/competition/antitrust/others/discpaper2005.pdf> (Accessed: 4 March 2021).

¹⁸³ Jeffrey R. CHURCH–Roger WARE (2000) *Industrial Organization: A Strategic Approach*. New York: McGraw Hill, p. 603.

¹⁸⁴ See the criticism of market-share-based approaches: Daniel ZIMMER (2016) The Emancipation of Antitrust from Market-Share-Based Approaches, *The Antitrust Bulletin*, 61(1), pp. 133–154.

¹⁸⁵ KËLLEZI 2008, p. 55.

market shares „may not tell the entire story”,¹⁸⁶ but this factor is a reasonable first choice to start the analysis.

The term ‘dominance’ is a legal term, therefore it cannot be found in textbooks on economics. Economists use the term ‘market power’ which has different degrees. „[A]t one end of the spectrum would be a firm with no or only imperceptible market power; at the other end a firm which is a true monopolist. Between these two extremes could be found firms with ‘some’, or ‘appreciable’, or ‘significant’, or ‘substantial’ market power. However the legal expression ‘dominant position’ is a binary term: either an undertaking is dominant and therefore subject to Article 102 [TFEU, as well as the national rules on abuse of dominance] and the ‘special responsibility’ that this entails; or it is not, in which case its unilateral behaviour is not subject to competition law scrutiny at all.”¹⁸⁷

„Market [...] power is associated with high market shares.”¹⁸⁸ Nevertheless, there is no consensus on what degree of market power is necessary to set out the existence of a dominant position. „It is unlikely, however, that a firm with a market share of less than 35 percent would have the ability to reduce output or impose a significant price increase above the competitive level.”¹⁸⁹ According to another opinion, the lowest possible threshold of the existence of a dominant position is 30 percent.¹⁹⁰ In EU competition law, the degree of market share is an important first indicator of assessing the existence of a dominant position, but other relevant market conditions also have a key role.¹⁹¹ This approach is reflected in the judgments of the CJEU which provide several examples of the fact that possessing a given market share in one case is sufficient to find dominance, but in another case the same degree of market share does not imply it. „In [the] *United Brands*¹⁹² [case] UB’s 40-45 per cent of the market was held to be sufficient, although the Court also considered other factors indicative of its dominance.

¹⁸⁶ Douglas A. HERMAN–Shawn W. ULRICK–Seth B. SACHER (2014) Dominance Thresholds: A Cautionary Note, *The Antitrust Bulletin*, 59(4), p. 855.

¹⁸⁷ WHISH–BAILEY 2012, p. 180.

¹⁸⁸ KËLLEZI 2008, p. 60.

¹⁸⁹ R. Shyam Khemani (ed.) (1999) *A Framework for the Design and Implementation of Competition Law and Policy*. Washington–Paris: World Bank – Organisation for Economic Co-operation and Development (OECD), p. 71.

¹⁹⁰ DEDICS Zsigmond (2007) A vevői erő szabályozási kísérletei Magyarországon és más EU-tagállamokban [The regulatory attempts of buyer power in Hungary and in other EU member states], *Iustum Aequum Salutare*, 3(2), p. 157.

¹⁹¹ United Nations Conference on Trade and Development (2020) *Model Law on Competition (2020), revised chapter IV*. Adopted at Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, 19–23 October 2020, TD/RBP/CONF.9/L.2., p. 8. Available at: https://unctad.org/system/files/official-document/tdrbpconf9L2_en.pdf (Accessed: 6 March 2021).

¹⁹² Case 27/76 – Judgment of the Court of 14 February 1978: *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*.

However, in *Hoffmann-La Roche*^{193,194} the Court overturned a Commission finding that the firm was dominant in the market for B3 vitamins, of which it had only 43 per cent. [...] In the *Akzo*¹⁹⁵ case the ECJ held that a market share of 50 per cent could be said to be very large, and hence indicative of a dominant position, and this finding was repeated in *Irish Sugar*¹⁹⁶.¹⁹⁷

In Germany, pursuant to Section 18(4) of the GWB an undertaking having a market share of at least 40 percent is presumed to be dominant, and the undertaking in question shall prove the opposite, i.e. the burden of proof is shifted. Such an exact degree of market share percentage can be found neither in Hungary and the EU, nor in the United States, nevertheless the latter one can be considered as an odd one out, since „the United States Supreme Court has not accepted a market share of less than 75 per cent, by itself, as enough to establish monopoly power.”¹⁹⁸ When one takes a look at the US terminology, it can be said that „monopoly power requires, at a minimum, a substantial degree of market power,” and „a dominant market share is a useful starting point in determining monopoly power.”¹⁹⁹ The method used in the United States suggests the „two-thirds of the market (or more) as a rule of thumb for presuming monopoly power”.²⁰⁰

The approach of the EU and that of Hungary towards market share required to find the existence of a dominant position are similar to Germany’s, even in the lack of *expressis verbis* regulation: 40 per cent of market share is an approximate threshold when assessing the existence of dominance, but, of course, other market conditions, which are not analysed here, have also crucial relevance. If one compares the enforcement of abuse of dominance in the EU with that of monopolisation in the United States, it can be said that „monopolistic conduct prohibited by Section 2 of the Sherman Act is likely to constitute an abuse of dominance under TFEU Article 102, although not *vice versa*.”²⁰¹ Replacing Article 102 TFEU with either Germany’s or

¹⁹³ Case 85/76 – Judgment of the Court of 13 February 1979: *Hoffmann-La Roche & Co. AG v Commission of the European Communities*.

¹⁹⁴ See also Erich KAUFER (1980) *The Control of the Abuse of Market Power by Market-Dominant Firms Under the German Law Against Restraints of Competition*, *Zeitschrift für die gesamte Staatswissenschaft*, Vol. 136, pp. 510–532.

¹⁹⁵ Case C-62/86 – Judgment of the Court (Fifth Chamber) of 3 July 1991: *AKZO Chemie BV v Commission of the European Communities*.

¹⁹⁶ Case T-228/97 – Judgment of the Court of First Instance (Third Chamber) of 7 October 1999: *Irish Sugar plc v Commission of the European Communities*.

¹⁹⁷ CRAIG–DE BÚRCA 2015, p. 1063.

¹⁹⁸ United Nations Conference on Trade and Development 2020, p. 11.

¹⁹⁹ U.S. Department of Justice (2008) *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, September 2008, p. 20 and p. 22.

²⁰⁰ Eleanor M. FOX (2008) *The Market Power Element of Abuse of Dominance – Parallels and Differences in Attitudes – US and EU*. In: Claus-Dieter EHLERMANN–Mel MARQUIS (eds.) *European Competition Law Annual 2007 – A Reformed Approach to Article 82 EC*. Oxford: Hart Publishing, p. 115.

²⁰¹ Eleanor M. FOX (2014) *Monopolization and Abuse of Dominance: Why Europe is Different*, *The Antitrust Bulletin*, 59(1), p. 150.

Hungary's rules on abuse of dominance would also likely represent the truth, since both countries are EU Member States, and EU competition law has exercised a decisive influence on national competition law regimes.²⁰²

The exact threshold expressed in market share to assess the existence of abuse of dominance would mean a safe harbour, as well as it could contribute to the simpler delineation of abuse of dominance from other abusive unilateral conducts. A presumption (such as in Germany) which arises from market share thresholds is used both to help identify a dominant position and to identify market situations falling within safe harbours.²⁰³ Besides this, although, it cannot be forgotten that *the different types of abusive conducts other than abuse of dominance even dissolve this 'safe harbour' created by the market share threshold in the form of a presumption of possessing a dominant position.*

Nevertheless, it is sparse to *expressis verbis* declare (or presume) when a dominant position based on market share can be found. An example can be found in Germany with the presumption of the 40 per cent threshold of market share. The same extent comes across in a soft law document, an EU Commission communication:

*„The Commission considers that low market shares are generally a good proxy for the absence of substantial market power. The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40% in the relevant market. However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations. Such cases may also deserve attention on the part of the Commission.”*²⁰⁴

Neither Hungary, nor the US applies such a clear-cut boundary in written legal sources. It must not be forgotten, nonetheless, that even the German provision is merely an indication by legislation that a market share of 40 per cent or more suggests the existence of a dominant

²⁰² With regard to Hungary this thought is reflected in NAGY 2021, p. 23, as well as in TÓTH Tihamér (2020) *Jogharmonizáció a magyar versenytörvény elmúlt harminc évében* [Harmonisation of law in the last thirty years of Hungarian competition law], *Állam- és Jogtudomány*, 61(2), p. 72. In connection with Germany, see: Sigrid QUACK–Marie-Laure DJELIC (2005) *Adaptation, Recombination and Reinforcement: The Story of Antitrust and Competition Law in Germany And Europe*. In: Wolfgang STREECK–Kathleen THELEN (eds.) *Beyond Continuity – Institutional Change in Advanced Political Economies*. Oxford: Oxford University Press, pp. 255–281.

²⁰³ Organisation for Economic Co-operation and Development (2018) *Executive Summary of the Roundtable on Safe Harbours and Legal Presumptions in Competition Law*. Annex to the Summary Record of the 128th Meeting of the Competition Committee held on 5-6 December 2017. DAF/COMP/M(2017)2/ANN1/FINAL, p. 4.

²⁰⁴ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), 14.

position. Whether such dominance actually exists must be examined on the basis of the actual market and competitive conditions to be established in the individual case.²⁰⁵ The complex assessment method on the existence of a dominant position is reflected in the national competition acts of both Hungary²⁰⁶ and Germany²⁰⁷, as well as in the CJEU's²⁰⁸ and the US Supreme Court's judgments²⁰⁹.

Nevertheless, in conclusion, I find that *market share is generally recognised as an important first indicator²¹⁰ when assessing the likely existence of a dominant position, and it is a fundamental factor for distinguishing abuse of dominance from other abusive conducts, such as abuse of economic dependence or abuse of superior bargaining position.*

Mergers and acquisitions are not regulated in EU primary law. Their main source of law was adopted in 2004 within the framework of a regulation,²¹¹ which determines its scope to all concentrations with a Community dimension. The consideration of a Community dimension is detailed in the legal act.²¹² The definition of concentration can also be found in the regulation.^{213,214} „A true merger involves two separate undertakings merging entirely into a new

²⁰⁵ Jürgen KÜHNEN (2020) *GWB § 18 Marktbeherrschung*, Rn. 81. In: Ulrich LOEWENHEIM–Karl M. MEESSEN–Alexander RIESENKAMPFF–Christian KERSTING–Hans Jürgen MEYER-LINDEMANN (eds.) *Kartellrecht – Kommentar zum Deutschen und Europäischen Recht*, 4th edn. Munich: C.H. Beck.

²⁰⁶ See Act LVII of 1996, Section 22(2).

²⁰⁷ See GWB, Section 18(3).

²⁰⁸ See the above-mentioned cases of *United Brands*, *Hoffmann-La Roche*, *Akzo*, and *Irish Sugar*.

²⁰⁹ See U.S. Department of Justice 2008, p. 27.

²¹⁰ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), 13.

²¹¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

²¹² See Council Regulation (EC) No 139/2004, Article 1.

2. A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

²¹³ Council Regulation (EC) No 139/2004, Article 3.

²¹⁴ See in detail Stephen DAVIES–Bruce LYONS (2008) *Mergers and Merger Remedies in the EU: Assessing the Consequences for Competition*. Cheltenham: Edward Elgar Publishing; European Commission (2010) *EU Competition Law: Rules Applicable to Merger Control*. Luxembourg: Office for Official Publications of the European Union; Oliver BUDZIŃSKI (2006) *An Economic Perspective on the Jurisdictional Reform of the European*

entity [...]. However it is important to understand that the expression ‘merger’ as used in competition policy includes a far broader range of corporate transactions than full mergers of this kind. Where A acquires all, or a majority of, the shares in B, this would be described as a merger if it results in A being able to control the strategic business decisions of B; even the acquisition of a minority shareholding may be sufficient, in particular circumstances, to qualify as a merger: under the EUM[erger]R[egulation] the question is whether A will acquire ‘the possibility of exercising decisive influence over B.’²¹⁵

In Hungary, rules on mergers and acquisitions are to be found in the Hungarian Competition Act.²¹⁶ The German regulation is based on Sections 35–43A of the GWB.²¹⁷ In the United States, the two most important sources of law are Section 7 of the Clayton Act of 1914²¹⁸ and the Hart-Scott-Rodino Antitrust Improvements Act of 1976.²¹⁹

2.2.2 *Conducts related to relative market power*

This subchapter aims to deal with the following conducts: abuse of significant market power, abuse of economic dependence and abuse of superior bargaining power (hereinafter referred to together as ‘other abuse-type conducts’). It is difficult, or even impossible, to strictly distinguish these notions from each other. The relationship between the concept of superior bargaining power and economic dependence is complicated and complex. They are often associated with one another. „[E]conomic dependence on the part of the supplier could be the explanation behind superior bargaining power”, but the notion of „[e]conomic dependence [by itself rather] describes the relationship between two parties without saying much about the

Merger Control System, *European Competition Journal*, 2(1), pp. 119–140. See the assessment of the EU’s merger regime: Borja MARTINEZ FERNÁNDEZ–Iraj HASHI–Marc JEGERS (2008) The Implementation of the European Commission’s Merger Regulation 2004: An Empirical Analysis, *Journal of Competition Law & Economics*, 4(3), pp. 791–809. See a comparative analysis: Gavin ROBERT (2014) Merger Control Procedure and Enforcement: An International Comparison, *European Competition Journal*, 10(3), pp. 523–549.

²¹⁵ WHISH–BAILEY 2012, pp. 809–810.

²¹⁶ Act LVII of 1996, Sections 23–32.

²¹⁷ GWB, Sections 35–43A.

²¹⁸ 15 U.S. Code § 18 – Acquisition by one corporation of stock of another. See Section 1 and 2:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

²¹⁹ 15 U.S. Code § 18a – Premerger notification and waiting period.

nature of competition on the market.”²²⁰ Complementing *Daskalova*’s opinion, this finding on economic dependence may also be correct with respect to superior bargaining power. Of the three above-mentioned conducts, the expression ‘significant market power’ is the only one which refers to the condition and nature of competition: from a single-factor perspective (be it the factor of market share) there is a market participant which possesses, *inter alia*, a significant proportion of market shares in the respective market.

The terminology used in connection with these notions in the different countries examined is not so coherent as in the case of abuse of dominance. To summarise, *all of these conducts are abusive and unilateral, but the market share threshold to be required to find the existence of an abuse is lower than with regard to the traditional concept of abuse of dominance.*

First and foremost, the most important difference between abuse of dominance and other abuse-type conducts is that regarding the latter one can see „[a] situation in which an undertaking has a market power not with respect to all other market participants (like in the case of a dominant position), but only with respect to another undertaking that economically depends on it.”²²¹ Thus, these abuse-type conducts are relative or relational²²² concerning the market power of the abusive undertakings. Their market power can be interpreted only within the context of their relationship to undertakings being abused.

Given that market power is associated with high market shares, regarding other abuse-type conducts these „high” market shares get also relativised, that is to say, the highness of market shares of the abusive undertaking is also measured (assessed) in relation to the market position of the abused undertaking. Therefore, in comparison with the abuse of dominance, possessing significantly lower market shares by an undertaking may be sufficient to find the existence of any kind of other abuse-type conducts.

When it comes to the terminology of other abuse-type conducts, completely different expressions are used by national legal systems. The use of the following notions can be found without clear boundaries: significant market power, superior market power, superior bargaining power, superior bargaining position, and economic dependence. All of these can get included

²²⁰ DASKALOVA 2019, p. 285.

²²¹ Study on the legal framework covering business-to-business unfair trading practices in the food supply chain. Final report, Prepared for the European Commission, DG Internal Market, DG MARKT/2012/049/E, 26 February 2014, pp. 47–48.

²²² Masako WAKUI–Thomas CHENG (2015) Regulating Abuse of Superior Bargaining Position under the Japanese Competition Law: An Anomaly or A Necessity? *Journal of Antitrust Enforcement*, 3(2), p. 302–333 and Warren GRIMES (2001) The Sherman Act’s Unintended Bias against Lilliputians: Small Players’ Collective Action as a Counter to Relational Market Power, *Antitrust Law Journal*, 69(1), pp. 195–248 are cited by Liyang HOU (2019) Superior bargaining power: the good, the bad and the ugly, *Asia Pacific Law Review*, 27(1), p. 40.

under the umbrella term ‘relative or relational market power’. While I referred to the term ‘abuse of dominance’ as binary and legal, one can experience that the term ‘market power’, which is an economic term, has sneaked into the names of some of these legal instruments. It is manifest that for the finding of a dominant position, an undertaking shall also possess significant or superior market power, or shall have a superior bargaining position, therefore confusion may emerge. Adding to the confusion is the lack of agreement on how much and what type of market power is needed to cause harm to competition.²²³

The European Union

The European Union’s standpoint towards other abuse-type conducts may be presented by citing the following provision:

„Member states should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings.”²²⁴

A few Member States have done so: for example, the two analysed countries, Germany and Hungary. Nevertheless, the European Union has not yet adopted *general* provisions on other abuse-type conducts *vis-à-vis* undertakings, which would apply to all economic sectors. By emphasising the adjective ‘general’ with italicised, I aim to refer to the fact that special provisions connected to the situation of superior bargaining power and economic dependence, as well as to their consequences in the form of unfair trading practices were adopted pertaining to the agricultural and food supply chain, namely the Directive (EU) 2019/633.²²⁵ This legal act forms a central part of the thesis and is analysed in detail in Part Two. Besides, I also refer to it in the next subchapter (Subchapter 2.2.3).

The Directive (EU) 2019/633 aims to address significant imbalances in bargaining power between suppliers and buyers of agricultural and food products, and finds that these

²²³ BROOK–EBEN 2021, p. 2.

²²⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Recital (8).

²²⁵ 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.

differences in bargaining power correspond to economic dependence of suppliers on buyers. Its assessment method reflects the relativity, contrary to the abuse of dominance, when it determines annual turnovers as a suitable approximation for *relative bargaining power* (a new term again).²²⁶ It shows me that according to the EU an undertaking's superior bargaining power over another one can be equated with economic dependence. *However, the Directive does not mention the term 'abuse' at all. By using the expression 'unfair trading practices' it seems that the EU tries to avoid even the slightest suspicion of that – by adopting the Directive (EU) 2019/633 – it introduced provisions on some kind of lower-level abuse of dominance with a totally different assessment method than the traditionally used market investigation in abuse of dominance cases.*

Despite this fact, in the case law of the CJEU, some cases can be identified related to abuse of economic dependence, although these were connected to legal monopoly issues.²²⁷ In 2018, *Bougette, Budzinski, and Marty* wrote that „competition law does not provide a test or a set of criteria to identify such abuses with respect to market transactions among private undertakings”,²²⁸ which finding has to be reviewed in the agricultural and food sector in light of Directive (EU) 2019/633. This legal act, which *implicitly* addresses issues emerging from the abuse of relative market power (or superior bargaining power, or significant market power, or whatever it may be called), uses turnover thresholds to determine its scope *rationae personae*.²²⁹

If one turns to the terminology of these legal instruments, the term (superior) ‘bargaining power’ represents the civil law nature of the notion, ‘significant market power’ the economic character, and ‘unfair trading practices’ the unfair competition law determination. In most jurisdictions, handling other abuse-type conducts with the toolbox of civil law is considered sufficient, mainly based on the reason that these jurisdictions are reluctant „to interfere with the contractual freedom between private parties” and think that conventional competition law

²²⁶ See Directive (EU) 2019/633, Recital (1), (9) and (14).

²²⁷ See Case 226/84 – Judgment of the Court (Fifth Chamber) of 11 November 1986: *British Leyland Public Limited Company v Commission of the European Communities*; Case T-229/94 – Judgment of the Court of First Instance (First Chamber, extended composition) of 21 October 1997: *Deutsche Bahn AG v Commission of the European Communities*; Case T-128/98 – Judgment of the Court of First Instance (Third Chamber) of 12 December 2000: *Aéroports de Paris v Commission of the European Communities*.

²²⁸ Patrice BOUGETTE–Oliver BUDZINSKI–Frédéric MARTY (2018) Exploitative abuse and abuse of economic dependence: What can we learn from an industrial organization approach? *Ilmenau Economics Discussion Papers*, No. 119, December 2018, p. 3.

Available at: <https://www.econstor.eu/bitstream/10419/191022/1/1043565396.pdf>.

²²⁹ See Directive (EU) 2019/633, Article 1, 2.

instruments are appropriate and enough.²³⁰ From a competition law standpoint, the reason of incongruity rests on the circumstance that other abuse-type conducts aim to restrict the market behaviour of powerful undertakings without requiring a dominant position,²³¹ as well as these conducts lack correct economic justifications.²³²

In the EU, other abuse-type conducts are often associated with the form of exploitative abuse. „While exploitative abuse initially was considered the only case to which Article 102 [TFEU] applied, Court of Justice case-law (e.g., Continental Can,²³³ Hoffmann-La Roche) has promoted a shift towards exclusionary abuse cases along with an increasing neglect of exploitative abuse cases.”²³⁴

By scrutinising the case law of the CJEU on abuse of dominance, *Këllezi* came to the conclusion that economic dependence can be one of the factors to be considered during the assessment of a dominant position. It is seen as an additional element, „in particular when the undertaking under investigation has low market shares”.²³⁵

*As can be seen, the EU provides room for Member States to regulate abusive unilateral conducts which are stricter than abuse of dominance, but – generally – the EU itself is not concerned with these conducts. The exception is the sector-specific Directive (EU) 2019/633. Nevertheless, in the case law of the CJEU, economic dependence may be assessed as an exceptional circumstance within the analysis of a dominant position.*²³⁶ Generally speaking, abuse of economic dependence does not constitute a sui generis, separate legal instrument in EU competition law.

Hungary

In Hungary, the legal instrument ‘*abuse of significant market power*’ is not included in the Competition Act. The name should not mislead anyone. It is the „little brother” of abuse of dominance. The legal instrument can be found in Act CLXIV of 2005 which regulates trade in general. Its scope covers both retail and wholesale trade, as well as the activities of commercial

²³⁰ International Competition Network (ICN) (2008) Report on Abuse of Superior Bargaining Position, 7th Annual Conference of ICN, Kyoto, Japan, 14–16 April 2008, p. 35.

²³¹ WAKUI–CHENG 2015, p. 303.

²³² Louis VOGEL (1998) Competition Law and Buying Power: The Case for a New Approach in Europe, *European Competition Law Review*, 1998/1, pp. 4–11. cited by HOU 2019, p. 39.

²³³ Case 6-72 – Judgment of the Court of 21 February 1973: Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities.

²³⁴ BOUGETTE–BUDZINSKI–MARTY 2018, p. 2.

²³⁵ KËLLEZI 2008, p. 88.

²³⁶ KËLLEZI 2008, p. 88.

agents.²³⁷ Nonetheless, this regulation only applies to the non-food sector; agriculture and food sector has its own, *sui generis* regulation concerning the issue.

The relevant provisions are to be found in Act CLXIV of 2005's chapter titled *Regulation on undertakings with significant market power*.²³⁸ The adoption of these rules took place as a reaction to the appearance of food retail chains in Hungary in the 1990's. Since then, its aim has been to prevent suppliers to be abused by retailers, because the provisions of the Hungarian Competition Act on abuse of dominance could not apply to retailers due to the lack of dominance. That is to say, the reason behind the adoption of these rules has been to ensure that retailers could not abuse their *buyer power*²³⁹ which has not reached the intervention threshold required by abuse of dominance rules. Act CLXIV of 2005 defines the notion of *significant market power*: a market situation as a result of which the trader becomes or has become a reasonably unavoidable contractual partner in the delivery of his products or services to customers and is able to influence the market access of a product or product group regionally or nationally due to its market share.²⁴⁰

The structure of provisions is the same as that of the abuse of dominance. There is a general prohibition which declares that the abuse of significant market power is forbidden.²⁴¹ Subsequently, there is a list which provides examples of what constitutes an abuse of significant market power. A few of them are worth mentioning: unjustified discrimination between suppliers; unduly restricting the supplier's access to sales opportunities; imposing unfair conditions on the supplier which result in unfair risk-sharing for the benefit of the trader, in particular the disproportionate pass-on of costs to the supplier, including warehousing, advertising, marketing and other costs; unjustified subsequent changes to the contract terms to the detriment of the supplier or the imposition of such a possibility by the trader; threatening with the termination of the contract in order to enforce unilaterally advantageous contract terms.²⁴²

Act CLXIV of 2005 approaches the issue of abuse of significant market power from the logic of antitrust law, by extending the toolbox at the disposal of antitrust law.²⁴³ Nevertheless, according to another viewpoint, abuse of significant market power does not belong to antitrust

²³⁷ Act CLXIV of 2005, Section 1 and Section 2, 9.

²³⁸ See Act CLXIV of 2005, Sections 7–7/B.

²³⁹ KOCIS Márton (2014) Vevői erő – a hazai szabályozás 8 éve és európai uniós kitekintés [Buyer power – The 8 years of national regulation and a European Union outlook], *Versenytükör*, 10(1), pp. 63–64.

²⁴⁰ Act CLXIV of 2005, Section 2, 7.

²⁴¹ Act CLXIV of 2005, Section 7(1).

²⁴² See: Act CLXIV of 2005, Section 7(2).

²⁴³ FIRNIKSZ Judit–DÁVID Barbara (2020) A versenyjog határterületei: A vevői erő régi és új szabályai [Border areas of competition law: Old and new rules on buyer power], *Magyar jog*, 67(5), p. 280.

law.²⁴⁴ However, the picture becomes more complicated, if one takes into account that the competent authority for the enforcement of abuse of significant market power is the Hungarian Competition Authority (*Gazdasági Versenyhivatal*) based on those rules which also apply to abuse of dominance cases.²⁴⁵

Moreover, Act CLXIV of 2005 determines an irrebuttable presumption.²⁴⁶ Pursuant to Section 7(3) significant market power exists against a supplier if the previous year's consolidated net sales from the trading activities of that group of companies, including all parent companies and subsidiaries under Act C of 2000 on Accounting and, in the case of joint purchasing, all companies forming a purchasing association (hereinafter referred to as the consolidated net sales revenue), exceeds HUF 100 billion.²⁴⁷ When Act CLXIV of 2005 came into force on 1 January 2006, this was a quite justified threshold but has become outdated, on the one hand, because of the inflation and, on the other hand, the continuously increasing turnover of retailers. It means that many Hungarian retailers fall under the presumption's scope despite that they do not necessarily have the degree of market power that would justify the application of these provisions to them.²⁴⁸ A trader also possesses significant market power, if it is or will be in a unilaterally advantageous bargaining position against a supplier based on market structure, entry barriers, market share, the financial strength and other resources of the undertaking, the size of its trading network, and the size and location of its business.²⁴⁹

The strong connection between abuse of significant market power and abuse of dominance can further be evidenced by the fact that Act CLXIV of 2005 in its chapter titled *Regulation on undertakings with significant market power* makes a complementary reference to the rules on abuse of dominance included in the Hungarian Competition Act. It declares that – for the purposes of the Hungarian Competition Act – a dominant position shall be deemed to exist on the market of retail sale of daily consumer goods as a relevant market if the previous year's consolidated net sales revenue of the undertaking or the related undertakings together²⁵⁰ from the retail sale of daily consumer goods exceeds HUF 100 billion.²⁵¹ For the purposes of this paragraph daily consumer goods are foodstuffs to meet the daily needs and requirements of people and which are typically consumed or replaced by consumers within one year, with

²⁴⁴ KOCSIS 2014, p. 66.

²⁴⁵ Act CLXIV of 2005, Section 9(3).

²⁴⁶ KOCSIS 2014, p. 64.

²⁴⁷ Act CLXIV of 2005, Section 7(3).

²⁴⁸ KOCSIS 2014, p. 64.

²⁴⁹ Act CLXIV of 2005, Section 7(4).

²⁵⁰ Related undertakings shall be considered pursuant to the point 23 of Section 4 of the Act LXXXI of 1996 on the corporate tax and dividend tax

²⁵¹ Act CLXIV of 2005, Section 7/A(1).

the exception of products sold in the course of catering.^{252,253} That is to say, a retailer is in dominant position *ex lege* if its turnover generated from the sales of food products exceeds HUF 100 billion.

Germany

„Germany was the first European country to adopt specific rules on the abuse of economic dependence. [...] The underlying rationale was to prevent big oil corporations from discriminating against small independent oil stations during the oil crisis; additionally, the rule aimed at protecting other retailers from dependence on strong brands and the dependence that resulted from long-standing business relations.”²⁵⁴ Germany’s regulation under the threshold of abuse of dominance uses the legal terms *relative* and *superior market power*,²⁵⁵ and these form an integral part of German competition law. The provisions are to be found in Section 20 of GWB. The first sentence of Section 20(1) contains a legal definition of relative market power.²⁵⁶ In early 2021, a significant change was adopted with regard to this definition. Before the amendment, the Act’s Section 20(1) extended the prohibition of unfair hindrance and objectively unjustified unequal treatment of similar undertakings by dominant undertakings to undertakings and associations of undertakings with relative market power to the extent that *small and medium-sized undertakings* are dependent on them as suppliers or customers in such a way that there are no sufficient and reasonable possibilities of switching to other undertakings. This intended to counteract any adverse effects on the competitive activities of undertakings caused by this form of market power in the same way as those caused by dominant undertakings. The purpose of Section 19(2) No. 1 therefore also applies to the norm addressees of Section 20(1).²⁵⁷ With the amendment, abuse of relative market power can also take place to the

²⁵² Act CLXIV of 2005, Section 7/A(2).

²⁵³ The general definition of daily consumer goods in Act CLXIV of 2005 includes much more than food. It also covers perfumes, drugstore products, household cleaning products and chemical goods, as well as hygienic paper products. However, for the purpose of this provision, the turnover generated from the sales of perfumes, drugstore products, household cleaning products and chemical goods, as well as hygienic paper products are not taken into account.

²⁵⁴ Monika TAUBE (2006) *Das Diskriminierungs- und Behinderungsverbot für »relativ marktstarke« Unternehmen – Wettbewerbs- oder individualschützende Funktion des § 20 Abs. 2 GWB*. Berlin: Duncker & Humblot is cited by KELLEZI 2008, p. 61.

²⁵⁵ In German: *relative oder überlegene Marktmacht*.

²⁵⁶ Ulrich LOEWENHEIM (2020) *GWB § 20 Verbotenes Verhalten von Unternehmen mit relativer oder überlegener Marktmacht*, Rn. 3. In: Ulrich LOEWENHEIM–Karl M. MEESSEN–Alexander RIESENKAMPFF–Christian KERSTING–Hans Jürgen MEYER–LINDEMANN (eds.) *Kartellrecht – Kommentar zum Deutschen und Europäischen Recht*, 4th edn. Munich: C.H. Beck.

²⁵⁷ Kurt MARKERT (2020) *GWB § 20 Verbotenes Verhalten von Unternehmen mit relativer oder überlegener Marktmacht*, Rn. 1. In: Torsten KÖRBER–Heike SCHWEITZER–Daniel ZIMMER (eds.) *Wettbewerbsrecht – Band 2*:

detriment of *large companies*. The definition is formulated as follows: Section 19(1) in conjunction with (2) No. 1 shall also apply to undertakings and associations of undertakings to the extent that other undertakings are dependent on them as suppliers or customers of a certain type of goods or commercial services in such a way that there are insufficient and reasonable possibilities to switch to third undertakings and that there is a clear imbalance to the countervailing power of the other undertakings.²⁵⁸ As can be seen, the German regulation uses the term ‘relative market power’ as a definition, but the content of the definition includes elements which refer to abuse of economic dependence.

In connection with this provision, a presumption is formulated. It shall be presumed that a supplier of a certain type of goods or commercial services is dependent on a customer within the meaning of this provision, if this customer regularly obtains special benefits from the supplier in addition to the customary price reductions or other service charges which are not granted to similar customers.²⁵⁹

The *GWB*’s Section 20(2) is connected to the type of abuse formulated in Section 19(2) No. 5. The latter declares that abuse shall be deemed to have occurred, in particular, if a market-dominant undertaking, as a supplier of or customer for a certain type of goods or commercial services, requests other undertakings to grant it advantages without an objectively justified reason; in this context, particular consideration shall be given to whether the request is comprehensibly justified for the other undertaking and whether the requested advantage is in reasonable proportion to the reason for the request. This provision also applies to undertakings and associations of undertakings in relation to their dependent undertakings.²⁶⁰

Besides these, there is a further protective provision formulated for the interests of small and medium-sized undertakings. Undertakings with superior market power²⁶¹ compared to small and medium-sized competitors shall not use their market power to directly or indirectly hinder such competitors unfairly.²⁶² Subsequently, in the following sentences an illustrative list is presented as to what constitutes an unfair hindrance.²⁶³

GWB. Kommentar zum Deutschen Kartellrecht, 6th edn. Munich: C.H. Beck. See also *GWB*, Section 20(1), Sentence 1.

²⁵⁸ *GWB*, Section 20(1), Sentence 1.

²⁵⁹ *GWB*, Section 20(1), Sentence 3.

²⁶⁰ *GWB*, Section 20(2).

²⁶¹ In German: *überlegene Marktmacht*.

²⁶² *GWB*, Section 20(3).

²⁶³ The non-exhaustive nature of the list can be grounded on the wording of the sentence which uses the German adverb ‘*insbesondere*’. It means particularly in English.

The United States of America

During the examination of the US regulation on other abuse-type conducts, it is worth starting with the 2008 Report of the International Competition Network on Abuse of Superior Bargaining Position. The US respondents did not recognise abuse of superior bargaining position as an autonomous legal concept.

„The United States noted that the concept of an abuse of a superior bargaining position is very vague, and that any regulation of such ‘abuse’ is likely to introduce a great deal of uncertainty into the market regarding how best and most efficiently to negotiate contracts with smaller counterparts. Substantial uncertainty is inherent both in determining when a party is in a ‘superior bargaining position’ (particularly where there is no market power requirement), and in assessing when particular contract terms would be deemed to be ‘abusive.’ These uncertainties are likely to raise the costs of contracting, to the detriment of parties and ultimately consumers.”²⁶⁴

Nevertheless, there are contrasting views in the literature. There are authors who believe that the United States was the first to adopt rules on superior bargaining position in form of the Robinson-Patman Act of 1936.²⁶⁵ Conversely, the possible reason behind the rejecting answer of US experts formulated in the 2008 ICN Report may be found in the fact that „[a]lthough the Robinson-Patman Act contains efforts to protect small businesses against the abuse of buyer power, it is primarily *the horizontal competitor of the chain store who is promised protection, not the supplier.*”²⁶⁶

The Robinson-Patman Act has aimed to step up against price discrimination,²⁶⁷ which was the second attempt to do so in US antitrust history. The first attack upon it was Article 2 of

²⁶⁴ INTERNATIONAL COMPETITION NETWORK 2008, pp. 34–35.

²⁶⁵ See for example: HOU 2019, p. 42.

²⁶⁶ Albert A. FOER (2018) *Abuse of Superior Bargaining Position (ASBP): What Can We Learn from Our Trading Partners?* [Online], p. 3.

Available at: https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0054-d-0007-151038.pdf (Accessed: 23 March 2021).

²⁶⁷ See: 15 U.S. Code § 13 – Discrimination in price, services, or facilities

(a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such

the Clayton Act. Nonetheless, the Robinson-Patman Act has been exposed to criticism on all fronts since its passage. „The sweeping changes in traditional business methods which appear to be threatened by an enforcement of this law, the alacrity with which the Federal Trade Commission is instituting proceedings under it, together with the confusion as to its meaning caused by a lack of authoritative definition of many of its terms together with the unprecedented awkwardness with which the law has been drafted, may justify some of the furor” of businessmen and lawyers.”²⁶⁸ Not to mention that one of the most influential antitrust lawyers of the United States, *Robert Bork* identified the passage of the Act as antitrust’s least glorious hour.²⁶⁹

Definitions in legal literature

i. Buyer power as an economic prerequisite?

The question arises as to how legal literature defines other abuse-type conducts. A few examples are presented here. Before doing so, I begin with the explanation of an economic term, namely, that of buyer power. *I provide definitions on buyer power because other abuse-type conducts are typically exercised by buyers.* Each kind of other abuse-type conducts may be connected to buyer power. As the analysis of abuse of dominance was started by clarifying market power in general, here let us see a definition on buyer power in which market power is stressed:

discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned. [...]

²⁶⁸ Milo Fowler HAMILTON–Lee LOEVINGER (1937) The Second Attack on Price Discrimination: The Robinson-Patman Act, *Washington University Law Quarterly*, 22(2), pp. 153–154.

²⁶⁹ Robert H. Bork (1978) *The Antitrust Paradox*. New York: Free Press, p. 382 cited by Roger D. BLAIR–Christina DEPASQUALE (2014) “Antitrust’s Least Glorious Hour”: The Robinson-Patman Act, *The Journal of Law & Economics*, 57(3), p. 201.

„Buyer power is simply market power on the buyer side of a market. In economic terms, buyer power is that power which allows buyers to force sellers to reduce the price below the price that would result in a competitive equilibrium.”²⁷⁰

In an even broader sense it can be said that buyer power is „the bargaining strength that a buyer has with respect to the suppliers with whom it trades.”²⁷¹ One may also conceive it as the following:

„[b]uyer power enables a single buyer, or a group of buyers, to affect the terms of trade with upstream suppliers. It enables a buyer to reduce the price it pays a supplier or to impose other more favourable non-price terms.”²⁷²

While *Scheelings and Wright* paints a negative picture on buyer power connecting it with monopsony, *Inderst and Mazzarotto* rather perceives it as bargaining power. *Ezrachi and Ioannidou* is close to *Anchustegui* who, in his in-depth analysis on buyer power, refers to it as an umbrella term which has, at least, two sub-expressions: monopsony power and bargaining power. The main difference between its two senses is whether the withholding effect appears during the exercise of power. If it does, it is monopsony power which results in a reduction of purchases. Monopsony is inefficient in all cases, while bargaining power is *prima facie* efficiency-enhancing. In his book, *Anchustegui* provides an enumeration of legal literature whether authors identify buyer power either with monopsony power or with bargaining power, or they use the notion as an umbrella term covering both, similarly to him.²⁷³ One can see that legal literature rather uses buyer power in its sense of monopsony power and as an umbrella term than in its sense of bargaining power. Sometimes one uses the term in a given sense in one publication, then conceives it in the other sense in another one.

²⁷⁰ Richard SCHEELINGS–Joshua WRIGHT (2006) ‘Sui Generis’?: An Antitrust Analysis of Buyer Power in the United States and European Union, *Akron Law Review*, 39(1), p. 208.

²⁷¹ RomanINDERST–Nicola MAZZAROTTO (2008) Buyer Power in Distribution, *Issues in Competition Law and Policy*, Vol. 2 [Online]. Available at: <https://tinyurl.com/ksv9w5m2> (Accessed: 26 March 2021).

²⁷² Ariel EZRACHI–Maria IOANNIDOU (2014) Buyer Power in European Union Merger Control, *European Competition Journal*, 10(1), p. 69.

²⁷³ ANCHUSTEGUI 2017, pp. 28, 34 and 43.

By concentrating on retailers, buyer power arises „*from the ability of retail firms to obtain from suppliers more favourable terms than those available to other buyers or would otherwise be expected under normal competitive conditions.*”²⁷⁴

The question arises as to why buyer power is important to abuse-type conducts, be it abuse of dominance or other abuse-type conducts. Simply put, because buyer power may be an economic prerequisite in the case of an abuse carried out by an undertaking acting as buyer in the market. An undertaking may possess enough buyer power to find itself in a dominant position,^{275,276} and buyer power may also contribute to other abuse-type conducts. In Hungarian literature, there are views which use significant market power (the legal instrument, not the term of economics) and significant buyer power as synonyms,²⁷⁷ possibly based on the consideration that in Hungary the adoption of rules on abuse of significant market power was primarily the consequence of more and more powerful buyers appearing in retail market. This approach is not completely correct, for market power can exist not only on a buyer’s but also on a seller’s side.²⁷⁸

As to buyer power, the most comprehensive and detailed analysis is provided by *Anchustegui* who summarises its direct and indirect effects, and finds that only an analysis taking into account each and every aspect of and impact on both the upstream and downstream market (dualistic approach) may lead us to a correct conclusion whether the given conduct is harmful in a competition law sense. Simplifications are, therefore, to be avoided.²⁷⁹

ii. Superior bargaining position

In connection with the notion ‘abuse of superior bargaining position’, *Albert A. Foer* writes the following:

²⁷⁴ DOBSON CONSULTING (1999) *Buyer power and its impact on competition in the food retail distribution sector of the European Union*. Final Report prepared for the European Commission – DGIV Study Contract No. IV/98/ETD/078, p. 3.

²⁷⁵ See, for example, Case C-95/04 P. – Judgment of the Court (Third Chamber) of 15 March 2007: *British Airways plc v Commission of the European Communities*.

²⁷⁶ *Anchustegui* finds that „the exercise of both monopsony and bargaining power is under the scope of application of EU competition law, as these conducts are capable of creating market inefficiencies, and affecting competitive conditions and ‘competition’ as such that may cause competitive harm to end consumers, rival buyers and suppliers alike.” Nevertheless, he also declares that not only the rules on the abuse of a dominant position can be connected to buyer power but also all areas covered by EU competition law, that is, even Article 101 TFEU and Merger Regulation. See: ANCHUSTEGUI 2017, p. 31.

²⁷⁷ FIRNIKSZ–DÁVID 2020; KOC SIS 2014.

²⁷⁸ For the origins of buyer power and seller power, see Joanne MEEHAN–Gillian H. WRIGHT (2012) The origins of power in buyer–seller relationships, *Industrial Marketing Management*, 41(4), pp. 669–679.

²⁷⁹ ANCHUSTEGUI 2017, pp. 73–76.

„the concept typically includes, but is not limited to, a situation in which a party makes use of its superior bargaining position relative to another party with whom it maintains a continuous business relationship to take any act such as to unjustly, in light of normal business practices, cause the other party to provide money, service or other economic benefits.”²⁸⁰

The confusing relationship between other abuse-type conducts can be shown by *Hou*’s finding who identifies the core concept of superior bargaining position in such a way that „a strong party in a contract forces the other party (or parties) who is *economically dependent* on the former to accept unfair and oppressive terms.”²⁸¹ *Wakui and Cheng* do not provide a definition, nevertheless they declare that abuse of superior bargaining position „has always sat uncomfortably within competition law.”²⁸² They also mention the lack of necessity for finding anti-competitive effects of the respective conduct falling under the notion of abuse of superior bargaining position but acknowledge that stepping out of the box of competition law because of insufficient and unjustified conventional competition law principles and economic rationale does not mean that the legal instrument ‘abuse of superior bargaining position’ is useless.²⁸³ *Lianos and Lombardi* emphasise that from a game theory approach abuse of superior bargaining power does not require and is not dependent on structural analysis. Bargaining power can be perceived as a specific relationship between two (or more) negotiating parties in a specific context and, thus, its measurement should occur taking into consideration this relativity.²⁸⁴ This is, partly, in line with the lack of necessity of anti-competitive effects but does not mean that bargaining power would have no impact on price and non-price terms.²⁸⁵

All in all, bargaining power and the abuse of superior bargaining power are nebulous concepts and the latter has quite ill-defined standards.²⁸⁶ Furthermore, the regulation of this type of abuse is useful, given that it may have both price and non-price impacts despite the fact that the assessment method of abuse of superior bargaining position does not fit well in the conventional antitrust law toolbox. Nevertheless, it is an adjunct to competition law²⁸⁷ covering

²⁸⁰ FOER 2018, p. 1.

²⁸¹ HOU 2019, p. 40.

²⁸² WAKUI-CHENG 2015, p. 303.

²⁸³ WAKUI-CHENG 2015, p. 333.

²⁸⁴ IOANNIS LIANOS-CLAUDIO LOMBARDI (2016) Superior Bargaining Power and the Global Food Value Chain. The Wuthering Heights of Holistic Competition Law? *CLES Research Paper Series*, 1/2016, p. 15.

²⁸⁵ ALBERT CHOI-GEORGE TRIANTIS (2012) The Effect of Bargaining Power on Contract Design, *Virginia Law Review*, 98(8), pp. 1665–1743.

²⁸⁶ WAKUI-CHENG 2015, p. 303.

²⁸⁷ WAKUI-CHENG 2015, p. 333.

certain forms of abusive unilateral conducts which do not fall under the scope of abuse of dominance. Reconciling the legal instrument ‘abuse of superior bargaining position’ with traditional competition law may take place through looking at the latter as regulation of buyer power issues in general.²⁸⁸ *Takizawa and Arai* also connect the regulation on abuse of superior bargaining position with buyer power issues.²⁸⁹

iii. Economic dependence

Këllezi detects the essence of economic dependence as follows: „economic dependence arises when a supplier is economically dependent on a buyer or vice versa.”²⁹⁰ It must be supplemented with the thought that „the finding of a situation of economic dependence consists in the absence, for the dependent undertaking, of alternative solutions to sell or to purchase its products in the market. The impossibility to find other sales outlets indicates that the undertaking is dependent on the buyer.”²⁹¹ *Këllezi*’s definition on economic dependence also includes a moderate extent of buyer power, which, however, is not enough to find the existence of a dominant position but sufficient to fall under the rules on abuse of economic dependence.

As *Truli* puts it, the provisions on economic dependence are „more or less conceptually associated with the notion of abuse of dominance,” and one can observe two trends: these rules are found in either traditional competition acts (see, for example, Germany) or in the respective country’s fair trade legislation or other.²⁹² *Bougette, Budzinski and Marty* declare the specific and complex nature of abuse of economic dependence, and as an illustration they cite the report of International Competition Network on Abuse of Superior Bargaining Position.²⁹³ The conceptual clarification between the notion of economic dependence and the notion of abuse of superior bargaining position is still missing, and their relationship is unsettled. They are – to a great extent – overlapping instruments but they emphasise different aspects. A superior

²⁸⁸ WAKUI-CHENG 2015, p. 319.

²⁸⁹ See SAYAKO TAKIZAWA-KOKI ARAI (2014) Abuse of Superior Bargaining Position: the Japanese Experience, *Journal of European Competition Law & Practice*, 5(8), p. 562.

²⁹⁰ KËLLEZI 2008, p. 55.

²⁹¹ KËLLEZI 2008, p. 69. See also Mor BAKHOUM (2015) Abuse Without Dominance in Competition Law: Abuse of Economic Dependence and its Interface with Abuse of Dominance, *Max Planck Institute for Innovation and Competition Research Paper*, No. 15-15 [Online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2703809 (Accessed: 27 March 2021).

²⁹² EMMANUELA TRULI (2017) Relative Dominance and the Protection of the Weaker Party: Enforcing the Economic Dependence Provisions and the Example of Greece, *Journal of European Competition Law & Practice*, 8(9), p. 579.

²⁹³ PATRICE BOUGETTE-OLIVER BUDZINSKI-FRÉDÉRIC MARTY (2019) Exploitative Abuse and Abuse of Economic Dependence: What Can We Learn From an Industrial Organization Approach? *Revue d’économie politique*, 129(2), p. 262.

bargaining position in most cases comes from the fact that one of the trading partners is dependent on the other because of certain factors which contribute to this unequal relationship. The reasons for dependency are versatile. *Prima facie* one may tend to associate superior bargaining position with an undertaking-related dependence (*unternehmensbedingte Abhängigkeit*), but dependence may come to the fore on other grounds. Dependence on product range (*sortimentsbedingte Abhängigkeit*) refers to the dependence of retailers on carrying goods from certain manufacturers in their assortment in order to be able to compete as a supplier of this type of goods. In practice, it is almost exclusively a matter of the dependence of trading companies on the supply of well-known branded goods. Dependence may also be the result of scarcity; a buyer cannot switch to other suppliers on competitive terms in a situation of unforeseeable shortage due to sudden loss of supply options, e.g. due to an embargo by foreign states, strikes or catastrophic events (*knappheitsbedingte Abhängigkeit*). Demand-side dependence exists if suppliers of a certain type of goods or commercial services are dependent on buyers of these goods or services in the manner that they do not have sufficient and reasonable alternative possibilities to other buyers of these goods or services (*nachfragebedingte Abhängigkeit*). The undertaking-related dependence mentioned first means that a supplier of a certain type of goods or commercial services has geared its business operations in the context of long-term contractual relationships to a certain other enterprise on the other side of the market to such an extent that it can only switch to other enterprises by accepting significant competitive disadvantages on the market in question. These four types of economic dependence are no other than simplifications; the relationship between two undertakings may also provide us with two or more types of dependence at the same time.²⁹⁴

These factors may all imply that the respective trading partner gets to a superior bargaining position, nevertheless, one can also see that not all of these dependence types appear in a way that the supplier is dependent on the buyer, but *vice versa*, it can also take place that the buyer is dependent on the supplier (see, for example, *sortimentsbedingte* and *knappheitsbedingte Abhängigkeit*). As emphasised, both *Wakui and Cheng* and *Takizawa and Arai* associate abuse of superior bargaining position (at least, national rules) with buyer power issues, although these two latter types of dependence show that sellers can also be those trading partners on whom buyers are dependent.

²⁹⁴ MARKERT 2020, Rn. 28–49.

iv. Significant market power (as a legal instrument)

Abuse of significant market power as a legal instrument referring to relative market power is not mentioned in English-language legal literature. It is a problematic and not too good choice of Hungarian legislation to use this term for conducts not reaching the intervention threshold to be required by abuse of dominance.

v. Conclusion

We can see the chaos of terminology as regards other abuse-type conducts. The legal instruments called ‘abuse of significant market power’, ‘abuse of economic dependence’, and ‘abuse of superior bargaining power/position’ as well as their further linguistic variants all presuppose market power, although lower market power than the one required to find the existence of a dominant position. This is most typical on the side of buyers. The situation becomes even more complicated with including into the analysis the legal instruments having the word ‘unfair’ in their name. Subchapter 2.2.4 will shed more light on the relationship between other abuse-type conducts and conducts related to unfairness.

2.2.3 *Conducts related to unfairness*

This subchapter shortly addresses the notion ‘unfair trading practices’ (‘unfair trade practices’), as well as some aspects of unfair competition law. As previous subchapters are only concerned with general rules, I follow the same method here. Although it must be mentioned that regarding special competition-related provisions applying to agriculture and the food supply chain, both EU law and Hungarian law use a notion in which the word ‘unfair’ appears.²⁹⁵ All in all, I present here those legal phenomena in connection with which the word ‘unfair’ shows up.

Unfair trading practices may be handled by the toolbox of several different branches of law. Competition law/antitrust law, unfair competition law, as well as contract law may provide us with certain solutions as regards different types of unfair trading practices. Here I do not aim to deal with contract law solutions, since it can only interrupt in cases when the concerned

²⁹⁵ See 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; and Act XCV of 2009 on the prohibition of *unfair* distribution practices against suppliers in relation to agricultural and food products [2009. évi XCV. törvény a mezőgazdasági és élelmiszeripari termékek vonatkozásában a beszállítókkal szemben alkalmazott tisztességtelen forgalmazói magatartás tilalmáról].

parties' bargaining power is extremely unequal which generates that the consent of the weaker party is broken, that is to say, concluding the contract takes place under duress.^{296,297} In the course of concentrating on competition and unfair competition law, one also has to make references to consumer protection law. Its rationale lies in the fact that unfair competition law was initially aimed at protecting traders against the malpractices of competitors, but later – thanks to the emergence of consumerism – consumer protection has been allowed to permeate to the field of unfair competition law.²⁹⁸ The difference between competition law and unfair competition law addressing a situation of other abuse-type conducts is based on their approach towards the issue. While competition law intervenes when there is a possible negative outcome of the given conduct, unfair competition law (as well as contract law) aims to ensure „a relatively equalized landscape of bargaining capacity.“²⁹⁹

The word ‘unfair’ itself is slightly misleading in business-to-business (B2B) relationships, since nowadays predominantly consumers are considered those who are the main victims of unfair trade practices,³⁰⁰ and in the last two decades several states have adopted specific consumer protection acts.³⁰¹ The EU has so far overlooked the problem as to disparities of bargaining power between undertakings,³⁰² which – using the current terminology – may result in unfair trading practices. The situation becomes more complicated, if one takes into account the national characteristics of the issue.³⁰³

Otherwise, it is necessary to highlight that with regard to general competition rules applying to the relationship between undertakings, the EU does not use the term ‘unfair’ in the name of any of its legal instruments. Nevertheless, the sector-specific Directive (EU) 2019/633, which aims to handle significant imbalances between suppliers and buyers, operates with the expression ‘unfair trading practices’.

²⁹⁶ HOU 2019, p. 41.

²⁹⁷ See its contract law analysis Spencer Nathan THAL (1988) The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Fairness, *Oxford Journal of Legal Studies*, 8(1), pp. 17–33.

²⁹⁸ Rogier W. DE VREY (2005) *Towards a European Unfair Competition Law – A Clash Between Legal Families*. Leiden–Boston: Martinus Nijhoff Publishers, p. 3.

²⁹⁹ Ioannis LIANOS ET AL. (2017) *Global Food Value Chains and Competition Law*, BRICS Draft Report, p. 370.

³⁰⁰ Sara Abdollah DEHDASHTI (2018) B2B unfair trade practices and EU competition law, *European Competition Journal*, 14(2), p. 305.

³⁰¹ Reto M. HILTY–Frauke HENNING-BODEWIG (eds.) (2009) *Lauterkeitsrecht und Acquis Communautaire*. Berlin–Heidelberg: Springer Verlag, p. 17.

³⁰² Jochen GLÖCKNER (2017) Unfair trading practices in the supply chain and the co-ordination of European contract, competition and unfair competition law in their reaction to disparities in bargainingpower, *Journal of Intellectual Property Law & Practice*, 12(5), p. 434.

³⁰³ HILTY–HENNING-BODEWIG 2009, pp. 16–17.

The infiltration of the concept ‘fairness’ into competition policy debates has received an increased focus recently.³⁰⁴ The Commissioner for Competition in the EU from 2014 to 2019 emphasised the requirement of fairness several times.³⁰⁵ However, it must not be forgotten that since the beginnings criticism has come to the fore against the notions ‘unfairness’ and ‘unfair competition’ because of their vagueness and legal uncertainty.³⁰⁶

Regarding the issue of unfair trading practices in EU law, I have to commence with the wording of Article 102 TFEU, which declares that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in directly or indirectly imposing *unfair purchase or selling prices or other unfair trading conditions*.³⁰⁷ According to a viewpoint, „B2B UTPs lack harmonized and inclusive action at the EU level”, although

*„EU competition law appears always to have been competent to deal with this matter to a considerable extent. Article 102 TFEU is a solid basis for researching and investigating B2B UTPs. Disparity in bargaining power, in the form of dominance, is central to Article 102, whether a single undertaking or a group of undertakings collectively possess this power. EU case law on Article 102 illustrates potential to intervene in B2B UTPs.”*³⁰⁸

As can be seen from this finding, originally in the European Union both other abuse-type conducts³⁰⁹ and unfair trading (or trade) practices are interpreted within the framework of abuse of dominance. Article 102 TFEU constitutes a starting point, though it can only be applied when existence of a dominant position is found. Obviously, different content may be explored beyond

³⁰⁴ See in detail: Francesco DUCCI–Michael TREBILCOCK (2019) The Revival of Fairness Discourse in Competition Policy, *The Antitrust Bulletin*, 64(1), p. 80.

³⁰⁵ See, for example, her speech held at the Global Antitrust Enforcement Symposium, Georgetown Law School, 25 September 2018. Available at: https://wayback.archive-it.org/12090/20191129205744/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/hitting-sweet-spot-antitrust-enforcement_en (Accessed: 31 March 2021). See also her speech held at the GCLC Annual Conference, Brussels, 25 January 2018. Available at: https://wayback.archive-it.org/12090/20191129212136/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fairness-and-competition_en (Accessed: 31 March 2021); or her speech held at the High Level Forum on State Aid Modernisation, Brussels, 28 June 2017. Available at: https://wayback.archive-it.org/12090/20191129213740/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/state-aid-and-fair-competition-worldwide_en (Accessed: 31 March 2021).

³⁰⁶ As early as 1919 this issue was already analysed in detail. See: Charles Grove HAINES (1919) Efforts to Define Unfair Competition, *Yale Law Journal*, 29(1), p. 1. For current literature see the following: Maurits DOLMANS–Wanjie LIN (2017) Fairness and Competition Law: A Fairness Paradox, *Concurrences*, 2017/4.

³⁰⁷ Article 102, a).

³⁰⁸ DEHDASHTI 2018, pp. 305–306.

³⁰⁹ See Chapter 2.2.2.

the notion ‘unfairness’ concerning undertakings and concerning consumers. As to undertakings, unfairness may refer to equal opportunity to trade.³¹⁰

Unfair trading practices, with having Article 102 TFEU as an original orientating point in their content, are strongly related to other abuse-type conducts. On unfair trading practices *Jochen Glöckner* suggests that on the one hand, „[c]ompetition law should be strengthened with regard to exclusionary practices exercised by undertakings with less than absolute dominance”,³¹¹ on the other hand, [u]nfair competition law can be used to address exploitative abuses in vertical relationships.”³¹²

Dehdashti groups unfair trading practices *vis-à-vis* costumers (not consumers) covered by Article 102 TFEU into two categories. Within the group of unfair trading practices *without* competitive relations, she stresses and mentions unfair excessive pricing,³¹³ establishes a group of non-pricing unfair trading conditions, and highlights discriminatory practices. In the other group of unfair trading practices which consists of those *with* competitive relations she lists the practices ‘refusal to supply’ and ‘margin squeeze’³¹⁴.³¹⁵ „Albeit the prohibition on an abuse of a dominant position in competition law might also outlaw unfair practices, tackling such unfairness is at most a subsidiary, but certainly not its primary aim.”³¹⁶

It can be observed that several unfair trading practices are treated within the scope of Article 102 TFEU but their general name including the word ‘unfair’ is deceitful, since these conducts are prime examples when an undertaking in a dominant position abuses its market

³¹⁰ DEHDASHTI 2018, pp. 340–341.

³¹¹ The expression ‘undertakings with less than absolute dominance’ is used by Glöckner in the same sense as I refer to the undertakings which commit other abuse-type conducts.

³¹² GLÖCKNER 2017, p. 434.

³¹³ See more: Mark FURSE (2008) Excessive Prices, Unfair Prices and Economic Value: The Law of Excessive Pricing Under Article 82 EC and the Chapter II Prohibition, *European Competition Journal*, 4(1), pp. 59–83; Liyang HOU (2011) Excessive Prices Within EU Competition Law, *European Competition Journal*, 7(1), pp. 47–70; Pinar AKMAN–Luke GARROD (2011) When are excessive prices unfair? *Journal of Competition Law & Economics*, 7(2), pp. 403–426; Alexandr SVETLICINII–Marco BOTTA (2012) Article 102 TFEU as a Tool for Market Regulation: “Excessive Enforcement” Against “Excessive Prices” in the New EU Member States and Candidate Countries, *European Competition Journal*, 8(3), pp. 473–496; Grant STIRLING (2020) The elusive test for unfair excessive pricing under EU law: revisiting United Brands in the light of Competition and Markets Authority v Flynn Pharma Ltd, *European Competition Journal*, 16(2-3), pp. 368–386.

³¹⁴ See more: Liam COLLEY–Sebastian BURNSIDE (2006) Margin Squeeze Abuse, *European Competition Journal*, 2(1), pp. 185–210; Alberto HEIMLER (2010) Is a Margin Squeeze an Antitrust or a Regulatory Violation? *Journal of Competition Law & Economics*, 6(4), pp. 879–890; John B Meisel (2012) The Law and Economics of Margin Squeezes in the US Versus the EU, *European Competition Journal*, 8(2), pp. 383–402; Daniel PETZOLD (2015) It Is All Predatory Pricing: Margin Squeeze Abuse and the Concept of Opportunity Costs in EU Competition Law, *Journal of European Competition Law & Practice*, 6(5), pp. 346–350; Annalies AZZOPARDI (2017) No abuse is an island: the case of margin squeeze, *European Competition Journal*, 13(2-3), pp. 228–248.

³¹⁵ DEHDASHTI 2018.

³¹⁶ Elisa PAREDIS–Bert KEIRSBILCK (2020) Run-Up, Legal Basis and Scope of Application. In: Bert KEIRSBILCK–Evelyn TERRYN (eds.) *Unfair Trading Practices in the Food Supply Chain – Implications of Directive (EU) 2019/633*. Cambridge–Antwerp–Chicago: Intersentia, p. 4. See also PAREDIS–KEIRSBILCK 2020, p. 10: „[...] EU competition law has its limits in addressing UTPs [...]”.

power. Nevertheless, their common name suggests that they are connected to unfair competition law but their real nature is of antitrust law. It would be advisable to use the expression ‘abusive practices’ to better indicate that they pertain to conventional antitrust law when an existence of dominance is found and to other abuse-type conducts when the dominance threshold is not reached. It shows that the EU terminology ‘unfair trading practices’ is ambiguous, because many of these conducts form part of conventional antitrust law (Article 102 TFEU) at Union level, as well as fall under the scope of national rules both on abuse of dominance and/or on other abuse-type conducts.

We have seen before that the title of the sector-specific Directive (EU) 2019/633 includes the word ‘unfair’, but its preamble incorporates several phrases which suggest that the practices are similar to other abuse-type conducts; on top of that, the Directive itself is not connected to unfair competition law at all.

The structure of EU unfair competition law is complicated. Three groups may be distinguished:

- a Directive 2005/29/EC on unfair business-to-consumer commercial practices,³¹⁷ the scope of which – obviously – does not cover B2B relationships.
- b Directive 2006/114/EC on misleading and comparative advertising,³¹⁸ in which the narrower provisions on misleading advertising only apply to B2B relationships.
- c Directive 2006/114/EC on misleading and comparative advertising, in which the specific provisions on comparative advertising apply to both B2B and B2C relationships, but regarding the latter one it makes a cross-reference to the Directive 2005/29/EC.³¹⁹

Thus, Directive 2006/114/EC installs some protection to not only consumers but also to businesses.³²⁰

The demarcation of unfair competition law from consumer protection law is particularly difficult, not least because the Directive 2005/29/EC threatens to blur the contours between these two areas of law. A possible demarcation line, however, can be drawn up. Consumer protection law is rather concerned with individual legal relationship between traders and

³¹⁷ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

³¹⁸ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

³¹⁹ Geraint HOWELLS–Hans MICKLITZ–Thomas WILHELMSSON (2006) *European Fair Trading Law – The Unfair Commercial Practices Directive*. Aldershot: Ashgate Publishing, p. 64.

³²⁰ PAREDIS–KEIRSBILCK 2020, p. 5.

consumers, while unfair competition law aims to protect the collective freedom of consumers to make decisions up to and at the conclusion of the contract.³²¹ The question as to whether the Directive 2005/29/EC is a legal act originating from the field of unfair competition law or that of consumer protection law has also been arisen by literature.³²² The difference between consumer protection law and competition law (not unfair competition law) is that the previous one tries to defend the welfare of individual consumers, while the latter rather serves the objective of the welfare of aggregate consumers in the economy.³²³

As mentioned above, there are national differences regarding the regulation of unfair competition. In Hungary, unfair competition against business partners and competitors is regulated in the Hungarian Competition Act,³²⁴ in the same statute as antitrust law. It covers trade libel, boycott,³²⁵ slavish imitation, comparative advertising, as well as the infringement of fair competition in tenders, auctions or futures contracts. Unfair commercial practices *vis-à-vis* consumers are to be found in Act XLVII of 2008.³²⁶

Germany's regulation on unfair competition against both businesses and consumers is brought under one roof within the framework of UWG.³²⁷ It declares that the act serves to protect competitors, consumers and other market participants from unfair business activities. At the same time, it protects general public interest in undistorted competition.³²⁸ Germany thus follows an integrated model with a protective purpose triad,³²⁹ which not only covers the protection of competitors and consumers but also of public interest.³³⁰ Wadlow questions what kind of legislation the Directive 2005/29/EC is, which – suggested by its name – is a legal act

³²¹ HILTY–HENNING–BODEWIG 2009, p. 20.

³²² Christopher WADLOW (2007) The case for reclaiming European unfair competition law from Europe's consumer lawyers. In: Stephen WEATHERILL–Ulf BERNITZ (eds.) *The Regulation of Unfair Commercial Practices under EC Directive 2005/29 – New Rules and New Techniques*. Oxford: Hart Publishing, pp. 175–189.

³²³ Marco BOTTA–Klaus WIEDERMANN (2019) The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey, *The Antitrust Bulletin*, 64(3), p. 434.

³²⁴ Act LVII of 1996, Sections 2–7.

³²⁵ Boycott means an unfair invitation to another to terminate an economic relationship with a third party or to prevent the establishment of such a relationship.

³²⁶ Act XLVII of 2008 on the prohibition of unfair commercial practices against consumers [2008. évi XLVII. törvény a fogyasztókkal szembeni tisztességtelen kereskedelmi gyakorlat tilalmáról].

³²⁷ For an introduction to the structure of UWG see: Stephan SZALAI (2013) Einführung in die Grundstrukturen des Wettbewerbsrechts, *Neue Justiz – Zeitschrift für Rechtsentwicklung und Rechtsprechung*, 67(8), pp. 309–317.

³²⁸ UWG, Section 1: Dieses Gesetz dient dem Schutz der Mitbewerber, der Verbraucherinnen und Verbraucher sowie der sonstigen Marktteilnehmer vor unlauteren geschäftlichen Handlungen. Es schützt zugleich das Interesse der Allgemeinheit an einem unverfälschten Wettbewerb.

³²⁹ In German: *Schutzzwecktrias*.

³³⁰ Olaf SOSNITZA (2020) *UWG § 1 Zweck des Gesetzes*, Rn. 10–12. In: Peter W. HEERMANN–Jochen SCHLINGLOFF (eds.) *Münchener Kommentar zum Lauterkeitsrecht – Band 1*, 3rd edn. Munich: C.H. Beck. See also: Karl-Nikolaus PEIFER–Eva Inés OBERGFELL (2016) *UWG § 5 Irreführende geschäftliche Handlungen*, Rn. 47. In: Karl-Heinz FEZER–Wolfgang BÜSCHER–Eva Inés OBERGFELL (eds.) *Lauterkeitsrecht – Kommentar zum Gesetz gegen den unlauteren Wettbewerb – Band 2*, 3rd edn. Munich: C.H. Beck.

from the area of consumer protection law but also has an undisputable unfair competition law relevance; *Sosnitza* asks the same question in connection with UWG, although approaching it from the other side: is UWG an act of consumer protection law?³³¹ Both authors come to the conclusion that the respective legal act has a character typical for both areas of law. This question is not relevant regarding Hungary owing to the country's different regulatory solutions.

The UWG includes disparagement and denigration,³³² libel,³³³ imitation,³³⁴ as well as targeted hindrance.^{335,336} The latter has several types. One may speak about, *inter alia*, advertising hindrance (*Werbehinderung*), product-related hindrance (*produktbezogene Hinderung*), unfair enticing of costumers (*unlauteres Abfangen von Kunden*), boycott (*Boykott*), and price undercutting (*Preisunterbietung*).³³⁷ Besides these, comparative advertising may also be unfair,³³⁸ and aggressive³³⁹ and misleading business practices³⁴⁰ can happen to the detriment of both consumers and other market participants. Misleading can also take place through omission,³⁴¹ and it has types which protect all market participants with the exception of consumers,³⁴² as well as types which aim to protect consumers directly and competitors indirectly.^{343, 344}

If one compares the system of rules on unfair competition in Hungary and Germany, there are significant differences. While Hungary has only one competition statute which includes both antitrust and unfair competition law, Germany has two separate statutes regarding these two areas of law. Nevertheless, Hungary has a separate statute on unfair competition rules against consumers, while Germany's statute against unfair competition aims to ensure the protection of both consumers and other market participants in one and the same act. As can be seen, Hungary integrates antitrust law and unfair competition law in one act through the material scope of competitors, while Germany integrates unfair competition law in one act by

³³¹ SOSNITZA 2020, Rn. 13-15.

³³² In German: *Herabsetzung* and *Verunglimpfung*.

³³³ In German: *Anschwärzung*.

³³⁴ In German: *Nachahmung*.

³³⁵ In German: *gezielte Behinderung*.

³³⁶ UWG, Section 4.

³³⁷ See Ansgar OHLY (2016) *Gezielte Behinderung*. In: Ansgar OHLY–Olaf SOSNITZA (eds.) *Gesetz gegen den unlauteren Wettbewerb mit Preisangabenverordnung*, 7th edn. Munich: C.H. Beck.

³³⁸ UWG, Section 6.

³³⁹ UWG, Section 4a.

³⁴⁰ UWG, Section 5.

³⁴¹ UWG, Section 5a.

³⁴² UWG, Section 5a(1).

³⁴³ UWG, Section 5a(2)-(6).

³⁴⁴ Christian ALEXANDER (2020) § 5a *Irreführung durch Unterlassen*, Rn. 49-55. In: Peter W. HEERMANN–Jochen SCHLINGLOFF (eds.) *Münchener Kommentar zum Lauterkeitsrecht – Band 1*, 3rd edn. Munich: C.H. Beck.

extending its personal scope to not only competitors but also to consumers. In Germany, the main legal source on competition restrictions (*GWB*) is a separate act, while in Hungary, the statute on unfair commercial practices against consumers (*Act XLVII of 2008*) is the one which stands alone. Another difference can be spotted in connection with the position of boycott. In Hungary, as already noted, boycott prohibition is positioned in that list of the competition act which enumerates unfair competition conducts;³⁴⁵ Germany's regulation on boycott prohibition is placed in Section 21 of *GWB*.

If one turns the attention to the regulation of unfair competition in the United States, one may find a quite different approach. The term itself has no precise meaning in common law legal systems. It is primarily used as a synonym for passing off³⁴⁶ but also appears in a wider sense: „as a generic name to cover the complete range of legal and equitable causes of action available to protect a trader against the unlawful trading activities of a competitor.” In its widest sense, however, it covers the protection of traders against damage caused by unfair competition generally.³⁴⁷ The significant difference of civil law and common law systems is best illustrated by *LaFrance*:

*„The concept of passing off lies at the heart of the system of trademark protection in the common law countries. It is rooted in the common law action for deceit. Although intent to deceive was originally an element of the action, it is no longer required, as the focus of the tort has shifted to the effect on consumers. While the tort has expanded considerably over time, causing observers to remark on its protean qualities, it still does not approach the broad concept of unfair competition law as recognized in continental Europe, because it is not a general action for misappropriation of the intangible value of a mark.”*³⁴⁸

Unfair competition in the US is worth being determined in relation with trademark protection. The latter forms part of unfair competition law: it is unfair „to pass off your goods as those of another producer by using a trademark confusingly similar to that of the other producer.”³⁴⁹ However, unfair competition might also include more than trademark infringement. One of the

³⁴⁵ Unfair competition conducts are in a separate chapter (Chapter II – The prohibition of unfair competition) of the Hungarian competition act.

³⁴⁶ Passing off is an approximate equivalent of slavish imitation.

³⁴⁷ Gerald DWORKIN (1998) The Expanding Unfair Competition in the Common Law World, *International Intellectual Property Law & Policy*, 3(31), p. 1.

³⁴⁸ Mary LAFRANCE (2011) Passing Off and Unfair Competition: Conflict and Convergence in Competition Law, *Scholarly Works* [Online]. Available at: <https://scholars.law.unlv.edu/facpub/784> (Accessed: 7 April 2021).

³⁴⁹ Graeme B. DINWOODIE–Mark D. JANIS (2018) *Trademarks and Unfair Competition – Law and Policy*, 5th edn. New York: Wolters Kluwer, p. 12.

provisions of the federal statute, the Lanham Act³⁵⁰ exceeds trademark protection³⁵¹ and also provides protection (in form of federal remedy) against any false designation of origin, false or misleading description of fact, or false or misleading representation of fact.³⁵² Despite that, the application of this provision is not unlimited to *unfair trade practices*. Nevertheless, it encompasses „false advertising³⁵³ as that term is generally understood.”³⁵⁴ Likewise, the misappropriation of trade secrets and the disparagement of a rival’s goods are also covered by the doctrine of unfair competition.³⁵⁵

Besides this provision of Lanham Act, certain provisions of the Federal Trade Commission Act must be mentioned, as well. It states that „[u]nfair methods of competition³⁵⁶ in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”³⁵⁷ The Federal Trade Commission may only deem an act or practice unlawful on the grounds that such act or practice is unfair, if

„the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”³⁵⁸

³⁵⁰ For more see: Julius R. LUNSFORD JR. (1952) Unfair Competition: Scope of the Lanham Act, *University of Pittsburgh Law Review*, 13(3), pp. 533–552; The Federal Law of Unfair Competition, *The Trade-Mark Reporter*, 1954, 44(9), pp. 1048–1054; Sylvester J. LIDDY (1996) The Lanham Act – An Analysis, *The Trademark Reporter*, 86(4), pp. 421–441; Sondra LEVINE (2010) The Origins of the Lanham Act, *Journal of Contemporary Legal Issues*, Vol. 19, pp. 22–27.

³⁵¹ DINWOODIE–JANIS 2018, p. 12. and p. 14.

³⁵² See 15 U.S. Code § 1125 - False designations of origin, false descriptions, and dilution forbidden.

„(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act. [...]

³⁵³ For more see: Jean Wegman BURNS (1999) Confused Jurisprudence: False Advertising under the Lanham Act, *Boston University Law Review*, 79(4), pp. 807–888; Courtland L. REICHMAN–M. Melissa CANNADY (2002) False Advertising under the Lanham Act, *Franchise Law Journal*, 21(4), pp. 187–197.

³⁵⁴ Judgment of the United States Court of Appeals, Second Circuit of 27 June 1974: Alfred Dunhill, Ltd. v. Interstate Cigar Co.

³⁵⁵ Camilla A. HRDY–Mark A. LEMLEY (2021) Abandoning Trade Secrets, *Stanford Law Review*, 73(1), pp. 16–17.

³⁵⁶ During the debate in the Senate, serious arguments emerged about the term ‘unfair competition’. See Gilbert Holland MONTAGUE (1915-1916) Unfair Methods of Competition, *Yale Law Journal*, 25(1), pp. 20–41.

³⁵⁷ 15 U.S. Code § 45 – Unfair methods of competition unlawful; prevention by Commission, (a)(1).

³⁵⁸ 15 U.S. Code § 45 – Unfair methods of competition unlawful; prevention by Commission, (n).

It is easy to find that this provision aims to protect consumers exclusively.

As early as 1936³⁵⁹ a scholarly article listed those practices based on the Federal Trade Commission's annual reports which had appeared in the Commission's work. In his study, *Handler* used the term '*unfair trade practices*' under which the following practices fall: (a) false or misleading advertising, (b) misbranding of fabrics, (c) bribing buyer and other costumers to hold or secure patronage, (d) procuring the business or trade secrets of competitors, (e) inducing employees or competitors to violate their contracts and enticing away employees of competitors, (f) making false and disparaging statements, (g) trade boycotts, (h) passing off goods or articles, (i) concealing business identity in connection with the marketing of one's product, (j) giving products misleading names, etc.³⁶⁰

2.2.4 Concluding remarks

As may be noted from the examination above, of the three analysed units—conventional antitrust law, conducts related to relative market power, and the border area between antitrust law and unfair competition law—the one and only area which has clear-cut regulatory content and coherent terminology is antitrust. Both the EU and its Member States analysed and the United States regulate anti-competitive agreements and concerted practices, abuse of dominance (monopolization), and mergers and acquisitions within the framework of antitrust law.

The two other fields of law are not uniform in their content and terminology. Conducts related to relative market power including other abuse-type conducts, that is to say, abusive and unilateral conducts which do not require the existence of dominance are a divisive question. The United States does not acknowledge the *raison d'être* of the regulation of other abuse-type conducts, for it considers them unnecessary intervention into contractual relations. On the contrary, both Germany and Hungary have general rules as to other abuse-type conducts: Germany operates with the terms *relative market power* and *superior market power* in the name of their respective legal instrument (Section 20 of *GWB*), but in the text of the provisions it also refers to the term *dependency*. Germany integrated these provisions into its general competition statute applicable to all economic sectors, thus they form integrative part of conventional antitrust law. Hungary also deals with abusive and unilateral conducts other than abuse of

³⁵⁹ For even earlier literature see: Oliver R. MITCHELL (1896-1897) Unfair Competition, *Harvard Law Review*, 10(5), pp. 275–298. This article (p. 275) says that „unfair competition [...] has only of late years begun to make its appearance in the books”, therefore the term came to the fore in the 1890's.

³⁶⁰ Milton HANDLER (1936) Unfair competition, *Iowa Law Review*, 21(2), pp. 244–247.

dominance but does not codify the issue in its general competition statute; the respective legal instrument is positioned in Act CLXIV of 2005 on Trade. The Hungarian Legislator uses the confusing term *abuse of significant market power*. Within the case law of the CJEU, abuse of economic dependence is taken into account – on certain occasions – in cases connected to Article 102 TFEU as a likely complementary element of finding a dominant position. The common features of these market behaviours falling under the different kinds of other abuse-type conducts are that (a) they are all abusive and unilateral, (b) there is reduced threshold (as compared with abuse of dominance) to be required to find their existence, as well as (c) they constitute relativity in the sense that only relative (relational) market power can be found to the detriment of the abused party, contrary to abuse of dominance which requires absolute market power in the respective geographical and product market. For a coherent terminology it would be reasonable to use the term *abuse of relative market power* or *abuse of economic dependence*. The terms *superior market power* and *significant market power*, such as in Hungary, may result in confusion, for the finding of dominance also requires superior market power or significant market power. These are economical terms and do not present the legal essence of other abuse-type conducts: their relative (relational) nature or their character referring to the fact that one undertaking is dependent on another.

The disarray of terminology in the border area between antitrust law and unfair competition law is even more considerable. The term *unfair trading (trade) practices* refer to conducts not only of unfair competition law nature but also of antitrust law nature. In the European Union, the term *unfair trading practices* is a common name for conducts covered by Article 102 TFEU. Moreover, the sector-specific Directive (EU) 2019/633 also uses the term *unfair trading practices* in its title, although the practices covered by the Directive are typical forms of other abuse-type conducts which do not require the existence of a dominant position. As mentioned above regarding the United States, one can find literature³⁶¹ using the term *unfair trade practices* for typical unfair competition conducts, such as boycott, misleading advertising, false and disparaging statements etc. The situation becomes more shadowy, if one scrutinises the regulated practices in the Directive (EU) 2019/633, among which one may find, *inter alia*, trade secret infringement³⁶² (in US terminology: misappropriation) which is a typical form of

³⁶¹ According to the database of HeinOnline, this scholarly work has been cited 3993 times, so its significance cannot be disputed. See: HANDLER 1936, pp. 244–247.

³⁶² Directive (EU) 2019/633, Article 3, 1. (g):

„Member States shall ensure that at least all the following unfair trading practices are prohibited:

[...]

(g) the buyer unlawfully acquires, uses or discloses the trade secrets of the supplier within the meaning of Directive (EU) 2016/943 of the European Parliament and of the Council.”

unfair competition. In Germany, until the entry into force of the Act on the Protection of Trade Secrets,³⁶³ which is the result of an EU directive's implementation into national law,³⁶⁴ UWG contained the rules on trade secret infringement.³⁶⁵ In Hungary, the legal situation was the same. The incorporation of the Directive into national legislation also took place like in Germany: trade secret infringement is now regulated in Act LIV of 2018 on the Protection of Trade Secret, and the provision of Act LVII of 1996 on the Prohibition of Unfair Market Conduct and Competition Restriction on trade secret infringement³⁶⁶ was repealed.³⁶⁷ Thus, one may experience developments heading to opposite directions at EU and national level. As a consequence of trade secret infringement regulated by an EU directive, the protection of trade secrets does not fall any more under the scope of national unfair competition laws but is encompassed by a separate statute in both analysed countries.

By looking at some translation issues, one may completely be lost in the dark. Although previously I translated the Hungarian act as Act XLVII of 2008 on the Prohibition of Unfair *Commercial* Practices against Consumers, the authentic Hungarian title includes the word *kereskedelmi* which can be translated to English not only as *commercial* but also as *trading*. The Hungarian translation of Directive (EU) 2019/633 works with the expression *tisztességtelen piaci gyakorlatok*, although the original English title includes the expression *unfair trading practices*. Nevertheless, the Hungarian word *piaci* cannot be translated to English as *trading*. Possibly, Hungarian legal translators would have liked to indicate the differences concerning the protected persons of these legal acts. In Hungarian, the terminus technicus *kereskedelmi gyakorlatok* (commercial practices) applies exclusively to the protection of consumers, while the expressions which include the word *piaci* refer to legal instruments that aim to protect undertakings. It is also visible in the Hungarian competition act's title: Act LVII of 1996 on the Prohibition of Unfair Market Conduct³⁶⁸ and Competition Restriction. This distinction was adopted as a consequence of the Directive 2005/29/EC which uses the expression *unfair commercial practices* (in Hungarian: *tisztességtelen kereskedelmi gyakorlatok*) to business-to-consumer relations.

³⁶³ Gesetz zum Schutz von Geschäftsgeheimnissen (GeschGehG).

³⁶⁴ It serves the German implementation of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

³⁶⁵ It was regulated in Sections 17–19.

³⁶⁶ It was regulated in Section 4.

³⁶⁷ For the previous regulation of trade secret infringement, see: NAGY Csongor István (2008) A magyar versenyjog üzleti titok-szabályának néhány értelmezési kérdéséről [Some interpretation questions with regard to the rule of trade secrets in Hungarian competition law], *Jogtudományi Közöny*, 63(11), pp. 553–561.

³⁶⁸ Unfair market conduct is the translation of the Hungarian expression *tisztességtelen piaci magatartás*.

To some extent this problem also comes to the fore in German: UWG, which applies to both consumers and undertakings, uses the term *unlautere geschäftliche Handlung*. It can be translated as either unfair business act or unfair commercial act. On the contrary, the German translation of Directive (EU) 2019/633 dealing with unfair trading practices is translated word by word as *unlautere Handelspraktiken*, and the German version of the Directive 2005/29/EC operates with the term *Geschäftspraktiken*.

The thesis does not aim to elaborate exact terminology on general legal acts neither at EU nor at national level. However, it is manifest that the word choice *unfair trading practices* is not too good. The adjective *unfair* has a shade of meaning which binds these conducts to unfair competition law but the majority of conducts falling under this term within EU law are not unfair competition laws at all.

Other abuse-type conducts contained in Subchapter 2.2.2 and unfair trading practices contained in Subchapter 2.2.3 have a unique relationship. Other abuse-type conducts are likely prerequisites for unfair trading practices, that is to say, *unfair trading practices are the possible outcomes of other abuse-type conducts* (such as abuse of economic dependence, abuse of significant market power, abuse of superior bargaining position/power). An undertaking has to have relative market power *vis-à-vis* its business partner to engage in an unfair trading practice, or a business partner has to be economically dependent upon another undertaking in order that the latter could engage in an unfair trading practice. In addition, an unfair trading practice may also fall under the scope of abuse of dominance, if the respective undertaking engaged in an unfair trading practice has a dominant position.

3 Agri-food competition law

Chapter 3 starts with the definition of agri-food competition law and it aims to analyse its elements. In the end, I enumerate those legal acts which belong to the definition formulated. A table is presented in order to contribute to the better clarity of the legal sources of agri-food competition law. The chapter also aims to discover the historical developments directly or indirectly connected to agri-food competition law. Within the framework of the historical summary, the thesis concentrates on the background taken place in the United States, as well as in the EU and its two Member States, Germany and Hungary. The United States is taken into consideration because not only general but also sector-specific competition rules appeared here for the first time. Germany is examined owing to the strong theoretical foundations built up by the country's scholars. Although within the chapter there is a historical overview, but it must

not be forgotten that the US regulation is still based on the legal acts adopted in the last decade of the 19th century and in the first three decades of the 20th century.

3.1 Definition of agri-food competition law

Based on the previous analysis, the definition of agri-food competition law is formulated as follows:

Agri-food competition law is the aggregate of legal instruments aiming to realise agricultural and food policy objectives, created and maintained to regulate the behaviour of undertakings in and the competitive process of the agricultural and food market.

Agri-food competition law is conceived as a special area of law, that is, by using the German term, as a *Sonderrechtsgebiet*. It is built upon exception norms and specific norms. In doctrinal context, I do not follow the functional theory because doing so would mean that all legal sources of competition law constitute part of agri-food competition law, therefore all general rules should be analysed, too. The scope of agri-food competition law can be restricted by adopting the *Sonderrechtstheorie*. The table elaborated in the end of Part One distinguishes exception norms and specific norms. While the *Sonderrechtstheorie* is taken over from the German agricultural law literature, the instrumental approach follows the Hungarian agricultural law literature.

Now let us turn to the analysis of the elements of the definition of agri-food competition law.

The instrumental approach towards agri-food competition law means that the legal sources of agri-food competition law are adopted and passed to achieve agricultural and food policy objectives through legislation. The question arises as to what one means by the term *agricultural and food policy*. It is rational to start with the definition of policy: „a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usually determine present and future decisions.”³⁶⁹ Within this thesis, this definition of policy is supplemented with the further condition that guiding and determining present and future decisions takes place with regard to

³⁶⁹ Philip Babcock Gove and the MERRIAM-WEBSTER Editorial Staff (2002) *Webster's Third New International Dictionary of the English Language – Unabridged*. Springfield, Massachusetts: Merriam-Webster Inc., p. 1754. For further definition see: MERRIAM-WEBSTER (2016) *Merriam-Webster's Dictionary of Law*. Springfield, Massachusetts: Merriam-Webster Inc., p. 364: *an overall plan, principle, or guideline*.

agriculture and food. As specified in the Introduction, agri-food products have to be determined in this aspect, for I connect agri-food products with agricultural and food policy objectives. One of the starting points when determining these products is the list referred to in Article 38 TFEU.³⁷⁰ The products in this list are those that are subject to the Common Agricultural Policy.³⁷¹ The other starting point is the definition of food in Regulation (EC) No 178/2002: 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. It also includes drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment. Nevertheless, it does not cover feed, live animals unless they are prepared for placing on the market for human consumption, plants prior to harvesting, medicinal products, cosmetics, tobacco and tobacco products, narcotic or psychotropic substances, residues and contaminants.³⁷² Although tobacco and tobacco products and those live animals which are not prepared for placing on the market for human consumption are not foodstuffs pursuant to Article 2 of Regulation (EC) No 178/2002, live animals in general, as well as unmanufactured tobacco and tobacco refuse can be found in Annex 1 of TFEU, therefore they are considered agri-food products and, thus, are included within the scope of the analysis.

Later I address several issues of the process of policy making relating to agriculture and the food sector, but now only a highly relevant finding of *Lindblom* is mentioned:

*„When we say that policies are decided by analysis, we mean that an investigation of the merits of various possible actions has disclosed reasons for choosing one policy over others. When we say that politics rather than analysis determines policy, we mean that policy is set by the various ways in which people exert control, influencer, or power over each other.”*³⁷³

In the following one will see that this conclusion is increasingly relevant to the policy making processes of agriculture and food, in particular on the international stage.³⁷⁴ It is completely revealing that during the Doha Round within the framework of World Trade Organization

³⁷⁰ TFEU, Annex I.

³⁷¹ TFEU, Article 38, 3.

³⁷² Regulation (EC) No 178/2002, Article 2.

³⁷³ Charles Edward LINDBLOM (1980) *The Policy-Making Process*, 2nd edn. Englewood Cliffs: Prentice Hall, p. 26 is cited by Deborah STONE (2011) *Policy Paradox: The Art of Political Decision Making*, 3rd edn. New York City: W. W. Norton & Company, p. 379.

³⁷⁴ See in detail the official and unofficial actors and their roles in public policy: Thomas A. BIRKLAND (2016) *An Introduction to the Policy Process – Theories, Concepts, and Models of Public Policy Making*, 4th edn. Abingdon: Routledge, pp. 107–198.

(hereinafter referred to as WTO), which ended in failure, *inter alia*, owing to agricultural issues, the General Council declared that the issue of the interaction between trade and competition would not form part of the Work Programme, therefore no work towards negotiations on this issue would take place within the WTO during the Doha Round.³⁷⁵ It is manifest that from a private law perspective a multilateral agreement providing protection for small-scale producers, as well as small and medium-size enterprises against transnational agricultural and food corporations could only be adopted within the WTO. The Working Group on the Interaction between Trade and Competition Policy was set up by the Singapore Ministerial Conference in 1996,³⁷⁶ and in 2001 the Working Group was instructed to focus on, among others, hardcore cartels.³⁷⁷ However, after the previously mentioned General Council decision, the Working Group became inactive, which shows that the issue of competition restrictions of private law nature has been removed from the agenda at international level.

During the policy making process, policy makers have to consider fairness, since it is – to a certain extent – an ethical obligation to bear in mind the variety of social values, interests and preferences.³⁷⁸ Fairness, as an emerging aspect in the discourse on competition policy and as a basic value of law, is of paramount importance when making agricultural and food policy, by the acknowledgement that the most added value in the food supply chain is generated by agricultural producers, nevertheless they are the most vulnerable to market conditions. Agriculture as one of the riskiest sectors of economy is, on the one hand, subject to price risks, and, on the other hand, highly dependent on nature, as a consequence of which droughts, floods

³⁷⁵ World Trade Organization (2004) Doha Work Programme, Decision Adopted by the General Council on 1 August 2004, WT/L/579, 1. g.: „Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.”

³⁷⁶ World Trade Organization (1996) Singapore Ministerial Declaration adopted on 13 December 1996, WT/MIN(96)/DEC, Paragraph 20: „Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudice whether negotiations will be initiated in the future, we also agree to:

- establish a working group to examine the relationship between trade and investment; and
- establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.”

³⁷⁷ World Trade Organization (2001) Doha Ministerial Declaration adopted on 14 November 2001, WT/MIN(01)/DEC/1, Paragraph 25: „In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and *provisions on hardcore cartels*; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.”

³⁷⁸ Giuseppe MUNDA (2017) *Dealing with Fairness in Public Policy Analysis – A Methodological Framework*. Luxembourg: Publications Office of the European Union, p. 11.

and pests make the agricultural work arduous.³⁷⁹ Trade regulation rules, including competition rules, with the immanent feature of unfairness contribute to a trade system having the character of democratic deficit.³⁸⁰ In the European Union, because of the Common Agricultural Policy becoming more market-oriented the vulnerability of farmers against fluctuation of food prices has recently increased.³⁸¹

In conclusion, agricultural and food policy is a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in light of given conditions to guide and usually determine present and future decisions with regard to agriculture and food.

Agricultural and food policy may, however, be completely different at different regulatory levels causing problems and contradictions.³⁸² Not only policy objectives but also regulatory solutions chosen to realise these objectives may differ level by level and country by country, and this may imply certain complications.

As a consequence of the instrumental approach in the definition of agri-food competition law, realising agricultural and food policy objectives takes place with the help of legal acts (instruments) which are related to the competition process between undertakings engaged in buying and selling agri-food products.

Which are these legal acts at the different regulatory levels? Based on German agricultural law literature, I divide them into two groups: (a) specific norms and (b) exception norms. While specific norms are trade regulation rules exclusively adopted for agriculture and the food supply chain, exception norms are antitrust rules in the sense that they make exceptions to general antitrust rules.

1 The European Union

1.a Exception norms:

1.a.i Article 42 of the Treaty on the Functioning of the European Union

1.a.ii Article 206 to Article 210 of the 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

³⁷⁹ OECD (2007) *Promoting Pro-Poor Growth – Policy Guidance for Donors*. Paris: OECD Publishing, p. 188.

³⁸⁰ Per PINSTRUP-ANDERSEN–Peter SANDØE (eds.) (2007) *Ethics, Hunger and Globalization – In Search of Appropriate Policies*. Dordrecht: Springer, p. 140.

³⁸¹ PAREDIS–KEIRSBILCK 2020, p. 7.

³⁸² The variety of agricultural policies may be found in William H. MEYERS–Thomas JOHNSON (eds.) *Policies for Agricultural Markets and Rural Economic Activity – Vol. 1*. In: Tim JOSLING (editor-in-chief) (2018) *Handbook of International Food and Agricultural Policies*. Toh Tuck Link: World Scientific Publishing.

1.a.iii Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products

1.b Specific norms:

1.b.i 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;

2 Hungary

2.a Exception norms:

2.a.i Section 93/A of Act LVII of 1996 on the Prohibition of Unfair Market Conduct and Competition Restriction

2.a.ii Section 7(6) of Act CLXIV of 2005 on Trade

2.b Specific norms:

2.b.i Act XCV of 2009 on the Prohibition of Unfair Distribution Practices against Suppliers in Relation to Agricultural and Food Products

2.b.ii Section 7/A-7/B of Act CLXIV of 2005 on Trade

3 Germany

3.a Exception norms:

3.a.i Section 28 of GWB

3.a.ii Section 6 of Agrarmarktstrukturgesetz

3.b Specific norms:

3.b.i Section 20(3) of GWB

3.b.ii Part III and IV of AgrarOLkG

4 The United States of America:

4.a Exception norms:

4.a.i Section 6 of Clayton Act

4.a.ii Capper-Volstead Act of 1922

4.b Specific norms:

4.b.i Packers and Stockyards Act of 1921

4.b.ii Unfair Trade Practices Affecting Producers of Agricultural Products Act of 1968

4.b.iii Perishable Agricultural Commodities Act of 1930

	Exception norms / <i>ius singulare</i> / <i>Ausnahmenormen</i>	Specific norms / <i>ius proprium</i> / <i>Spezialnormen</i>
the European Union	- Article 42 of the Treaty on the Functioning of the European Union - Article 206 to Article 210 of the 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 [...]	- 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

	- Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products	
Hungary	- Section 7(6) of Act CLXIV of 2005 on Trade - Section 93/A of Act LVII of 1996 on the Prohibition of Unfair Market Conduct and Competition Restriction	- Act XCV of 2009 Prohibition of Unfair Distribution Practices against Suppliers in Relation to Agricultural and Food Products - Section 7/A-7/B of Act CLXIV of 2005 on Trade
Germany	- Section 28 of GWB - Section 6 of AgrarOLkG	- Section 20(3) of GWB - Part III and IV of AgrarOLkG
the United States	- Section 6 of Clayton Act - Capper-Volstead Act of 1922	- Packers and Stockyards Act of 1921 - Perishable Agricultural Commodities Act of 1930 - Unfair Trade Practices Affecting Producers of Agricultural Products Act of 1968

3.2 The historical antecedents of agri-food competition law

This subchapter addresses those antecedents which can be considered as direct or indirect development stages of agri-food competition law. Both the EU and the countries examined are dealt with in separate subchapters. Exceptionally and because of the chronological order, the analysis starts with the United States owing to its pioneering role in antitrust law. Subsequently, I turn to Germany and Hungary. Finally, I review the antecedents in the EU.

3.2.1 The United States of America

The modern origins of antitrust date back to the end of the 19th century, when the Sherman Antitrust Act was passed in the United States of America. The Sherman Act was signed into law by President Benjamin Harrison on 2 July 1890 and was the first federal law to address anti-competitive practices as we know them today.

The word ‘antitrust’ itself derives from the fact that the primary form of the creation of monopoly was the legal institution ‘trust’, a specific construct of common law jurisdictions. Nevertheless, *Collins* notes that the era’s state and federal antitrust legislation was aimed not against large firms but the combinations of competitors, and „[r]egardless of their technical legal form, these combinations came at the time to be called trusts.”³⁸³

³⁸³ Wayne D. COLLINS (2013) Trusts and the Origins of Antitrust Legislation, *Fordham Law Review*, 81(5), p. 2280.

The Sherman Act came into public consciousness as a reaction against the trust created by S.C.T. Dodd in 1882. Dodd was an attorney-at-law for Rockefeller's Standard Oil Company and sought to create through the trust a close association of oil refiners able to influence prices and supply in the marketplace while avoiding state taxes and corporate regulation. Although many economists at this time opposed the adoption of a federal antitrust statute, saying that it would adversely affect rising real wages and falling prices, the camp of opponents refused to give up their belief in fair competition. However, the question of how to achieve undistorted and fair competition remained unresolved on their side. In agriculture, for example, technological progress has made it impossible for individual producers and small businesses to keep pace with their larger competitors. The populist tendency of the last third of the 1800s, often identified with the Granger movement that emerged in the decade following the American Civil War, accelerated the emergence of antitrust.³⁸⁴ The mastermind behind the Granger movement was *Oliver Hudson Kelley*, an employee of the Department of Agriculture, who founded the organisation known as 'The Patrons of Husbandry' in 1867. The organisation was made up of local units called 'Granges'. Most adherents were attracted to the movement by the need to take action against the monopoly of railway companies and grain elevators (often owned by the railway companies), which charged farmers exorbitant fees for handling and transporting grain and other agricultural products.³⁸⁵

In one of the Granger cases, in *Munn v. Illinois* the US Supreme Court ruled that within the limits of the powers inherent in its sovereignty, the government may regulate the conduct of its citizens towards each other and, where the public good so requires, the manner in which individual citizens should use their property. In order to clarify the *ratio decidendi*, declared in principle, the facts of the case may be summarised as follows. The Illinois state legislation, influenced by the Granger movement, set maximum rates that grain elevators could charge for storage and transportation.³⁸⁶ After Munn & Scott was fined under the legislative act, and the Illinois Supreme Court upheld the ruling, the company appealed to the US Supreme Court,

³⁸⁴ Laura Phillips SAWYER (2019) US Antitrust Law and Policy in Historical Perspective, *Harvard Business School*, Working Paper 19-110 [Online], p. 2. Available at: https://www.hbs.edu/ris/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf (Accessed: 22 April 2021).

³⁸⁵ See The Editors of Encyclopaedia Britannica: *Granger movement – American Farm Coalition*. Available at: <https://www.britannica.com/event/Granger-movement> (Accessed: 22 April 2021).

³⁸⁶ The General Assembly of Illinois – An Act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to art. 13 of the Constitution of this State (approved April 25, 1871), Section 15: „The maximum charge of storage and handling of grain, including the cost of receiving and delivering, shall be for the first thirty days or part thereof two cents per bushel, and for each fifteen days or part thereof, after the first thirty days, one-half of one cent per bushel; provided, however, that grain damp or liable to early damage, as indicated by its inspection when received, may be subject to two cents per bushel storage for the first ten days, and for each additional five days or part thereof, not exceeding one-half of one per cent per bushel.”

arguing that the Illinois regulation violated the US Constitution because it unconstitutionally restricted the right holder's exercise of his property rights, thus infringing the right to property. This argument was rejected by the Supreme Court, and the essence of the ruling was that the states' regulatory power extends to the relations of private corporations when they have an impact on the public interest. Since the granaries were also intended for use in the public interest, charges imposed by them could be regulated by the State.³⁸⁷ This holding highlights and confirms the possibility for states to take action by means of certain legal instruments in order to ensure fair competition, even though this means the imposition of property restrictions on certain entities through the determination of how they should operate in the market.

Although the administration emphasised that the Sherman Act was necessary because of the Standard Oil Trust's unscrupulous and—in many cases—unlawful trading practices,³⁸⁸ as well as the exploitation of the agricultural sector by industry,³⁸⁹ some authors argued that it was wrong to regard the agricultural sector's vulnerability as an impetus behind antitrust legislation,³⁹⁰ for agriculture is not a sector that is exclusively exposed to industry, and the facts show that the practices of railroad companies stabilised and increased the income of farmers.³⁹¹ Furthermore, there are authors who see Sherman's personal motives behind the passage of the Act. It was Russell A. Alger who helped Benjamin Harrison get the Republican Party nomination for president, which Sherman resented, so Sherman targeted Alger's trust, 'Diamond Match'. This was done by means of the Antitrust Act of 1890. It is also argued that Sherman, as the most influential member of the Senate's Committee on Finance, directly supported a tariff policy of high tariffs, which is in inextricable contrast to his efforts to limit trusts.³⁹² In view of these considerations, it is believed that there were more personal motivations behind Sherman Antitrust Act.

However, it is better to choose a middle way and not to overemphasise the power of a personal motif. If Sherman's individual „desire for revenge” had been the sole basis for the Act's adoption, Congress would not have voted for it. In any case, the exploited agricultural sector in general, including the Granger movement and the vulnerable agricultural producers, played a decisive role on the road to the passage of Sherman Act. With the Standard Oil

³⁸⁷ *Munn v. Illinois*, 94 U.S. 113 (1876) – US Supreme Court decision.

³⁸⁸ Hans THORELLI (1955) *The Federal Antitrust Policy: Origination of an American Tradition*. Baltimore: Johns Hopkins University Press, p. 92.

³⁸⁹ William LETWIN (1965) *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act*. New York: Random House, pp. 67–68.

³⁹⁰ Robert L. BRADLEY JR. (1990) On the Origins of the Sherman Antitrust Act, *Cato Journal*, 9(3), p. 739.

³⁹¹ George STIGLER (1985) The Origin of the Sherman Act, *The Journal of Legal Studies*, 14(1), pp. 1–12.

³⁹² BRADLEY JR. 1990, pp. 739–740.

Company having been in a monopolistic position and causing resentment because of governmental manifestations combined with the belief in free competition, which dominated the views of all parties, led to the passage of the Sherman Act. The extent to which Sherman's personal motivation played a role in this is irrelevant, as the Act could not have been passed without the then current anti-competitive and distortive trade practices that preceded it and the public outcry against them. This brief memento shows that the need to protect farmers was an important starting point for the Sherman Act's adoption. Equally important is the principle enunciated in *Munn v. Illinois*, which had agricultural relevance and which provided case-law justification for competition rules and a solid basis for the creation of federal antitrust laws in the United States.

In connection with the Sherman Act and the goals of antitrust, one must mention one of the most, if not the most, influential antitrust lawyers in the United States, namely Robert Bork, a leading figure of the Chicago School. A major breakthrough and a totally different approach towards antitrust was brought to the fore by his article titled *Legislative Intent and the Policy of the Sherman Act*.³⁹³ In this scholarly writing, Bork examined the controversies about the Sherman Act, and he concluded the following:

*„My conclusion, drawn from the evidence in the Congressional Record, is that Congress intended the courts to implement (that is, to take into account in the decision of cases) only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction.“*³⁹⁴

The die has been cast: it was that moment which brought to light the goal of consumer welfare in antitrust policy. Bork's extremism lies in the fact that he thought of consumer welfare as the one and only objective antitrust should follow. „In Bork's critique, it seemed an antitrust law driven by anything but consumer welfare was the law of the libertine, degenerate and debauched. Economic analysis was now righteous and self-restrained. As such, Bork managed to embed the culture war into one's method of interpreting the Sherman Act.“³⁹⁵ Although debates surrounded his views from the 1960s to the 1980s,³⁹⁶ opposing voices have already

³⁹³ Robert H. BORK (1966) Legislative Intent and the Policy of the Sherman Act, *Journal of Law & Economics*, 9(1), pp. 7–48.

³⁹⁴ BORK 1966, p. 7.

³⁹⁵ Tim WU (2018) *The Curse of Bigness: Antitrust in the New Gilded Age*. New York: Columbia Global Reports [e-book].

³⁹⁶ Barak Y. ORBACH (2010) The Antitrust Consumer Welfare Paradox, *Journal of Competition Law & Economics*, 7(1), pp. 133–164.

calmed down in the last four decades. As Hovenkamp says: „Few people dispute that antitrust’s core mission is protecting consumers’ right to the low prices, innovation, and diverse production that competition promises.”³⁹⁷ And the paradigm of consumer welfare has been adopted not only by US antitrust enforcement authorities, but also it has penetrated into the discourse on the goals of EU competition law.³⁹⁸ The days of a more economic approach have come to the world of US antitrust law and, with some delay, of EU competition law.³⁹⁹ The more economic approach is connected to the notion of consumer welfare through the fact that consumer welfare is borrowed from the vocabulary of economics, and its measurement is based on consumer surplus. However, it is unclear that consumer welfare only includes the maximisation of consumers’ surplus, or it also aims to include the maximisation of producers’ surplus. According to *Hovenkamp*, Robert „Bork did not use the term “consumer welfare” in the same way that most people use it today. For Bork, “consumer welfare” referred to the sum of the welfare, or surplus, enjoyed by both consumers and producers. [...] A large part of the welfare that emerges from Bork’s model accrues to producers rather than consumers.”⁴⁰⁰ Nevertheless, one thing is certain: the aim of introducing the concept to antitrust law has not resulted in the expected outcomes with regard to legal certainty and clarity.⁴⁰¹

This short (and preliminary) outlook to the legislative intent of the Sherman Act in the interpretation of Robert Bork is necessary because it has implications beyond itself, and it

³⁹⁷ Herbert HOVENKAMP (2008) *The Antitrust Enterprise: Principle and Execution*. Cambridge, MA: Harvard University Press, pp. 1–2.

³⁹⁸ See, for example: Alberto PERA–Vito AURICCHIO (2005) Consumer Welfare, Standard of Proof and the Objectives of Competition Policy, *European Competition Journal*, 1(1), pp. 153–177; Liza Lovdahl GORMSEN (2007) The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC, *European Competition Journal*, 3(2), pp. 329–344; Pinar AKMAN (2009) ‘Consumer Welfare’ and Article 82EC: Practice and Rhetoric, *World Competition*, 32(1), pp. 71–90; Anca Daniela CHIRITA (2010) Undistorted, (Un)fair Competition, Consumer Welfare and the Interpretation of Article 102 TFEU, *World Competition*, 33(3), pp. 417–436; Roger ZÄCH–Adrian KÜNZLER (2010) Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law. In: Roger ZÄCH–Andreas HEINEMANN–Andreas KELLERHALS (eds.) *The Development of Competition Law – Global Perspectives*, pp. 61–86; Louis KAPLOW (2012) On the choice of welfare standards in competition law. In: Daniel ZIMMER (ed.) *The Goals of Competition Law*. Cheltenham: Edward Elgar Publishing, pp. 3–26; Matteo NEGRINOTTI (2012) The single market imperative and consumer welfare: irreconcilable goals? Exploring the tensions amongst the objectives of European competition law through the lens of parallel trade in pharmaceuticals. In: Daniel ZIMMER (ed.) *The Goals of Competition Law*. Cheltenham: Edward Elgar Publishing, pp. 295–337; Victoria DASKALOVA (2015) Consumer Welfare in EU Competition Law: What Is It (Not) About? *The Competition Law Review*, 11(1), pp. 131–160; Kevin COATES–Dirk MIDDELSCHULTE (2019) Getting Consumer Welfare Right: the competition law implications of market-driven sustainability initiatives, *European Competition Journal*, 15(2–3), pp. 318–326; Frédéric MARTY (2020) Is the Consumer Welfare Obsolete? A European Union Competition Law Perspective, *GREDEG Working Papers*, 2020-13, Groupe de Recherche en Droit, Economie, Gestion (GREDEG CNRS), Université Côte d’Azur, France;

³⁹⁹ See Anne C WITT (2016) *The More Economic Approach to EU Antitrust Law*. Oxford: Hart Publishing.

⁴⁰⁰ Herbert HOVENKAMP (2019) Is Antitrust’s Consumer Welfare Principle Imperiled? *Faculty Scholarship at Penn Law* [Online], p. 1. Available at: https://scholarship.law.upenn.edu/faculty_scholarship/1985/ (Accessed: 2 November 2021).

⁴⁰¹ DASKALOVA 2015.

started a revolution in US antitrust law and, later, in EU competition law. It makes a difference whether one considers consumer welfare as the sole objective of competition law or whether one also formulates other objectives that one wants competition law to achieve. The narrow interpretation of antitrust law which only contributes to the generating of consumer surplus has serious side effects on a topic such as competition in agri-food markets. It determines not only the depth and extent of intervention but also the roles one expects the agricultural sector to play in the economy.⁴⁰² A commitment to a narrow interpretation of antitrust law has far-reaching implications for agricultural society as a whole which is dominated by social concerns.

Although the adoption of the Sherman Act was seen as a major breakthrough, events in the late 19th and early 20th centuries proved that it did not provide adequate protection against distortions and restrictions of competition. This period also saw the so-called *Merger Movement*, during which corporate empires were created in spite of the Sherman Act, by using other legal constructions instead of trusts. As early as 1899, the seriousness of the problem was felt, and the *Civic Federation of Chicago* convened and held a conference to address the problem of trusts. Here, some already expressed their fear for agricultural regions, as the *Merger Movement* had created companies with market power that could raise the price of manufactured goods while lowering the price of raw materials.⁴⁰³ The need for a new law was already mooted by *John Bates Clark*, which was very similar to the provisions of the Clayton Act passed fifteen years later.⁴⁰⁴

One of the notable differences between the Sherman Act and the Clayton Act is that while the former does not, the latter contains a direct provision for the agricultural sector. The Sherman Act did not differentiate between sectors, and there was a widespread public perception that the first federal antitrust law was in part enacted with the intention of cracking down on large agricultural cooperatives. On the other hand, it was also suggested that the Sherman Act's provisions could be interpreted as meaning that mutual assistance between local farmers managing small farms violate the Act. Around the 1890s, there were already about a thousand agricultural cooperatives in the United States, which brought together producers and sought to coordinate their activities in order to reduce the vulnerability of farmers and improve their competitive position.⁴⁰⁵ They were, however, covered by the Sherman Act in the same way as any other undertaking engaged in any other activity. There are authors in the literature

⁴⁰² See more in Part Two.

⁴⁰³ David Dale MARTIN (1959) *Mergers and the Clayton Act*. Berkeley: University of California Press, p. 6.

⁴⁰⁴ MARTIN 1959, p. 7.

⁴⁰⁵ Christine A. VARNEY (2010) The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity, *The Antitrust Source*, December 2010, p. 1.

who describe the Sherman Act as simply bad law,⁴⁰⁶ and given that many see it as a response to the defencelessness of agricultural sector and yet it does not contain specific rules for certain sectors with different needs, such as agriculture, there may be some basis for negative opinions. And if not bad, it can certainly be described as an oversimplified legislative product. The Clayton Act of 1914 attempted to change this, already seeking to place a differentiated emphasis on sectors where there was a specific need to do so. The Sherman Act was not repealed by the Clayton Act, the latter merely supplemented and strengthened the former. There are authors who have seen the Clayton Act as an excellent attempt to increase the strength of the Sherman Act,⁴⁰⁷ and one can agree that the Clayton Act's provisions, a quarter of a century later, can be thought of as improvement. Approached from the other direction, one could not necessarily have expected more from the Sherman Act, for it lacked background experience which legislation could gain from case law in the decades that followed its adoption.

The Clayton Act declares that

*„[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”*⁴⁰⁸

Prior to the adoption of Clayton Act's Section 6, the position of agricultural cooperatives was not unambiguous in case law. Some state courts drew parallels between cartels and agricultural cooperatives by applying antitrust provisions to them; there were other much more tolerant courts.⁴⁰⁹

One of the most striking examples of questionable judicial application of antitrust laws was the *Ford v. Chicago Milk Shippers' Association* ruling, in which the Illinois Supreme Court held that the cooperative had influenced milk prices in a way that had restricted competition, and both the cooperative itself and its members had achieved this goal in parallel to the

⁴⁰⁶ BRADLEY JR. 1990, p. 741.

⁴⁰⁷ Charles NAGEL (1930) The Origin and Purpose of the Sherman Act, *St. Louis Law Review*, 15(4), p. 323.

⁴⁰⁸ 15 U.S. Code § 17 – Antitrust laws not applicable to labor organizations.

⁴⁰⁹ Chris SAGERS–Peter CARTENSEN (2007) *Federal Statutory Exemptions from Antitrust Law*. Chicago: American Bar Association, p. 97.

detriment of retailers.⁴¹⁰ The case can be summarised as follows. Dairy farmers in Chicago formed a cooperative marketing association to determine prices that farmers would receive for milk and other dairy products. A milk trader entered into a purchase agreement with the cooperative but subsequently refused to pay the purchase price. When the cooperative brought an action to enforce payment, the trader relied on an 1891 Illinois state law that allowed buyers „who signed a contract to buy goods from a participant in a combination that violated the law could refuse to pay for the goods.” The Illinois Supreme Court, without reference to the Sherman Act, ruled in favour of the dealer, holding that the cooperative was formed for the purpose of fixing prices and influencing and limiting the amount of milk that could be marketed. It is unlawful for the cooperative to pursue these objectives. Although the cooperative sought to argue that the cooperative itself and its members are a single legal entity, making it incapable that the cooperative conspired with itself to restrict competition, the Illinois Supreme Court broke the unity between the cooperative and its members.⁴¹¹

In general, in the early cases dating back to before the adoption of state cooperative laws, state courts ruled predominantly against cooperatives. This trend was later reversed and cooperatives were considered as specific market actors. Not only was it realised that the vulnerability of farmers to market conditions could be alleviated through cooperatives, but also that their operation had to be balanced with antitrust law. This could not be done in another way than by exempting them from the scope *rationae personae* of antitrust law, thus placing them in a privileged position. However, this finding was realised almost 25 years after the passage of the Sherman Act. This realisation may certainly be described as a first resolution of the conflicts between agricultural law and competition law, which set in motion the trend in competition law that has continued to this day: treating agricultural sector specially in relation to competition-related provisions.

After the adoption of Clayton Act’s Section 6, the development of agricultural cooperatives began, but two problems remained unresolved. On one hand, cooperatives covered by the exemption could not issue capital stock, since the exemption only applied to agricultural cooperatives without it. However, capital stock would have been essential to balance the power of middle-class producers. On the other hand, the question arose as to what was meant by the

⁴¹⁰ Charles Fisk BEACH (2007) *A Treatise on the Law of Monopolies and Industrial Trusts, As Administered in England and in the United States of America*. New Jersey: The Lawbook Exchange Ltd., p. 245.

⁴¹¹ Donald A. FREDERICK (2002) *Antitrust Status of Farmer Cooperatives: The Story of the Capper-Volstead Act*. U.S. Department of Agriculture, Rural Business-Cooperative Service, p. 68.

expression of ‘lawfully carrying out the cooperative’s legitimate objects’. To resolve these problems, the Capper-Volstead Act was passed in 1922.⁴¹²

The Capper-Volstead Act directly and exclusively imposes conditions on agricultural cooperatives which, if met by cooperatives, result that they are not completely subjected to the antitrust regime. Whereas Section 6 of the Clayton Act contains a mere provision on the issue—a general declaration that certain agricultural cooperatives are exempt from the scope of antitrust law, the Capper-Volstead Act establishes a complex regime.⁴¹³ Originally, the Clayton Act did not include agricultural cooperatives in the list of its exceptions, only intended to give priority to trade unions, but subsequently involved agricultural cooperatives among the exceptions. This raised the problem of how to interpret the expression ‘lawfully carrying out the cooperative’s legitimate objects’.⁴¹⁴

The overall purpose of the Capper-Volstead Act is to enable farmers to compete more effectively and market their products more efficiently.⁴¹⁵ Although in public consciousness the Act bears the names of its two most prominent proponents, its original title is as follows: An Act to authorize association of producers of agricultural products. The Act can be divided into two distinct parts: the first sets out the conditions under which a cooperative may be covered by the Act, and the second describes the procedure to be followed in the event a cooperative would commit an antitrust violation. The immunity granted by the Act is limited. Farmers can be held liable under antitrust law, if they abuse the tools available to them.

Under the first provision of the Act, the conditions can be summarised as follows: (1) only those who are engaged in the production of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, may be members of a cooperative or an association; (2) they may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce; (3) such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such

⁴¹² David L. BAUMER–Robert T. MASSON–Robin Abrahamson MASSON (1986) *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, *Villanova Law Review*, 31(1), pp. 190–191.

⁴¹³ See its critique: William E. PETERS (1963) *Agricultural Cooperatives and the Antitrust Laws*, *Nebraska Law Review*, 43(1), pp. 73–104. PETERS 1963, p. 103 concludes: „The law relative to agricultural cooperatives can be succinctly described by one word – uncertainty. Agricultural cooperatives are in the anomalous situation of not knowing what is right or wrong. As a consequence, they are faced with a continual threat of costly criminal and civil prosecutions. It is undesirable public policy to place any societal group in a position where it must risk extensive litigation in order to determine its rights.”

⁴¹⁴ L. Gene LEMON (1970) *The Capper-Volstead Act – Will It Ever Grow Up?* *Administrative Law Review*, 22(3), pp. 443–444.

⁴¹⁵ VARNEY 2010, p. 3.

purposes; (4) such associations are operated for the mutual benefit of the members thereof, as such producers; (5) no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum; (6) the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.⁴¹⁶ As can be seen, the Capper-Volstead Act sets out an extensive set of conditions. The two sub-conditions set out in point 5 are in an alternative relationship to each other, so it is sufficient to satisfy only one of them.

The first part, which establishes exact criteria to be followed by agricultural cooperatives, is complemented with complex procedural rules in the second part of the Act.⁴¹⁷

Beyond the Capper-Volstead Act, the Unfair Trade Practices Affecting Producers of Agricultural Products Act of 1968 is also worth mentioning. It was, among others, adopted to fill a gap in the enforcement of the Capper-Volstead Act. In certain agricultural sectors, farmers are not able to cooperate. A prime example of this is poultry growers.

„They provide housing for the chickens that the integrator owns. The integrator, also, provides the feed, medicine, etc. Hence, such growers cannot engage in collective action as a farm cooperative because they are hired only to grow the poultry belonging to others and, probably, because the owners of the birds do not qualify as „farmers” under Capper-Volstead this would also void the exemption.”⁴¹⁸

The Unfair Trade Practices Affecting Producers of Agricultural Products Act enumerates prohibited practices related to the collective action of agricultural producers.⁴¹⁹ Enabling

⁴¹⁶ 7 U.S. Code § 291 – Authorization of associations; powers.

⁴¹⁷ 7 U.S. Code § 292 – Monopolizing or restraining trade and unduly enhancing prices prohibited; remedy and procedure.

⁴¹⁸ Peter C. CARSTENSEN (2019) Controlling unfairness in American agriculture. In: Ignacio Herrera ANCHUSTEGUI–Ronny GJENDEMSJØ–Peter C. CARSTENSEN–Johan HEDELIN–Antonio Miño LÓPEZ (2019) Unfair trading practices in the food supply chain, *Concurrences*, 2019/3, p. 7.

⁴¹⁹ See 7 U.S. Code § 2303 – Prohibited practices:

„It shall be unlawful for any handler knowingly to engage or permit any employee or agent to engage in the following practices:

(a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association; or

(b) To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers; or

(c) To coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler; or

agricultural producers to cooperate with one another for strengthening their bargaining power, as well as ensuring antitrust exemption for these cooperatives are two pillars of great importance to agri-food markets. The Act provides protection for producers against the retaliation of their buyers. Retaliation is a common occurrence in the business relationship between agricultural producers and their buyers with (relative) market power.

Another important milestone in the history of agri-food competition law is the passage of Packers and Stockyards Act. It does not only provide for an exception (a derogation) under (from) general antitrust rules like Clayton Act's Section 6 and the Capper-Volstead Act, but also establishes a special statutory regime for handling sector-specific anomalies in the market of live animals. The development of this market in the United States and its regulatory attempts/regulation will lead me to a crucial conclusion on the importance of regulating agri-food markets both with appropriate general and sector-specific rules and the finding that the harmonious relationship between these two pillars shall be established.

During the Act's debate, Congressmen talked about 'food dictators' several times. A parallel was made between dictators and food dictators, and it was claimed that having a dictator as head of government is as inadvisable as having a food dictator on top of the food system.⁴²⁰

The journey to the adoption of the Packers and Stockyards Act, which was passed on 15 August 1921 and amended on 14 August 1935 to also cover live poultry dealers and handlers,⁴²¹ started with the Federal Trade Commission (hereinafter referred to as FTC) and the Department of Agriculture (hereinafter referred to as DoA) receiving appropriations for conducting research on „whether there was reason to believe that the production, preparation, storage distribution and sale of foodstuffs were subject to control or manipulation”.⁴²² Based on the inquiry,^{423,424} it was found that the five largest meat-packing companies had conspired to control „the purchases of livestock, the preparation of meat and meat products and the distribution thereof

(d) To pay or loan money, give any thing of value, or offer any other inducement or reward to a producer for refusing to or ceasing to belong to an association of producers; or

(e) To make false reports about the finances, management, or activities of associations of producers or handlers; or

(f) To conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by this chapter.”

⁴²⁰ William E. ROSALES (2004) Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening, *Wisconsin Law Review*, 2004/5, pp. 1497–1498.

⁴²¹ Harry Aubrey TOULMIN (1949) *A Treatise on the Anti-trust Laws of the United States: And Including All Related Trade Regulatory Laws – Vol. 3*. Ohio: W.H. Anderson Company, p. 215.

⁴²² William B. COLVER (1919) The Federal Trade Commission and the Meat-Packing Industry, *The Annals of the American Academy of Political and Social Science*, Vol. 82, p. 170.

⁴²³ See FEDERAL TRADE COMMISSION (1919) *Report of the Federal Trade Commission on the Meat-packing Industry – Summary and Part I*. Washington, Government Printing Office.

⁴²⁴ For an in-depth analysis of the investigation, see: G.O. VIRTUE (1920) The Meat-Packing Investigation, *The Quarterly Journal of Economics*, 34(4), pp. 626–685.

in this country and abroad”.⁴²⁵ The most important finding of the FTC report is reproduced here in full:

„Five corporations – Armour & Co., Swift & Co., Morris & Co., Wilson & Co., Inc., and the Cudahy Packing Co. – hereafter referred to as the „Big Five” or „The Packers,” together with their subsidiaries and affiliated companies, not only have a monopolistic control over the American meat industry, but have secured control, similar in purpose if not yet in extent, over the principal substitutes for meat, such as eggs, cheese, and vegetable-oil products, and are rapidly extending their power to cover fish and nearly every kind of foodstuff.”⁴²⁶

The FTC report also posited that the Big Five used, in an unfair and illegal way, their powers

„to manipulate live-stock markets, restrict interstate and international supplies of foods, control the prices of dressed meats and other foods, defraud both the producers of food and consumers, crush effective competition, secure special privileges from railroads, stockyard companies, and municipalities, and profiteer.”⁴²⁷

The report not only resulted in the Packers and Stockyards Act’s passage but also—before it in February 1920—in a consent decree in which the government settled an antitrust lawsuit under the Sherman Act with the major packers. The consent decree „enjoined and restrained the meatpackers from owning any public stockyard company and further required those that did to divest themselves of such ownership interests.”⁴²⁸ As a consequence of the divestiture, the concentration ratio of the four largest meatpackers dropped from about 45% to 20% until the late 1970s.⁴²⁹ Although there were several attempts to modify and/or eliminate the consent decree,⁴³⁰ ultimately it only happened in 1981, when it was „terminated on the joint motion of the Justice Department and Swift Independent Packing Company.”⁴³¹ No surprise that after the repeal of the consent decree, the concentration ratio of the four largest meatpackers started to

⁴²⁵ Thomas J. FLAVIN (1958) The Packers and Stockyards Act, 1921, *The George Washington Law Review*, Vol. 26, p. 161.

⁴²⁶ FEDERAL TRADE COMMISSION 1919, p. 31.

⁴²⁷ FEDERAL TRADE COMMISSION 1919, pp. 32–33.

⁴²⁸ Bill BULLARD (2013) Under Siege: The U.S. Live Cattle Industry, *South Dakota Law Review*, 58(3), p. 562.

⁴²⁹ C. Robert TAYLOR (2008) Buyer Power Litigation in Agriculture: Pickett v. Tyson Fresh Meats, Inc., *Antitrust Bulletin*, 53(2), p. 457.

⁴³⁰ Robert M. ADUDELLE–Louis P. CAIN (1981) The Consent Decree in the Meatpacking Industry, 1920–1956, *The Business History Review*, 55(3), pp. 359–378.

⁴³¹ Robert M. ADUDELLE–Louis P. CAIN (1982) A Strange Sense of Deja Vu: The Packers and the Feds, 1915–82, *Business and Economic History*, Vol. 11, p. 49.

increase through mergers and acquisitions, and by the early 1990s it rose to over 80%.⁴³² This sheds light on the importance of harmonious co-existence between general antitrust rules and sectoral regulation in handling sector-specific problems. Without appropriate merger control, the sectoral regulation, the Packers and Stockyards Act has not been sufficient in the last four decades to halt the consolidation of live market animals in the United States, contrary to the period when the consent decree was in force. This historical experience is key to my findings.

Another important source of US agri-food competition law is the Perishable Agricultural Commodities Act of 1930. Its section titled ‘Unfair conduct’ consists of practices which, on one hand, are similar to general unfair competition conducts applying to all sectors,⁴³³ and

⁴³² TAYLOR 2008, p. 457.

⁴³³ See 7 U.S. Code § 499b – Unfair conduct:

„It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

(1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce.

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer.

(3) For any commission merchant to discard, dump, or destroy without reasonable cause, any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce.

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated—

(A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or

(B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed \$2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

(6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in compliance with any Federal or State law or regulation as to the grade or quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced.

(7) For any commission merchant, dealer or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable

which, on the other hand, can be regarded as the consequence of superior bargaining power of buyers. To mention some examples for the latter: failing or refusing truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction.⁴³⁴

3.2.2 Hungary

The first competition-related statute in Hungary was the Act V of 1923 on Unfair Competition.⁴³⁵ Hungarian legislation was relatively quick to respond to the demands commenced in the end of the 19th century to protect competition. The explanatory memorandum of the Act states the considerations behind the protection of competition in a pathetic way: „The categorical imperative of morality shall prevail in the struggle in commerce and industry, if one does not want to completely impose individual selfishness on commerce, and if one does not want to eradicate faith in the possibility of a decent prosperity in commerce.”⁴³⁶ This statute was followed by Act XX of 1931 on the Agreements Regulating Economic Competition which covered both the prohibition of restrictive agreements and abuse of dominance.^{437,438} The legal instrument ‘abuse of dominance’, therefore, appeared in the early 1930s.

agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit re-sorting and discarding inferior produce.”

⁴³⁴ 7 U.S. Code § 499b, 4.

⁴³⁵ See the analysis of the antecedents of the Act V of 1923: PÁZMÁNDY Kinga (2006) A hirdetésre vonatkozó jogi szabályozás története [The history of legal regulation on advertisements], *Jogtörténeti Szemle*, 2006/2, pp. 11–19.

⁴³⁶ Explanatory Memorandum to the Act V of 1923 on unfair competition.

⁴³⁷ BOYTHA–TÓTH 2010, p. 39.

⁴³⁸ See in detail: BAUMGARTEN Nándor–MESZLÉNY Artur (1906) *Kartellek, trustok – Keletkezésük, fejlődésük, helyzetük a gazdasági és jogrendben* [Cartels, trusts – Their evolution, development, place in economic and legal order]. Budapest, Grill Károly Könyvkiadóvállalata; SZILÁGYI Pál–TÓTH András (2016) A kartellszabályozás történeti fejlődése [The historical development of cartel regulation], *Versenytükör*, 12(special issue no. II), pp. 4–13; KOVÁCS György (2016) A kartellkérdés és –szabályozás gazdaságelméleti és gazdaságpolitikai háttere a két világháború közötti magyar közgondolkodásban [The economic theory and economic policy background of cartel question and regulation between the two world wars in Hungarian public thinking], *Versenytükör*, 12(special issue no. II), pp. 14–38; HOMOKI-NAGY Mária (2016) Megjegyzések a kartellmagánjog történetéhez [Remarks on the history of private cartel law], *Versenytükör*, 12(special issue no. II), pp. 39–52; STIPTA István (2016) A gazdasági versenyt szabályozó megállapodásokról szóló 1931. évi XX. tc. hazai előzményei [The antecedents of the Act XX of 1931 on agreements regulating economic competition], *Versenytükör*, 12(special issue no. II), pp. 53–63; SZABÓ István (2016) A kartellfelügyelet szervezete és hatásköre az 1931. évi XX. törvénycikk nyomán [The organisation and powers of cartel supervision based on the Act XX of 1931], *Versenytükör*, 12(special issue no. II), pp. 64–83; VARGA Norbert (2016) Kartelleljárszorg szabályozása és gyakorlata, különös tekintettel a Kartellbíróság működésére [The regulation and practice of procedural cartel law, in particular the operation of Cartel Court], *Versenytükör*, 12(special issue no. II), pp. 84–95.

While Act V of 1923 included no specific provisions applying to agri-food products, Act XX of 1931 did. Sections 17 and 18 set out a complex regime regarding agricultural products. Section 17 forbade to influence the free and natural formation of agricultural products' price, which were brought to the fair, by conspiring, collusion or other artificial interference to the detriment of producers. The competent authority, the so-called fair police⁴³⁹ had to supervise local markets to ensure that the price formation is not influenced unlawfully, and if it detects such abuse, it had to prevent it by lawful means at its disposal. In the event of an abuse which could not be prevented by the fair police, or if the local fair price of a product showed a persistent and striking disproportion to the detriment of producers, taking into account all the circumstances, in relation to the national price or the price quoted on the Budapest commodity and value exchange, which gives rise to reasonable grounds for believing that this price development is the result of any abuse, the Minister for Economic Affairs could—on a reasoned proposal from the administrative commission or without such proposal, in agreement with the Ministers concerned, either for all agricultural products brought to the fair or for certain specified products—order that criminal proceedings be instituted for the offences referred to in Section 18, until revocation. In case of such referral, if urgently necessary, the administrative commission could also order this temporarily until the decision of the Minister for Economic Affairs.⁴⁴⁰

Pursuant to Section 18, unless the offence is punishable by stricter measures, anyone who conspires, colludes or spreads false information with the intention of influencing the free and natural formation of the fair price of an agricultural product brought to the fair to the detriment of producers commits an offence. The penalty for the offence was fine.⁴⁴¹

The explanatory memorandum—neither in its general nor in its paragraph-specific part—contains justification and reasoning for these special provisions applying to agricultural products. However, it does mention, as an example, that the Russian Criminal Code punished, in its Sections 913 and 1180, undertakings who conspired to raise food prices.⁴⁴²

In Hungary, between World War II and the regime change of 1989 there was no competition law as such because of the Socialist planned economy.⁴⁴³

⁴³⁹ Fair police is an archaic notion. *Fair* is not an adjective here, but it is understood as an event at which people, businesses, etc. show and sell their goods. The term 'fair police' cannot be found in other legal acts. The fair court was that body which had special jurisdiction based on the fact of being present at the fair, and it had organisational, administrative, judicial, *police* and revenue management functions.

⁴⁴⁰ Act XX of 1931, Section 17.

⁴⁴¹ Act XX of 1931, Section 18.

⁴⁴² See the part 'General Justification' of the Explanatory Memorandum to the Act XX of 1931.

⁴⁴³ However, see, for example: VÖRÖS Imre (1981) *A szocialista piaci magatartás joga [The law of Socialist market conduct]*. Budapest: Közgazdasági és Jogi Könyvkiadó, p. 37.

Subsequently, the regime change with the transition to market economy gave renewed vigour to economic competition and, consequently, to the development of competition law. In 1990, the Hungarian Competition Authority was established and a new competition law was passed.⁴⁴⁴ Nonetheless, no special provisions were adopted to protect agricultural markets until the Act XCV of 2009. As an antecedent, however, the Act XVI of 2003 on Agricultural Market Organisation is worth mentioning.⁴⁴⁵ It contained some competition-related rules. It was declared that if any regulation pursuant to Act XVI of 2003 infringes cartel prohibition, the Minister for Agriculture and Rural Development had to ensure that the economic benefits exceed the disadvantages deriving from the restriction.⁴⁴⁶ Furthermore, the Act declared that contracting parties shall not set a payment deadline exceeding 30 days from the date of the receipt of goods in contracts concluded between producers, processors, resellers and distributors for the transfer of agricultural and food products covered by the Act.⁴⁴⁷ In literature, this was referred to as a protective pillar in the interest of farmers,⁴⁴⁸ which, at least in one respect, limited the conduct of contracting parties having significant market power: they could not delay the payment of the consideration. Act XVI of 2003 was repealed on 1 September 2012.

3.2.3 Germany

For a brief introduction to the historical development of German competition law, I draw on the research of *Quack* and *Djelic*,⁴⁴⁹ however I complement their findings with *Schweizer*'s research on special regulation applying to agriculture and the food supply chain.

Neither the first German cartel act⁴⁵⁰ nor the decartelisation law of the occupying powers⁴⁵¹ contained any special provisions for agriculture.⁴⁵² The first cartel act was adopted

⁴⁴⁴ Act LXXXVI of 1990 on the prohibition of unfair market conduct.

⁴⁴⁵ OLAJOS István–SZILÁGYI János Ede (2004) The Agricultural Competition Law in Hungary, *European Integration Studies*, 3(1), pp. 45–56.

⁴⁴⁶ Act XVI of 2003, Section 32(5).

⁴⁴⁷ Act XVI of 2003, Section 29(1).

⁴⁴⁸ OLAJOS–SZILÁGYI 2004, p. 55.

⁴⁴⁹ Sigrid QUACK–Marie-Laure DJELIC (2005) *Adaptation, Recombination and Reinforcement: The Story of Antitrust and Competition Law in Germany and Europe* [Online]. Available at: <https://spire.sciencespo.fr/hdl:/2441/2615o52m2c857apcgdgcp1hr3h/resources/2005-djelic-quack-story-of-antitrust-and-competition-law-in-germany-and-europe.pdf> (Accessed: 25 May 2021).

⁴⁵⁰ Kartellverordnung vom 2. November 1923 (KartVO). See in more detail: Matthias WERNER (2008) *Wettbewerbsrecht und Boykott – Zur Beurteilung wettbewerblicher Boykottmaßnahmen nach dem novellierten Kartell- und Lauterkeitsrecht*. Baden-Baden: Nomos Verlag, pp. 33–34.

⁴⁵¹ Alliierte Dekartellierungsgesetze 1947. See in more detail: WERNER 2008, pp. 34–37.

⁴⁵² Dieter SCHWEIZER (2020) *GWB § 28 Landwirtschaft*, Rn. 1. In: Torsten KÖRBER–Heike SCHWEITZER–Daniel ZIMMER (eds.) *Wettbewerbsrecht – Band 2: GWB. Kommentar zum Deutschen Kartellrecht*, 6th edn. Munich: C.H. Beck.

by the Weimar government, while the decartelisation law of the occupying powers was based on US antitrust tradition. After World War II, „the American government demanded that German agencies prepare their own competition law. Once accepted by German and Allied authorities, this law, it was agreed, would replace the 1947 legislation.”⁴⁵³

The special treatment of agriculture was introduced by the *GWB* of 27 July 1957. Apart from a few minor editorial changes, only one major amendment to Section 100 was made between 1957 and 1998. The fourth amendment to *GWB* extended the exemption referring to the prohibition of vertical price maintenance provided for in Section 100(3) in the case of seeds to animals weaned by breeding companies or breeders’ associations recognised under the Animal Breeding Act, which are intended for reproduction in a multi-stage breeding process. In addition, the meaning and scope of application of *GWB*’s Section 100 were influenced by other legal provisions. Furthermore, the application of Section 100 has been superimposed by Community law, namely by Regulation No. 26 and various legal acts on producer groups or producer organisations as well as on inter-branch organisations and inter-branch agreements. The sixth amendment to *GWB* has maintained but simplified the special antitrust regime for agriculture. It was adapted to the new structure of the Act and harmonised with EU law. Previously it was codified in Section 100; now it appears in Section 28.⁴⁵⁴

3.2.4 The European Union

Competition law and the Common Agricultural Policy have been of primary importance to the European Economic Community since the Treaty of Rome of 25 March 1957.⁴⁵⁵ The Treaty of Rome, already in its preamble, acknowledged the priority of fair competition. The purpose of establishing a common market presupposes a system ensuring that competition in the common market is not distorted.⁴⁵⁶ The Treaty of Rome declared that Member States would develop the Common Agricultural Policy by degrees during the transitional period and would bring it into force by the end of that period at the latest.⁴⁵⁷ The objectives of the Common Agricultural Policy were listed in Article 39: (a) to increase agricultural productivity by

⁴⁵³ QUACK–DJELIC 2005, p. 5.

⁴⁵⁴ SCHWEIZER 2020, Rn. 2–10.

⁴⁵⁵ It is, however, worth mentioning that the Treaty establishing the European Coal and Steel Community (known also as the Treaty of Paris of 18 April 1951) also included rules in connection with competition. Articles 4, 60 and 65–67 set out the basic aspects of Community competition policy for the key sectors covered. See BERKE Barna (1998) *Az Európai Közösség versenyjoga* [The competition law of European Community]. In: KIRÁLY Miklós (ed.) *Az Európai Közösség kereskedelmi joga* [The commercial law of European Community]. Budapest: Közgazdasági és Jogi Könyvkiadó, p. 223.

⁴⁵⁶ Treaty of Rome, Article 2 and Article 3 f).

⁴⁵⁷ Treaty of Rome, Article 40(1).

promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour; (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; (c) to stabilise markets; (d) to assure the availability of supplies; (e) to ensure that supplies reach consumers at reasonable prices.⁴⁵⁸

The Treaty of Rome recognised the special characteristics of agriculture. During the elaboration of the Common Agricultural Policy, the following considerations had to be taken into account: (a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions; (b) the need to effect the appropriate adjustments by degrees; (c) the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.⁴⁵⁹ One cannot stress enough that this provision and the objectives of the CAP were adopted as a consequence of powerful German interests. „[T]he objectives of the CAP are an almost faithful reflection of the aims as contained in Germany’s Agricultural Act,⁴⁶⁰ passed in September 1955, which institutionalised the generally-held view that *agriculture deserves special treatment*.”⁴⁶¹

The basis for the priority of Common Agricultural Policy over competition rules was established in Article 42: The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Article 43(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.⁴⁶² Articles 43(2) and (3) laid down the procedural rules of working out the Common Agricultural Policy and the decision-making therein.⁴⁶³

The detailed objectives, problems, principles and instruments of the Common Agricultural Policy were discussed during the Stresa Conference taking place from 3 to 12 July

⁴⁵⁸ Treaty of Rome, Article 39(1).

⁴⁵⁹ Treaty of Rome, Article 39(2).

⁴⁶⁰ See *Landwirtschaftsgesetz vom 5. September 1955*. It is still in force. Its Section 1 declares the following: In order to enable agriculture to participate in the progressive development of the German economy and to ensure the best possible supply of foodstuffs for the population, agriculture must be enabled by means of general economic and agricultural policy – in particular trade, tax, credit and price policy – to compensate for the natural and economic disadvantages it suffers compared with other sectors of the economy and to increase its productivity. At the same time, the social situation of people working in agriculture is to be brought into line with that of comparable occupational groups.

⁴⁶¹ Rasmus KJELDAHL–Michael TRACY (1994) *Renationalisation of the Common Agricultural Policy?* Institute of Agricultural Economics, p. 59 cited by Wyn GRANT (1997) *The Common Agricultural Policy*. London: Macmillan Press, p. 64.

⁴⁶² Treaty of Rome, Article 42.

⁴⁶³ Treaty of Rome, Article 43(2) and (3).

1958.⁴⁶⁴ In his opening speech, *Professor Hallstein* strengthened the justification for the special treatment of agriculture in relation to competition rules:

*„The rules of competition which the Treaty has laid down in all economic sectors will only be applied to agriculture in so far as the Council so decides, in the light of the objectives of a Common Agricultural Policy. They will recur in the various forms which we will have to develop for the joint organisation of agricultural markets. Naturally, fixed rules of competition must also exist for production and trade in respect of agricultural commodities. In its final form the Common Market will operate on rules of competition based on the principle of equal rights. We know that agriculture is subject to special conditions for which allowance must be made.”*⁴⁶⁵

As can be seen from the above, the privileged position of the Common Agricultural Policy over competition rules due to the structural characteristics of primary agricultural production⁴⁶⁶ has accompanied the development of the European Union and its predecessors from the beginnings to the present day.

The birth of the CAP dates back to the first common market organisation in the cereal sector in 1962, although regarding the common prices, it entered into force in the 1967/68 crop year.⁴⁶⁷ 1962 not only saw the launch of the Common Agricultural Policy but also the adoption of detailed rules on agriculture-related derogations from competition rules.⁴⁶⁸ Though the Common Agricultural Policy has undergone a number of major and minor reforms over the past 60 years,⁴⁶⁹ one factor seems to have remained constant and has not changed to date: the

⁴⁶⁴ C. FOLMER–M.A. KEYZER–M.D. MERBIS–H.J.J. STOLWIJK–P.J.J. VEENENDAAL (1995) *The Common Agricultural Policy Beyond the Macsharry Reform*. Amsterdam–Lausanne–New York–Oxford–Shannon–Tokyo: Elsevier, p. 12.

⁴⁶⁵ Walter HALLSTEIN (1958) Address by Professor Walter Hallstein, President of the Commission of the European Economic Community, at the opening of the Conference of the Member States of the European Economic Community. Stresa, 3 July 1958, VI/2.

⁴⁶⁶ HALMAI Péter (ed.) (2020) *A Közös Agrárpolitika rendszere [The system of Common Agricultural Policy]*. Budapest: Dialóg Campus Kiadó, p. 17.

⁴⁶⁷ GRANT 1997, p. 67.

⁴⁶⁸ EEC Council: Regulation No 26 applying certain rules of competition to production of and trade in agricultural products.

⁴⁶⁹ See details on the reforms: Franz FISCHLER (2001) Reform of the Common Agricultural Policy, *Intereconomics*, 36(3), pp. 115–118; Peter NEDERGAARD (2006) The 2003 Reform of the Common Agricultural Policy: Against all Odds or Rational Explanations? *Journal of European Integration*, 28(3), pp. 203–223; Isabelle GARZON (2007) *Reforming the Common Agricultural Policy – History of a Paradigm Change*. Hampshire, Palgrave Macmillan; Robert ACKRILL–Adrian KAY–Wyn MORGAN (2008) The Common Agricultural Policy and Its Reform: The Problem of Reconciling Budget and Trade Concerns, *Canadian Journal of Agricultural Economics / Revue Canadienne D'agroéconomie*, 56(4), pp. 393–411; Peter NEDERGAARD (2008) The reform of the 2003 Common Agricultural Policy: an advocacy coalition explanation, *Policy Studies*, 29(2), pp. 179–195.

production and trade of agricultural products are subject to competition rules only to a limited extent. As *Blockx and Vandenberghe* put it, „[d]espite successive Treaty reforms, this agricultural exemption has never been profoundly touched upon and has remained in substance unaltered since 1957.”⁴⁷⁰

3.3 Earlier mentions of the interface between agri-food law and competition law

Now let us take stock of the attempts in legal literature which can be considered as precursors to agri-food competition law.

One of the first appearance of the systematic relationship between agricultural law and competition law worth mentioning is of *Wolfgang Winkler* from the early 1980's. *Winkler* distinguished four levels of agricultural law. Of these four levels, the area of law I call agri-food competition law is at the second level. At the first level of *Winkler's* clustering are the rules applying directly to agricultural holdings and provisions applying to agricultural enterprises and the labour employed by them. At the second level, there are those provisions which treat agriculture and the food industry as a specific sector of the national economy. According to *Winkler*, this level consists of market regulation, the legal basis for agricultural policy, the chambers of agriculture, laws on agricultural subsidies and agricultural economic law. The latter includes *agricultural competition law* and agricultural tax law. The notion 'agricultural competition law' is the word-for-word translation of the German expression used by him: *landwirtschaftliches Wettbewerbsrecht*. His third level includes legal norms on rural areas, such as land consolidation law, land reform, regulations on agriculture in regional planning and building law, as well as nature conservation law. At the fourth level he listed provisions which are related to environmental protection: for example, laws on emission control and environmental requirements to be enforced in the production and marketing of agricultural products.⁴⁷¹

Winkler himself stated that this grouping was not exclusive. *Norer* notes that this is a socio-economic division rather than a legal one.⁴⁷² In German literature, further mentions of the

⁴⁷⁰ JAN BLOCKX–JAN VANDENBERGHE (2014) Rebalancing Commercial Relations Along the Food Supply Chain: The Agricultural Exemption from EU Competition Law After Regulation 1308/2013, *European Competition Journal*, 10(2), p. 390.

⁴⁷¹ Wolfgang WINKLER (1981) Agrarrecht. In: Volkmar GÖTZ–Karl KROESCHELL–Wolfgang WINKLER (eds.) *Handwörterbuch des Agrarrechts – Band I*. Berlin: Erich Schmidt Verlag, pp. 49–89 cited by NORER 2005, pp. 67–68.

⁴⁷² NORER 2005, p. 67.

word *Agrarwettbewerbsrecht* can be found.⁴⁷³ Besides the expression *Agrarwettbewerbsrecht*, there are also narrower notions which constitute the two parts of *Agrarwettbewerbsrecht*: *Agrarkartellrecht* and *Agrarbeihilfenrecht*.⁴⁷⁴ The previous covers special competition-related rules of private law nature applying to agriculture and the food supply chain, while the latter is concerned with special rules on state aids in the agricultural and food sector.

In his 2010 article, *Walter Frenz* finds that the application of EU competition rules in the agricultural sector is deeply complicated. Agri-food competition law is shaped by competition law and state aid law as well as by the Common Agricultural Policy and its objectives. How these two starting points work in individual cases depends on *secondary agricultural law*, which regularly allows for competition rules to be intervened by sector-specific modifications. Therefore, the insignificant changes brought about by the Lisbon Treaty are not decisive but the ongoing developments in EU secondary law.⁴⁷⁵ *Frenz* deals with antitrust law and state aid law in his article, nevertheless, he does not address national provisions of the former area.⁴⁷⁶

Another example worth mentioning in German-language literature is of *Jan Ackermann*. His book is titled *Wohlgeordnetes Agrarwettbewerbsrecht mit Blick auf Erzeugerorganisationen und unlautere Handelspraktiken*.⁴⁷⁷ Its word-for-word English translation is *Well-organised agricultural competition law, with regard to producer organisations and unfair trading practices*. The author does not provide theoretical foundations towards agricultural competition law. The requirements for a well-organised area of law have been taken over by him from *Ines Härtel*. It becomes clear from the title of the book that *Ackermann* considers special competition law provisions on producer organisations and unfair trading practices as parts of agricultural competition law.

Neither the Hungarian nor the German translation of agri-food competition law contains the word ‘food’: the Hungarian *agrár-versenyjog* and the German *Agrarwettbewerbsrecht*

⁴⁷³ Walter FRENZ (2010) *Agrarwettbewerbsrecht*, *Agrar- und Umweltrecht*, 40(7), pp. 193–195; Ines HÄRTEL (2020) *Agrarrecht*. In: Matthias RUFFERT (ed.) *Europäisches Sektorales Wirtschaftsrecht*, 2nd edn. Baden-Baden: Nomos Verlag, pp. 463–556.

⁴⁷⁴ Horst PETRY (1975) *Die Wettbewerbsbeschränkung in der Landwirtschaft nach nationalem und europäischem Wettbewerbsrecht: ein Beitrag zum Agrarkartellrecht*, PhD thesis, University of Hohenheim; Philipp GROTELOH (2016) *Grundzüge des Agrarkartellrechts*. In: Matthias DOMBERT–Karsten WITT (eds.) *Münchener Anwaltshandbuch Agrarrecht*, 2nd edn. Munich: C.H. Beck, Rn. 51–59; Christian BUSSE (2016) *Die Stellung der Molkereigenossenschaften im Agrarkartellrecht*, *Wirtschaft und Wettbewerb*, 66(4), pp. 154–163; Ines HÄRTEL (2018) AEUV Art. 42 [Eingeschränkte Anwendung der Wettbewerbs- und Beihilferegeln]. In: Rudolf STREINZ (ed.) *EUV/AEUV – Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union*, 3rd edn. Munich: C.H. Beck.

⁴⁷⁵ FRENZ 2010, p. 193 and 195.

⁴⁷⁶ FRENZ 2010.

⁴⁷⁷ See ACKERMANN 2020.

would sound incredibly complicated, if one complemented them with the Hungarian and German translations of food (*élelmiszer* in Hungarian and *Lebensmittel* in German). As a consequence of this, the thesis treats the English ‘agri-food competition law’ with the German ‘Agrarwettbewerbsrecht’ and the Hungarian ‘agrár-versenyjog’ as equivalents despite the textual difference. With regard to the Hungarian term, treating *agrár-versenyjog* and agri-food competition law as equivalents is also strengthened by the Hungarian literature which considers agricultural products and foodstuffs together as one of the regulatory objects of Hungarian agricultural law (*agrárjog*). Similarly to Hungary, in the German-language legal literature the handbook of agricultural law (*Handbuch des Agrarrechts*) edited by *Norer* also deals with food law in a separate chapter,⁴⁷⁸ therefore it is correct to include competition rules on foodstuffs into the German term *Agrarwettbewerbsrecht*, even in the lack of indicating *Lebensmittel* in the name of the area of law.

In English-language literature there are significantly fewer references to agri-food competition law in *sui generis* terms. The doctrinal approach of German law is not present in the literature of common law jurisdictions due to the much less influence of Roman law. Nevertheless, a special approach towards competition in agri-food markets has also appeared in the United States. There are sector-specific antitrust and trade regulation provisions, and the literature has also raised its voice for the protection of agriculture. For example, *Jon Lauck* put it in the following way:

„Antitrust cases involving agricultural markets require a unique set of considerations. Unlike other industries that may not have existed at the time of the passage of the Sherman Act, agriculture maintains a special status as an industry that heavily influenced passage of the original antitrust legislation. The Congressional response to agrarian concerns indicates that farmers were specifically considered as a group that suffered or could suffer antitrust injuries. Such a status partially explains the continued clamor in agricultural circles for antitrust action to address the economic woes of the farmer.

Antitrust law, particularly in recent decades, has failed to consider its agrarian grounding. The incorporation of Chicago economic theories into antitrust analysis has failed to take structure as a serious factor in decisionmaking. As a result, the non-economic considerations Congress advanced, such as decentralization, have been spurned, contributing to a persistence of concentration in many sectors of the economy. The monopsonistic

⁴⁷⁸ See the following chapter: Sabine PRICHENFRIED (2005) *Lebensmittelrecht*. In: NORER (ed.) (2005), pp. 171–184.

relationship between some sellers and buyers, a structural consideration of particular import to farmers, has therefore not been widely recognized by the courts.

In the future, courts should weigh the agrarian origins of the antitrust laws and the importance of structural factors when deciding agrarian antitrust cases.”⁴⁷⁹

As can be seen, *Lauck* considers a major problem that antitrust law has not taken into account its agrarian origins in recent times, which is in strong connection with the appearance of Robert Bork’s approach towards antitrust law manifesting in the more economic approach and in the exclusive antitrust objective of consumer welfare.

Obviously, there are authors who argue against agrarian antitrust.⁴⁸⁰ One of the leading voices against it is economist *Warren-Boulton* who carries out research in the fields of antitrust and industrial organisation. Nevertheless, if one reads one of his articles dealing with this topic, one may feel a slight of *petitio principii*. He writes that

„Agrarian Antitrust proponents also express concerns as to new contractual relationships between farmers and business, especially hi-tech businesses such as Monsanto and DuPont, referring to “vertical contracts” that create barriers to entry and “intellectual property abuse.” To the extent that such arrangements are in fact anticompetitive, they would violate the antitrust laws and could be expected to be treated as severely as in any other sector of the economy.”⁴⁸¹

He does not take into account that the advocates of agrarian antitrust raise their voice against the paradigm of consumer welfare and the more economic approach followed by antitrust enforcement agencies in recent times. *Warren-Boulton* continues:

„One potential source for such concerns, however, would not be covered by antitrust. Many family farms that recently entered into contracts for products such as hogs and chickens and incurred substantial sunk costs suffered from “opportunistic behavior” by the firms with whom they had contracted. They presumably still have recourse in the law, but as a contract violation. No Agrarian Antitrust, however active, would be relevant to these cases. But the proponents of

⁴⁷⁹ Jon LAUCK (1999) *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, *North Dakota Law Review*, 75(3), p. 495.

⁴⁸⁰ See, for example, Frederick R. WARREN-BOULTON (2000) *The Case Against an „Agrarian Antitrust Policy”*. Presented at the Agricultural Outlook Forum 2000 on 25 February 2000.

⁴⁸¹ See WARREN-BOULTON 2000.

an Agrarian Antitrust go beyond such “economic” arguments to argue, again, that such arrangements transform the farmer or rancher “into a mere servant or agent of a corporation” (Carstensen, citing Peckham).⁴⁸²

He finds that contract law may serve as an appropriate area of law providing a sufficient toolbox of remedies to farmers but does not consider that in most countries contract law can intervene only in the case when one of the contracting parties uses duress to conclude the contract with the other contracting party.

4 Concluding remarks of Part One

Part One provides some important conclusions. I have formulated the definition of agri-food competition law:

Agri-food competition law is the aggregate of legal instruments aiming to realise agricultural and food policy objectives, created and maintained to regulate the behaviour of undertakings in and the competitive process of the agricultural and food market.

Agri-food competition law is perceived as a special area of law (*Sonderrechtsgebiet*) which—based on German agricultural law literature—consists of exception norms and specific norms. The instrumental approach to agri-food competition law helps identify those competition-related provisions beyond the adoption of which agricultural and food policy objectives appear. The thought of *Christian Busse* was adopted, according to which it is advisable to collect and order an area of law before it is analysed in detail.

The legal sources of agri-food competition law can be divided into two competition-related groups:

- I. Antitrust rules which are exception norms, that is to say, rules which provide for derogations from general antitrust rules.
- II. Trade regulation rules which are specific norms, that is to say, rules which are exclusively adopted for agriculture and the food supply chain.

Group II can be further divided into two groups:

1. Conducts related to relative market power, and

⁴⁸² See WARREN-BOULTON 2000.

2. Conducts related to unfairness.

I have found that the one and only area which has clear-cut regulatory content and coherent terminology is conventional antitrust law. The two other fields of law (II.1. and II.2.) are not uniform in their content and terminology.

The legal instruments in these three groups constitute the starting point to enumerate exception and specific norms applying to agri-food products. Exception norms include those legal provisions which function as exceptions provided for the agricultural sector and the food supply chain under general provisions. Specific norms are adopted particularly to regulate the legal relations of agriculture and the food supply chain. Conventional antitrust law only provides derogation to agriculture from the prohibition of anti-competitive agreements. Abuse of dominance and merger control have no exception norms.

Further relevant provisions can, however, be found among other abuse-type conducts which only require the existence of relative market power. In most cases, other abuse-type conducts are in connection with the third group consisting of conducts related to unfairness. Relative market power is a prerequisite of unfair trading practices. Other abuse-type conducts and their likely consequences manifesting in the form of unfair trading practices are regulated differently country by country and in the EU. Not only are they different in their regulatory content but also in their terminology. One could also say: so many countries, so many ways of regulation.


All analysed countries (Germany, Hungary, and the United States) as well as the European Union have both exception norms and specific norms to regulate and control competition in agri-food markets.

Historically, the first provisions appeared in the United States to provide limited exemption for agricultural cooperatives under antitrust law, and later this was taken over by the predecessor of the European Union. In the 1920's and 1930's, not only exception norms but also specific provisions were adopted in order to resolve the imbalances in bargaining power. Not only Hungary had specific rules on the price formation of agricultural products, but also Germany introduced special rules for agriculture in its 1957 competition statute (*GWB*). That is to say, the regulation of competition in agri-food markets both through antitrust and trade regulation provisions is a historically well-founded designation.

The number of legal literature directly or indirectly connected to agri-food competition law is moderate. The most scholarly publications are German; Hungary has no legal literature on the issue. In the United States, 'agrarian antitrust' is the only expression coming to the fore a few decades ago. Comprehensive, comparative and detailed analysis on special antitrust and

trade regulation rules applying to the agricultural and food sector has not been written so far. This gap is expected to be filled in by Part Two of the thesis.

The structure of agri-food competition law

agri-food competition law / Agrarwettbewerbsrecht im weiteren Sinne (competition-related rules for realising agricultural and food policy objectives / instrumental approach based on Hungarian agricultural law literature)*		
controlling the competitive process through (based on competition policy alternatives)**	antitrust rules	trade regulation rules
the nature of norms (based on German agricultural law literature / <i>Sonderrechtsgebiet</i>)***	exception norms****	specific norms*****
conduct types (based on competition law literature)	conducts related to anti-competitive agreements	conducts related to relative market power [°]  conducts related to unfairness [°]

* law is an instrument to realise policy alternatives

** competition policy can be realised through either antitrust or trade regulation, or both

*** a special area of law is built upon exception norms and specific norms

**** they are exceptions to general norms

***** they are exclusively adopted for agriculture and the food supply chain

[°] conducts related to unfairness, such as unfair trading practices, are the result of relative market power of one contracting party over the other

The legal sources of agri-food competition law

Conducts related to	anti-competitive agreements	relative market power	unfairness
the European Union	Article 42 TFEU		Directive 2019/633
	Articles 206–210 of Regulation No 1308/2013		
	Council Regulation No 1184/2006		
Germany	Section 28 of GWB	Nummer 1 of Section 20(3) of GWB	Part III and IV of AgrarOLkG
	Section 6 of AgrarOLkG		
Hungary	Section 93/A of Act LVII of 1996	Section 7/A-7/B of Act CLXIV of 2005 on Trade***	Act XCV of 2009; derogation provided by Section 7(6) of Act CLXIV of 2005 on Trade*
the United States	Section 6 of Clayton Act		Packers and Stockyards Act of 1921**
	Capper-Volstead Act of 1922		Unfair Trade Practices Affecting Producers of Agricultural Products Act of 1968
			Perishable Agricultural Commodities Act of 1930

* Section 7(6) of Act CLXIV of 2005 on Trade is an exception norm; it provides for an exception to Section 7 of Act CLXIV of 2005 on Trade. Section 7 consist of the rules on abuse of significant market power which is a legal instrument related to relative market power in Hungarian law. The exception refers to agri-food products which fall under the scope of Act XCV of 2009. The relationship between Section 7 of Act CLXIV of 2005 and Act XCV of 2009 is based on the principle *lex specialis derogat legi generali*; the general norm is Section 7 of Act CLXIV of 2005, while the specific norm is Act XCV of 2009, therefore cases in which Act XCV of 2009 is applicable do not fall under the scope of Section 7 of Act CLXIV of 2005.

** There are still debates as to whether the Packers and Stockyards Act is an antitrust statute. The Act is listed among ‘conducts related to unfairness’ because it declares that *unfair, unjustly discriminatory, and deceptive practices* are unlawful.

*** Section 7/A of Act CLXIV of 2005 relativises abuse of dominance by declaring that a dominant position exists in all cases when the net annual turnover of the respective undertaking generated from the sales of foodstuffs exceeds HUF 100 billion.

Section 7/B of Act CLXIV of 2005 is related to relative market power in such manner that in vertical relationships of the HORECA sector distributors are in many cases obliged by powerful producers to undertake a non-compete obligation, that is to say, they shall not distribute products which are not bought from the producer. Producers have relative market power over distributors by obliging them to agree to non-price contractual terms they would otherwise not agree to. This situation is handled by Section 7/B, which prescribes that products of at least two producers shall be distributed regarding beer and beverage in the HORECA sector.

Part Two: Detailed analysis of antitrust and trade regulation rules applying to agri-food markets

Part Two provides detailed analysis on antitrust and trade regulation rules applying to agri-food markets. However, first of all, it outlines the brief summary of economic considerations that may underpin the adoption of sector-specific competition rules in agri-food markets (Chapter 1). After that, each regulatory level (national and EU) has its own chapter. The analysis starts with the EU rules (Chapter 2), which are divided to two subchapters: one is concerned with the primary law of the EU and the other with the secondary law. The main chapter consisting of the national level (Chapter 3) is divided into subchapters according to the three countries scrutinised (Hungary, Germany, and the United States). Before the respective analysis, I aim to briefly present the agricultural and/or food policies behind the adoption of the respective legal acts. For Germany and Hungary, there is a separate subchapter as to how the Directive (EU) 2019/633 was implemented into national law. Given that German and Hungarian regulations are heavily influenced by EU legal acts, I begin the analysis with the level of the EU, then move on to national laws.

Chapter 4 of Part Two includes concluding remarks about the examined jurisdictions separately. Nevertheless, the comparison between the regulation of the US and that of the EU, as well as between the German and Hungarian regulation is carried out in Chapter 3 of Part Four.

1 Economic analysis of sectoral competition rules in agri-food markets

This chapter outlines the summary of economic considerations behind the sector-specific competition-related rules applying to agri-food markets.

Agricultural antitrust exemptions are related to anti-competitive agreements, which make possible for agricultural producers and their associations to combine forces and unite their economic power. This statutory possibility, both in the EU and the United States, is crucial in order that farmers could have countervailing market power against their buyers. As shown by *Anchustegui* and mentioned in Subchapter 2.2.2, buyer power has two forms: monopsony power and bargaining power. While the former is inefficient in all cases because of its withholding effect, the latter requires a much more careful analysis whether it has adverse effects on competition.⁴⁸³ Countervailing power established with the help of the exemption offsets

⁴⁸³ See ANCHUSTEGUI 2017.

monopsony power,⁴⁸⁴ but the exemption is also applicable when farmers face bargaining power which does not necessarily constitute danger to efficiency. Therefore, it seems that the statutory exemption may create a possibility for agricultural producers to have market power against their buyers even in the case when this power faces nothing to countervail. It may be detrimental in a way that consumer prices increase. It is called as supervailing power by *Baumer, Masson and Masson*. As can be seen later, for the sake of controlling supervailing power which may arise from the antitrust exemption, US antitrust has its control mechanism in the form of forbidding undue price enhancement.⁴⁸⁵ This is missing in EU antitrust.

Based on *Carstensen's* clustering which distinguishes five categories for antitrust exemptions,⁴⁸⁶ three of them may prove to be useful regarding the agricultural sector: first, market or institutional failures, second, wealth transfers and protection from competition, and third, exemptions that improve the efficiency of the enforcement of competition policy. Of these three relevant justifications, only one group seems to be acceptable for contemporary antitrust. It is the group of market failures within which the above-mentioned creation of countervailing power can be listed. Countervailing power, first coined by *Galbraith*, enabled by Section 6 of the Clayton Act and the Capper-Volstead Act in the United States and secondary law provisions in the EU, is different from the market power of industrial firms in that it is *the response* „to the power of those to whom they sold their [...] products.”⁴⁸⁷ The concept of countervailing power can be complemented with the consideration of reducing contracting costs.⁴⁸⁸ Suppliers of agricultural products have market power nor in the case when they negotiate terms and conditions jointly. The joint negotiation, however, reduces costs, and could control the business partner in engaging strategic conduct. Another theory, which is listed by *Carstensen* among the justifications to cure market or institutional failures and which is useful for agricultural producers, is the possibility for competitors to cooperate for the sake of creating an efficient market. This is embodied by agricultural cooperatives in the United States and producer organisations in the EU.

⁴⁸⁴ BAUMER–MASSON–MASSON 1986, p. 198.

⁴⁸⁵ BAUMER–MASSON–MASSON 1986, p. 201.

⁴⁸⁶ 1. Natural monopoly, 2. Market or institutional failure, 3. Wealth transfers and protection from competition, 4. Exemptions facilitating the transition of industry structure from state ownership or direct regulation to market orientation, 5. Exemptions that improve the efficiency of the enforcement of competition policy. See: Peter CARSTENSEN (2015) Economic Analysis of Antitrust Exemptions. In: Roger D. BLAIR–D. Daniel SOKOL (eds.) *The Oxford Handbook of Antitrust Economics – Vol. 1*. Oxford: Oxford University Press, pp. 33–62.

⁴⁸⁷ John Kenneth GALBRAITH (1993) *American Capitalism – The Concept of Countervailing Power*. Abingdon: Routledge, p. 139.

⁴⁸⁸ CARSTENSEN 2015, p. 49.

The considerations of the group ‘wealth transfers and protection from competition’ is not what antitrust tolerates and to what it wants to subscribe at all. Simply put, it is related to competition policy but it is not the field of antitrust. *Carstensen* mentions as one argument of this group the conferring of market power to achieve specific, in particular social, goals. Trade regulation provisions, such as the UTP Directive in the EU, aim to contribute to the attainment of increasing the individual earnings, and thus the standard of living, of agricultural producers. Besides this social goal, there are other arguments to appear within this group. The activity of agricultural producers, i.e. agricultural production, is supported because, as put by *Carstensen* in general, „the costs of protection are worth the benefit to some other socially desirable objective.”⁴⁸⁹ As to the agricultural sector, these other socially desirable goals are perfectly described by the concept of multifunctional agriculture. The protection of environment, the preservation of landscape, as well as rural employment and food security all are important pillars of the agricultural activity, which may be deemed as justifications for the intervention to the competition in agri-food markets. If policymakers are of the opinion that small and medium-sized agricultural enterprises better contribute to the preservation of landscape and environmental protection than large agribusinesses engaged in agricultural production, they may attempt to give a higher level of protection for smaller market participants not to be squeezed out of the market despite the fact that they may be (less) efficient. To this group, one can also add the wealth transfer considerations⁴⁹⁰ provided for agricultural producers through sector-specific regulation. Regarding agriculture, it is closely related to the specific social objective of the increasing of producers’ standard of living, which is pursued by agricultural policy.

Highly regulated sectors, such as agriculture, may require that not only antitrust agencies but also sectoral authorities have certain powers to contribute to the efficiency of the enforcement of competition policy.⁴⁹¹ A good example of this is the situation after the implementation of the UTP Directive in Germany and the regulation in force even before the implementation of the UTP Directive in Hungary where agriculture-specific authorities (*Bundesanstalt für Landwirtschaft und Ernährung* and *National Food Chain Safety Office*) make decisions on unfair trading practices committed against the suppliers of agri-food products.

⁴⁸⁹ CARSTENSEN 2015, p. 56.

⁴⁹⁰ CARSTENSEN 2015, p. 56.

⁴⁹¹ CARSTENSEN 2015, pp. 58–59.

All in all, it is reasonable to distinguish between, on the one hand, the economic arguments which are suitable to justify agricultural antitrust exemptions, and on the other hand, the arguments which can rather be called upon when one aims to justify other competition-related regulations in agri-food markets. The one and only acceptable antitrust argument for adopting exception norms for the agricultural sector is related to the concept of countervailing power. Its creation by agricultural suppliers has to be made possible to offset monopsony power of buyers. From an efficiency-based viewpoint, it is only acceptable if the buyer power appears as monopsony and not bargaining power. Although the bargaining power of buyers may have adverse effects on competition, but, as put by *Anchustegui*, it is not harmful at first sight. However, there may be other arguments to be referred to when attempting to find the justification to competition-related regulations not falling under the scope of conventional antitrust. The prohibition of unfair trading practices are easier to be explained by arguments related to wealth transfers or socially desirable objectives to be pursued by other policies. Although wealth transfers to agricultural producers are economic in nature but do not play a role in antitrust enforcement, similarly to those agricultural policy objectives which aim to raise the standard of living of farmers. These latter types of arguments seem like interest group demands,⁴⁹² in which the power of agricultural lobby can be discovered.

In conclusion, agri-food competition law has two different groups of justifications. While the exemptions provided for the creation of countervailing power are accepted by antitrust policy, socially desirable objectives and wealth transfers come from the field of agricultural policy to influence competition in agri-food markets and do not fit the legal toolbox at the disposal of conventional antitrust law.

2 Agri-food competition law at EU level

This chapter addresses the agri-food competition law of the European Union. The chapter is divided into two subchapters; the first dealing with primary law and the second with secondary law. The relevant case law is integrated into both subchapters. Then, I conclude.

2.1 The primary law of the EU

When addressing the primary law of the EU on agri-food competition, the analysis must be started with the Treaty on the Functioning of the European Union, in particular its Articles

⁴⁹² R. Shyam KHEMANI (2003) *Application of Competition Law: Exemptions and Exceptions*. UNCTAD Series on Issues in Competition Law and Policy, UNCTAD/DITC/CLP/Misc.25, p. 32.

38–44 on the common agricultural policy. The Treaty on European Union includes no specific provisions regarding the issue.

In principle, the EU defines its common agricultural and fisheries policy, which – according to *Whish and Bailey* – has its own philosophy.⁴⁹³ The internal market shall extend to agriculture, fisheries and trade in agricultural products.⁴⁹⁴ Therefore, the common agricultural and fisheries policy is part of the internal market. Save as otherwise provided in Articles 39 to 44 TFEU, the rules laid down for the establishment and functioning of the internal market shall also apply to agricultural products.⁴⁹⁵ Rules on competition, being positioned in Chapter 1⁴⁹⁶ of Title VII of the TFEU from Article 101 to 109, form a part of the internal market.⁴⁹⁷ However, even since the beginning of European integration, European agricultural markets have not been fully exposed to free competition.⁴⁹⁸ *Schweizer* posits that the introduction of common competition rules for agricultural markets has a negative and a positive component. The negative component relates to the application of competition rules in Articles 101 et seq. TFEU to agriculture. The positive component opens the way for the European Parliament and the Council to independently regulate competition issues in the agricultural sector.⁴⁹⁹

The basic system and derogation is provided by an exception norm codified in Article 42 TFEU which declares as follows:

The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.^{500,501}

This provision establishes a primacy of agricultural policy over general competition law.⁵⁰²

⁴⁹³ WHISH–BAILEY 2012, p. 963.

⁴⁹⁴ TFEU, Article 38, 1.

⁴⁹⁵ TFEU, Article 38, 2.

⁴⁹⁶ Section 1 of Chapter 1 (from Article 101 to 106) deals with rules applying to undertakings, while Section 2 of Chapter 1 is concerned with rules on state aids (from Article 107 to 109). It reflects the duality of agri-food competition law. One can divide this area of law into rules of private and of public law nature.

⁴⁹⁷ TFEU, Article 3, 1. b). See FRENZ 2010, p. 193.

⁴⁹⁸ HÄRTEL 2013, p. 437.

⁴⁹⁹ Dieter SCHWEIZER (2019) *Art. 42 AEUV*. In: Torsten KÖRBER–Heike SCHWEITZER–Daniel ZIMMER (eds.) *Wettbewerbsrecht – Band 1: EU. Kommentar zum Europäischen Kartellrecht*, 6th edn. Munich: C.H. Beck, Rn. 4.

⁵⁰⁰ TFEU, Article 42.

⁵⁰¹ See also GROTELOH 2016, Rn. 51.

⁵⁰² HÄRTEL 2013, p. 438.

Article 39 TFEU comprises the objectives of the Common Agricultural Policy, which have to be taken into consideration when deciding on the extent of the application of competition rules to the production and trade in agricultural products: „(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour; (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; (c) to stabilise markets; (d) to assure the availability of supplies; (e) to ensure that supplies reach consumers at reasonable prices.”⁵⁰³ For the attainment of the objectives of common agricultural policy, a common organisation of agricultural markets shall be established. The organisation can take the form of common competition rules, compulsory coordination of the various national market organisations, and/or a European market organisation. The question may arise as to how the common organisation of agricultural markets affects national jurisdiction. Although the most significant ruling on the issue was made before the adoption of the first single common market organisation, its finding on jurisdiction still prevails. The common market organisation (in the milk and milk products sector) does not mean that national competition authorities cannot apply competition laws to a (milk) producers’ cooperative holding a powerful position on the national market. The jurisdiction of national authorities in principle remains unaffected by the common organisation of a product’s market,⁵⁰⁴ however it has its limits. National authorities shall refrain from „adopting any measure which might undermine or create exceptions to that common organisation.” The measure adopted shall be in line with the objectives of the Common Agricultural Policy, as well as the respective measure shall not result in that any of the CAP objectives listed is impossible to be realised because of giving priority to another objective, that is to say, authorities shall find a balance between the attainment of CAP objectives without giving any of them unnecessary weight.⁵⁰⁵

Article 43(2) TFEU lays down procedural rules which have to be respected during the decision-making process: the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee,

⁵⁰³ TFEU, Article 39, 1.

⁵⁰⁴ Case C-137/00 – Judgment of the Court of 9 September 2003: *The Queen v The Competition Commission, Secretary of State for Trade and Industry and The Director General of Fair Trading, ex parte Milk Marque Ltd and National Farmers’ Union*, [67].

⁵⁰⁵ Case C-137/00 – Judgment of the Court of 9 September 2003: *The Queen v The Competition Commission, Secretary of State for Trade and Industry and The Director General of Fair Trading, ex parte Milk Marque Ltd and National Farmers’ Union*, [94].

shall establish⁵⁰⁶ those rules which provide for the possibility of derogation from general competition rules and, thus, the special treatment of agriculture.

By declaring the priority of CAP objectives over competition rules in the TFEU and its earlier versions, the attainment of CAP objectives shall be ensured through regulatory instruments, for – from a competition perspective – an uncontrolled and unregulated agricultural market within the EU is not able to realise and fulfil the objectives with the achieving of which it was entrusted. For example, the objective of ensuring a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture, cannot be expected to be realised by general antitrust rules, given that the CAP objective mentioned is social in nature but antitrust law is only concerned with efficiency considerations.

The main problems faced by the agricultural sector, such as „the problem of fluctuation of incomes from year to year; the problem of low incomes in certain sectors of the industry, which become manifest in poverty among families occupying small farms; and poor comparability between the rewards earned in agriculture and in the rest of the economy”⁵⁰⁷, require stronger intervention to agri-food markets beyond the reach of antitrust rules. By stronger intervention, I mean that legislation – in certain cases – may have to provide additional rules to protect market players with weak bargaining position. Additional rules can take the form of either exception norms or specific norms.

As already mentioned in Part One, EU case law has not failed to state that the Common Agricultural Policy takes precedence over competition rules,⁵⁰⁸ thereby strengthening the power of this policy choice present in EU primary law. There have been relatively few cases on the application of competition provisions to the agricultural sector, however these take us closer to the better understanding of the relationship between competition law and the agricultural sector.

⁵⁰⁶ TFEU, Article 43, 2.

⁵⁰⁷ Berkeley HILL (2012) *Understanding the Common Agricultural Policy*. London–New York: Earthscan, p. 33.

⁵⁰⁸ See: Case 139/79 – Judgment of the Court of 29 October 1980: Maizena GmbH v Council of the European Communities, [23]; Case C-280/93 – Judgment of the Court of 5 October 1994: Federal Republic of Germany v Council of the European Union, [61]; Case C-311/94 – Judgment of the Court of 15 October 1996: IJssel-Vliet Combinatie BV v Minister van Economische Zaken, [31]; Case C-456/00 – Judgment of the Court of 12 December 2002: French Republic v Commission of the European Communities, [33]; Case C-137/00 – Judgment of the Court of 9 September 2003: The Queen v The Competition Commission, Secretary of State for Trade and Industry and The Director General of Fair Trading, ex parte Milk Marque Ltd and National Farmers’ Union, [81]; Case C-671/15 – Judgment of the Court of 14 November 2017: Président de l’Autorité de la concurrence v Association des producteurs vendeurs d’endives (APVE) and Others, [37].

Although the priority of agricultural policy objectives over competition rules has been declared several times, there is a limited number of rulings which provide us with some clarifications on the current exemption system.⁵⁰⁹

2.2 The secondary law of the EU

The possibility for derogations established by the TFEU is realised in secondary legal acts. The following two regulations constitute the pillars of EU secondary legislation:

- 1 Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products;⁵¹⁰ and
- 2 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 1234/2007.⁵¹¹

The trade regulation pillar of EU agri-food competition law is based on the

- 3 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.⁵¹²

Both the relevant articles of the CMO Regulation and the Agri-Food Competition Regulation are exception norms (*ius singulare*); the UTP Directive consists of specific norms (*ius proprium*) by establishing a *sui generis* system which has no general equivalent.

2.2.1 Agri-Food Competition Regulation

The Agri-Food Competition Regulation replaced – with minor changes – the Council Regulation No 26 of 4 April 1962. The replacement took place because of clarity and rationality requirements.⁵¹³ The policy behind its adoption is derivable from the general objectives of the Common Agricultural Policy.

Although pursuant to Article 1 of the Agri-Food Competition Regulation, Articles 101 to 106 TFEU and provisions adopted for their implementation shall apply to all agreements,

⁵⁰⁹ Cases C-456/00 and C-311/94 are related to state aids, Case C-280/93 is connected to the issue of an import regime, Case C-137/00 is on jurisdiction issues, while Case 139/79 was brought before the Court in connection with a production quota.

⁵¹⁰ Hereinafter referred to as Agri-Food Competition Regulation.

⁵¹¹ Hereinafter referred to as CMO Regulation.

⁵¹² Hereinafter referred to as UTP Directive.

⁵¹³ Agri-Food Competition Regulation, Recital (1) and Article 5.

decisions and practices referred to in Articles 101(1) and 102 TFEU which relate to the production of, or the trade in, the products listed in Annex I to the TFEU, these conducts are also subject to Article 2 of the Agri-Food Competition Regulation.⁵¹⁴

The meaning of agricultural products is elaborated in CJEU case law.⁵¹⁵ Given that the following examples are not agricultural products listed in Annex I, special provisions do not apply to them: products obtained by further processing made from original products listed in Annex I, such as cognac brandies;⁵¹⁶ primary but non-Annex I agricultural products used as auxiliary substances for Annex I products;⁵¹⁷ primary but non-Annex I agricultural products, such as furskins.⁵¹⁸ Insofar as primary products have already been treated or processed, they are only covered by the special competition regime if the treated or processed product is listed in Annex I.⁵¹⁹

Article 2 includes the exceptions to Article 101(1) TFEU. In *Whish*'s words, these exceptions are the so-called derogations.⁵²⁰ Of the two pillars of EU competition law applying to undertakings regulated in the TFEU, the Agri-Food Competition Regulation only sets out derogations with regard to the prohibition of anti-competitive agreements; it does not recognise any derogation regarding abuse of dominance.⁵²¹ That is, the Agri-Food Competition Regulation does not affect the prohibition of abuse of dominance under 102 TFEU; this, therefore, applies in full to the agricultural sector.⁵²²

The two main derogations in relation to Article 101(1) TFEU may be called upon when agreements, decisions and practices

- a form an integral part of a national market organisation; or

⁵¹⁴ Agri-Food Competition Regulation, Article 1.

⁵¹⁵ See: SCHWEIZER 2020, Rn. 28.

⁵¹⁶ Case 123/83 – Judgment of the Court of 30 January 1985: *Bureau national interprofessionnel du cognac v Guy Clair*, [15]: „[...] potable spirits are expressly excluded from the category of agricultural products.”

⁵¹⁷ Case 61/80 – Judgment of the Court of 25 March 1981: *Coöperatieve Stremsel- en Kleurselfabriek v Commission of the European Communities*, [20]–[21]: The applicant's fifth submission was that animal rennet for cheese making is agricultural product despite the fact that it is not included in the Annex of agricultural products (then: Annex II, now: Annex I). According to the Court, „in order for the Regulation to be applicable to rennet, that product must therefore itself come under Annex II to the Treaty. It follows that Regulation No 26/62 can have no application in this case and that the applicant's fifth submission must be rejected.”

⁵¹⁸ Case T-61/89 – Judgment of the Court of First Instance (Second Chamber) of 2 July 1992: *Dansk Pelsdyravlereforening v Commission of the European Communities*, [2]: „The scope of Regulation No 26 applying certain rules of competition to production of and trade in agricultural products was limited in Article 1 thereof to the production of and trade in the products listed in Annex II to the Treaty. Consequently, that regulation may not be applied to the production of or trade in products, such as furskins, which do not come under Annex II to the Treaty even if they are ancillary to the production of another product which itself comes under that annex.”

⁵¹⁹ SCHWEIZER 2020, Rn. 28.

⁵²⁰ WHISH 2012, p. 964.

⁵²¹ WHISH 2012, p. 964.

⁵²² HÄRTEL 2018, Rn. 5.

b are necessary for attainment of the objectives set out in Article 39 of the TFEU.⁵²³ Sentence 2 of Article 2(1) also includes an example. The wording ‘in particular’ reflects the indicative/illustrative nature of the provision: *In particular*, Article 101(1) TFEU shall not apply to agreements, decisions and practices of farmers, farmers’ associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products. Nevertheless, there are also negative criteria determined as regards this provision. On the one hand, there is an absolute requirement that under the agreement, decision or practice of farmers, farmers’ associations, or associations of such associations, there shall be no obligation to charge identical prices, and on the other hand, there are two further requirements formulated being in an alternative relation to each other, and being individually in a cumulative relation to the prohibition of charging identical prices. These two requirements are the following: (a) competition shall not be excluded, or (b) the objectives of the Common Agricultural Policy shall not be jeopardised. This means that for an agreement, decision or practice being exempted from Article 101(1) TFEU, the following prohibitions shall be respected cumulatively: (a) the prohibition on charging identical prices, (b) the prohibition on exclusion of competition, and (c) the prohibition on jeopardising of CAP objectives.⁵²⁴ From a reversed point of view, it is sufficient to return to the application of Article 101(1) if any of the three above-mentioned prohibition is violated.

Paragraphs 2 and 3 of Article 2 consist of procedural rules. The European Commission has sole power, subject to review by the General Court and the Court of Justice of the European Union, to determine which agreements, decisions and practices fulfil the substantive conditions. The decision shall be made after consulting the Member States and hearing the undertakings or associations of undertakings concerned, and any other natural or legal person that it considers should be heard. The decision shall be published. Determining so may take place (a) on the own initiative of the Commission; (b) at the request of a competent authority of a Member State; or (c) at the request of an interested undertaking or association of undertakings.⁵²⁵ The publication of the determination shall state the names of the parties and the main content of the decision. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.⁵²⁶ Nevertheless, it is important to note that „as farmers assess the applicability of the

⁵²³ Agri-Food Competition Regulation, Article 2, 1.

⁵²⁴ Agri-Food Competition Regulation, Article 2, 1.

⁵²⁵ Agri-Food Competition Regulation, Article 2, 2.

⁵²⁶ Agri-Food Competition Regulation, Article 2, 3.

derogation to the agreement themselves without informing the Members States or the Commission, the Commission has no data on how often farmers relied on this derogation. In competition investigations, parties rarely referred to [this derogation].”⁵²⁷

The two derogations included in Article 2 of the Agri-Food Competition Regulation have a doubtful relationship. Although the wording shows that they are formulated as alternative conditions (the word ‘or’ implies this finding),⁵²⁸ earlier case law suggests otherwise. In a 1974 Court judgment, the term ‘national market organisation’ was defined. On the basis of Articles 43(3) and 45(1) of the Treaty establishing the European Economic Community, the Court found that the objectives of national market organisations are analogous at national level to those pursued by the common market organisations at Community level. It means that

*„the national organization can thus be defined as a totality of legal devices placing the regulation of the market in the products in question under the control of the public authority, with a view to ensuring, by means of an increase in productivity and of optimum utilization of the factors of production, in particular of manpower, a fair standard of living for producers, the stabilization of markets, the assurance of supplies and reasonable prices to consumers.”*⁵²⁹

By defining national market organisations based on the objectives of the Common Agricultural Policy, thereby drawing analogy between national and common market organisations means that the second condition in Article 2 of the Agri-Food Competition Regulation has been merged into the first condition. That is, based on case law, the first derogation can only apply to an agreement, if it also fulfils the second condition. It is insufficient that the agreement in case is an integral part of a national market organisation, because that agreement shall also be necessary for the attainment of Common Agricultural Policy objectives. It was reiterated later in a Commission Decision which found that the agreements and decisions of various French producers groups in the new potatoes market are exempted because they meet both criteria: not only do they constitute an integral part of a national market organisation but also are necessary

⁵²⁷ European Commission (2018) *Report from the Commission to the European Parliament and the Council – The application of the Union competition rules to the agricultural sector*, Brussels, 26 October 2018, COM(2018) 706 final, 17.

⁵²⁸ See: Those agreements are exempted from the general cartel prohibition which form an integral part of a national market organisation *or* are necessary for attainment of the Common Agricultural Policy objectives.

⁵²⁹ Case 48/74 – Judgment of the Court of 10 December 1974: Charmasson v Minister for Economic Affairs and Finance, [24] and [26].

for the objectives of the Common Agricultural Policy.⁵³⁰ Here a further condition must be mentioned: the first derogation can only be applied, if there is no common market organisation regarding the respective product.⁵³¹ It results that the significance of the derogation provided for national market organisations in Article 2 of the Agri-Food Competition Regulation is limited, given that „the majority of national marketing organisations have ceased to exist”⁵³² thanks to the system of single common market organisation.

The second derogation refers to the possibility for exempting agreements, decisions or concerted practices, if they are necessary for the attainment of Common Agricultural Policy objectives. The most significant clarification of case law regarding this provision is that the respective agreement shall contribute to the achievement of all five CAP objectives.⁵³³ An agreement cannot be exempted from the general prohibition, if it does not satisfy each and every objective listed in Article 39 TFEU.⁵³⁴

The Commission’s careful consideration whether an agreement realises all CAP objectives is clearly shown, for example, in one of its 2003 decisions. The enforcement authority thoroughly screened whether the five goals of the Common Agricultural Policy had all been attained respectively. The Commission found that the agreement in case, which – in the French beef market – intended to fix a minimum price higher than the market price, did not in any way increase agricultural productivity [Article 39(1)(a)]. It was not necessary to stabilise markets [Article 39(1)(c)], given that „[t]he crisis in the beef sector was due primarily to a massive imbalance between supply and demand. Fixing a minimum purchase price does nothing to remedy such a situation. It does not affect the volume of supply, of which there was a large surplus; an increase in minimum prices might even cause demand to fall, thus widening the gap between supply and demand.” Furthermore, taking into account that there is no shortage of supply in the beef market, it was not necessary to assure the availability of supplies [Article 39(1)(d)]. The goal of supplies reaching consumers at reasonable prices was neither realised [Article 39(1)(e)], by finding that „[e]specially in the case of consumption via restaurant and

⁵³⁰ See 88/109/EEC: Commission Decision of 18 December 1987 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.735 — New potatoes) – Official Journal L 059, 04/03/1988, pp. 0025–0031.

⁵³¹ WHISH–BAILEY (2012, pp. 965–966) mentions the *Scottish Salmon Board* case: „[...] as there was a common organisation of the market in fishery products, the Scottish Salmon Board could not rely on the national market organisation defence.” See 92/444/EC: Commission Decision of 30 July 1992 relating to a proceeding under Article 85 of the EEC Treaty (Case No IV/33.494 — Scottish Salmon Board) – Official Journal L 246, 27/08/1992, pp. 0037–0045.

⁵³² WHISH–BAILEY 2012, p. 965.

⁵³³ See Case 71/74 – Judgment of the Court of 15 May 1975: *Frubo v Commission*, [24]–[26]; Case C-399/93 – Judgment of the Court of 12 December 1995: *Oude Luttikhuis and others v Verenigde Coöperatieve Melkindustrie Coberco BA*, [25].

⁵³⁴ WHISH–BAILEY 2012, p. 965.

catering services, which are a major user of cheaper, imported meat, the suspension of imports could only have the effect of increasing prices.” All in all, the Commission found that

„the agreement is not necessary in order to achieve at least four of the five objectives of the Common Agricultural Policy. Even if the view were to be taken that it did indeed fall within the scope of the objective ‘ensuring a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture’, nevertheless, when that objective is weighed against the other four objectives [...], which it would not help to achieve, it has to be concluded that the derogation in Regulation No 26 does not apply here.”

The Commission, for the sake of strengthening its findings, also declared that if the respective agreement would have actually contributed to the attainment of all CAP objectives, the word ‘necessary’ in the provision means that the taken measure shall be proportionate, that is to say, there would be no less restrictive measure to be taken to realise the objectives. This requirement of proportionality was not met.⁵³⁵

Another remark must be noted. The wording of Article 2 of the Agri-Food Competition Regulation is formulated in such a way that it seems that after the first two derogations an example is mentioned by way of illustration. However, case law treats ‘this example’ as the third separate derogation from Article 101(1) TFEU. In *Oude Luttikhuis* the doctrinal elements of this third derogation are greatly summarised:

„The third derogation is subject to three cumulative conditions. For that derogation to be applicable, it must be confirmed, firstly, that the agreements in question concern cooperative associations belonging to a single Member State, secondly that they do not cover prices but concern rather the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of such products, and thirdly that they do not exclude competition or jeopardize the objectives of the Common Agricultural Policy.”⁵³⁶

⁵³⁵ 2003/600/EC: Commission Decision of 2 April 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/C.38.279/F3 – French beef), Official Journal L 209, 19/08/2003, pp. 0012–0041; see, in particular, points (135)–(149) of the decision. See also the rejected appeals before the EU Courts: Case T-217/03 – Judgment of the Court of First Instance (First Chamber) of 13 December 2006: FNCBV and Others v Commission and Case C-101/07 P – Judgment of the Court (Third Chamber) of 18 December 2008: Coop de France bétail and viande v Commission.

⁵³⁶ Case C-399/93 – Judgment of the Court of 12 December 1995: *Oude Luttikhuis and others v Verenigde Coöperatieve Melkindustrie Coberco BA*, [27].

The most recent judgment of the Grand Chamber of the Court of Justice of the European Union has established simplified benchmarks to decide whether competition rules shall apply to the activities of producer organisations and associations of producer organisations. The prohibition in Article 101 TFEU shall apply to agreements, decisions and concerted practices, if

- (1) they are not agreed/made *within* a producer organisation or an association of producer organisations, in other words, if they are not agreed/made between the members of *the same* producer organisation or *the same* association of producer organisations; or
- (2) any of the parties subject thereto is not *legally recognised* by the Member State; or
- (3) they are not *strictly necessary* for the pursuit of at least one objectives assigned to the producer organisation or the association of producer organisations.⁵³⁷

If any of the three criteria is not fulfilled, Article 101 TFEU shall apply to the respective agreement, decision or concerted practices.

These three requirements have been determined regarding the assessment of the following types of conducts: (1) collective fixing of minimum sale prices, (2) concertation on quantities put on the market and (3) exchanges of strategic information. That is, the Court ruled that the collective fixing of minimum sale prices escapes the prohibition in Article 101 TFEU, if it is agreed between the members of a legally recognised producer organisation or a legally recognised association of producer organisations and strictly necessary to reach the objective pursued by the respective PO or APO. The question arises as to what the prohibition on charging identical prices in Article 2 of the Agri-Food Regulation actually means, if a legally recognised PO or APO – to the extent of pursuing one of its objectives which is strictly necessary – can decide to determine a minimum sale price. It possibly means that the respective PO or APO shall ensure for its members to be able to sell their own products themselves below the minimum sale price determined by the PO or APO.⁵³⁸

2.2.2 CMO Regulation

⁵³⁷ Case C-671/15 – Judgment of the Court of 14 November 2017: Président de l’Autorité de la concurrence v Association des producteurs vendeurs d’endives (APVE) and Others, [67].

⁵³⁸ Case C-671/15 – Judgment of the Court of 14 November 2017: Président de l’Autorité de la concurrence v Association des producteurs vendeurs d’endives (APVE) and Others, [66].

The CMO Regulation has a separate part on competition rules.⁵³⁹ Part IV is divided into two chapters: Chapter I is concerned with rules applying to undertakings, while Chapter II contains provisions on state aids.

First and foremost, it is worth mentioning that the provisions of Agri-Food Competition Regulation and the provisions of Chapter I of Part IV of the CMO Regulation are – in most aspects – identical. In its Article 1, the Agri-Food Competition Regulation declares that it does not apply to the products covered by Council Regulation (EC) No 1234/2007. Since references to Regulation (EC) No 1234/2007 shall be construed as references to the CMO Regulation,⁵⁴⁰ the declaration of the Agri-Food Competition Regulation on its material scope still applies and is in force in relation to the CMO Regulation. The *ratione materiae* of Agri-Food Competition does not cover those Annex I products which are covered by the CMO Regulation. However, it does not have too much practical significance, given that both the material scope of Agri-Food Competition Regulation and of CMO Regulation are established on the Annex I to the TFEU. Because most Annex I products are covered by the CMO Regulation, the latter leaves little room to the Agri-Food Competition Regulation to be applied.

The CMO Regulation, contrary to the Agri-Food Competition Regulation, includes definitions on the relevant product and geographic market. Product market means the market comprising all those products which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use.⁵⁴¹ Geographic market means the market comprising the area in which the undertakings concerned are involved in the supply of the relevant products, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas, particularly because the conditions of competition are appreciably different in those areas.⁵⁴² These definitions do not say anything new compared with what can be read in CJEU case law. The definitions are also in line with the Commission Notice on the definition of relevant market for the purposes of Community competition law.⁵⁴³

Another definition of the CMO Regulation may cause a slight contradiction. Although there are no special rules applying to the agricultural and food sector as to Article 102 TFEU, the CMO Regulation provides for a definition of dominant position: a position of economic

⁵³⁹ See Part IV of the CMO Regulation.

⁵⁴⁰ CMO Regulation, Article 230(2).

⁵⁴¹ CMO Regulation, Article 207, (a).

⁵⁴² CMO Regulation, Article 207, (b).

⁵⁴³ Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), II./7–8.

strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, of its suppliers or customers, and ultimately of consumers.⁵⁴⁴ It is unclear why Article 208 of the CMO Regulation repeats word-for-word the case-law definition of the dominant position formulated in the cases *United Brands*⁵⁴⁵ and *Hoffmann-La Roche*⁵⁴⁶. The definition embedded in this provision lacks reason and has no function at all.

Although the core meaning of the exceptions formulated in the Agri-Food Competition Regulation and in the CMO Regulation is the same, there are two small differences between the provisions. Pursuant to Article 2(1) of the Agri-Food Competition Regulation, the prohibition of anti-competitive agreements shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations *belonging to a single Member State*. The CMO Regulation complements this list with producer organisations recognised under Article 152 or Article 161 of the CMO Regulation, or associations of producer organisations recognised under Article 156 of the CMO Regulation; however, as to the associations of farmers' associations it does not mention the requirement 'belonging to a single Member State'. The latter difference may be based on the fact that associations of farmers' associations must be recognised under national law, the rules of which only apply to organisations which belong to the same Member State. The expansion of the list with producer organisations can be perceived as the concretisation of farmers' associations. Every producer organisation is a farmers' association but not every farmers' association is a producer organisation. The dividing line is whether the entity in question is recognised by a Member State in accordance with the EU law. If it is, it is called a producer organisation, if it is not, it is called a farmers' association. It shows that „calling up” the exemption does not necessarily require recognition in legal sense.

Furthermore, by way of derogation from Article 101(1) TFEU, a recognised producer organisation may plan production, optimise the production costs, place on the market and negotiate contracts for the supply of agricultural products, on behalf of its members for all or part of their total production. There are five cumulative requirements to do so.

- (a) One or more of the following activities is/are genuinely exercised jointly: processing; distribution; packaging, labelling or promotion; organising quality control; use of

⁵⁴⁴ CMO Regulation, Article 208.

⁵⁴⁵ Case 27/76 – Judgment of the Court of 14 February 1978: *United Brands Company and United Brands Continental BV v Commission of the European Communities*, [65].

⁵⁴⁶ Case 85/76 – Judgment of the Court of 13 February 1979: *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, [38].

equipment or storage facilities; management of waste directly related to production. These activities contribute to the fulfilment of the CAP objectives.

- (b) The producer organisation concentrates supply and places the products of its members on the market, whether or not there is a transfer of ownership of agricultural products by the producers to the producer organisation.
- (c) It is irrelevant whether or not the price negotiated is the same as regards the aggregate production of some or all of the members.
- (d) The producers concerned are not members of any other producer organisation. This can be ignored in duly justified cases where producer members hold two distinct production units located in different geographical areas.
- (e) The agricultural product is not covered by an obligation to deliver arising from the farmer's membership of a cooperative, which is not itself a member of the producer organisations concerned, in accordance with the conditions set out in the cooperative's statutes or the rules and decisions provided for in or derived from those statutes.⁵⁴⁷

There are further procedural rules in the CMO Regulation which do not appear in the Agri-Food Competition Regulation. The listed entities, which can be subjected to the exception, may request an opinion from the Commission on the compatibility of the respective agreements, decisions and concerted practices with the objectives set out in Article 39 TFEU.⁵⁴⁸ The burden of proof is also established: the burden of proving an infringement of Article 101(1) TFEU shall rest on the party or the authority alleging the infringement; on the contrary, the party claiming the benefit of the exemptions shall bear the burden of proving that the conditions are fulfilled.⁵⁴⁹ As can be seen, the agricultural exception follows the same logic regarding the burden of proof as in the case of the individual exception under Article 101(3) TFEU.

Contrariwise, when speaking of interbranch organisations, in order that they could be exempted, they shall be recognised. Recognition not only has general rules⁵⁵⁰ but also special rules for the milk and milk products sector⁵⁵¹ and for the olive oil and table olives and tobacco sectors.⁵⁵² The exception provided for interbranch organisations is also based on self-assessment. However, an opinion may be requested from the Commission concerning the

⁵⁴⁷ CMO Regulation, Article 152, 1a.

⁵⁴⁸ CMO Regulation, Article 209, 2. The provision also declares that the Commission shall deal with requests for opinions promptly and shall send the applicant its opinion within four months of receipt of a complete request. The Commission may, at its own initiative or at the request of a Member State, change the content of an opinion, in particular if the applicant has provided inaccurate information or misused the opinion.

⁵⁴⁹ CMO Regulation, Article 209, 2.

⁵⁵⁰ CMO Regulation, Article 157–158.

⁵⁵¹ CMO Regulation, Article 163.

⁵⁵² CMO Regulation, Article 162.

compatibility of the agreement, and the Commission is obliged to send the requesting interbranch organisation its opinion within four months of receipt of a complete request. If the Commission finds at any time after issuing an opinion that the conditions to be exempted are no longer met, it shall declare that Article 101(1) TFEU shall apply in the future to the agreement, decision or concerted practice in question and inform the interbranch organisation accordingly. The Commission may change the content of an opinion at its own initiative or at the request of a Member State, in particular if the requesting interbranch organisation has provided inaccurate information or misused the opinion.⁵⁵³ There are five conditions determined which leads to the incompatibility of these agreements with EU law. Three of them are quite similar to the previously mentioned case of exception: the respective agreement, decision or concerted practice shall not create distortions of competition which are not essential to achieving the objectives of the CAP pursued by the activity of the interbranch organisation (similar to the jeopardisation of CAP objectives); they shall not entail price fixing or quota fixing (similar to charging identical prices); they shall not create discrimination or eliminate competition in respect of a substantial proportion of the products in question (similar to the exclusion of competition). Besides these, agreements, decisions and concerted practices shall not lead to the partitioning of markets within the Union in any form and shall not affect the sound operation of the market organisation.⁵⁵⁴

In the CMO Regulation, there are derogations which only apply to a certain subsector of agriculture. These are mostly related to contractual negotiations. Pursuant to Article 149(1), a producer organisation or an association of producer organisations⁵⁵⁵ in the milk and milk products sector – in case it is recognised under Article 161(1) – may negotiate on behalf of its farmer members, in respect of part or all of their joint production, contracts for the delivery of raw milk by a farmer to a processor of raw milk, or to a collector^{556, 557}. However, to do so, there are quantity restrictions determined: (a) the volume of raw milk covered by such negotiations shall not exceed 3,5% of total Union production, (b) the volume of raw milk covered by such negotiations which is produced in any particular Member State does not exceed 33% of the total national production of that Member State, and (c) the volume of raw milk covered by such negotiations which is delivered in any particular Member State does not exceed 33% of the total

⁵⁵³ CMO Regulation, Article 210, 2.

⁵⁵⁴ CMO Regulation, Article 210, 4.

⁵⁵⁵ See CMO Regulation, Article 149, 4.

⁵⁵⁶ A 'collector' is understood as defined by Article 148(1) of the CMO Regulation.

⁵⁵⁷ CMO Regulation, Article 149, 1.

national production of that Member State.^{558,559} There are three further conditions to be fulfilled: (a) the farmers concerned shall not be members of any other producer organisation which also negotiates such contracts on their behalf,⁵⁶⁰ (b) the raw milk shall not be covered by an obligation to deliver arising from the farmer's membership of a cooperative in accordance with the conditions set out in the cooperative's statutes or the rules and decisions provided for in or derived from these statutes, and (c) the producer organisation shall notify the competent authorities of the Member State or Member States in which it operates of the volume of raw milk covered by such negotiations.⁵⁶¹ This possibility of the producer organisations is irrespective of whether there is a transfer of ownership of the raw milk by the farmers to the producer organisation and whether the price negotiated is the same as regards the joint production of some or all of the farmer members.⁵⁶²

It is also worth mentioning that earlier, Articles 169–171 of the CMO Regulation included similar derogations applying to the olive oil, beef and veal, and arable crops sector, but these provisions were repealed with effect of 1 January 2018.^{563,564}

2.2.3 UTP Directive

⁵⁵⁸ CMO Regulation, Article 149, 2., c).

⁵⁵⁹ The threshold of 33% does not apply to cases when the volume of raw milk covered by the negotiations is produced in or delivered in a Member State having a total annual raw milk production of less than 500 000 tonnes. In this case, the volume of raw milk covered by the negotiations shall not exceed 45% of the total national production of that Member State, that is a privileged threshold shall apply. See: CMO Regulation, Article 149, 3.

⁵⁶⁰ However, Member States may derogate from this condition in duly justified cases where farmers hold two distinct production units located in different geographic areas.

⁵⁶¹ CMO Regulation, Article 149, 2., d)-f).

⁵⁶² CMO Regulation, Article 149, 2., a)-b).

⁵⁶³ European Commission (2018) *Report from the Commission to the European Parliament and the Council – The application of the Union competition rules to the agricultural sector*, Brussels, 26 October 2018, COM(2018) 706 final, 25.

⁵⁶⁴ Given that our analysis covers Germany and Hungary but is written in English, I must mention a translation error in connection with the Hungarian version of the CMO Regulation and of the Agri-Food Competition Regulation compared with the German and English versions. In both the English and German versions, Article 209(1) of the CMO Regulation and Article 2(1) of the Agri-Food Competition Regulation use the same terms with regard to the possible subjects of the exemption. In German, they speak about *landwirtschaftlicher Erzeugerbetrieb* and *Vereinigung von landwirtschaftlichen Erzeugerbetrieben*, that is – in English – about farmers and farmers' associations. On the contrary, in the Hungarian version of the CMO Regulation '*mezőgazdasági termelők*' and '*mezőgazdasági termelők társulásai*' are mentioned, while of the Agri-Food Competition Regulation '*mezőgazdasági termelők*' and '*termelői szervezetek*'. The problem is that the terms '*mezőgazdasági termelők társulásai*' and '*termelői szervezetek*' are not the same. The former is the English equivalent of *farmers' association* and the German one of *Vereinigung von landwirtschaftlichen Erzeugerbetrieben*, while the latter one (*termelői szervezetek*) is the English equivalent of *producer organisations* and the German one of *Erzeugerorganisation*. This is by no means irrelevant, given the need to clarify whether the exemption applies to legally recognised producer organisations or to farmers' associations which are not legally recognised. The correct Hungarian translation would be '*mezőgazdasági termelők társulásai*' in the Agri-Food Competition Regulation.

The road to and the policy behind the adoption of the Directive

The UTP Directive was adopted on 17 April 2019 by the European Parliament and the Council after more than ten years of preparatory work.⁵⁶⁵ Before analysing the Directive in detail, presenting the path towards its adoption⁵⁶⁶ is necessary since it gives insights into the agricultural policy objectives behind the legal act. Where appropriate, reference is made to legal literature, but I rely primarily on documents adopted within the framework of the European Union. Both *Ackermann* and *Paredis and Keirsbilck* consider the opinion adopted by the European Social and Economic Committee in 2005 as the first EU document dealing with unfair trading practices.^{567,568} In its first sentence, the opinion mentions that changes over the past 20 years have led to the emergence of supermarkets and hypermarkets, the main drivers of changing consumer demands.⁵⁶⁹ Structural changes in the retail market have led to increasing market concentration: „the market share of the top five food retailers has increased on average by 21.7% reaching an average of 69.2% in the [then-]EU 15.”⁵⁷⁰ One of the most important findings of the opinion is the following:

*„since consumers attach great importance to price and given that consumers’ demand also influences the offer, there is considerable pressure on retailers to lower prices. In their determination to provide low prices to the consumer, the [retail chains] put pressure on suppliers to reduce prices. This is true in the food sector and primarily in markets where the concentration is very high.”*⁵⁷¹

This more than 15-year-old finding implies that retail chains acting as intermediaries in the food chain have to choose whether to benefit their suppliers or consumers. Since there is significant competition for consumers in the retail market, retail chains can only compete with each other by lowering the prices they pay to suppliers, by taking advantage of their relative market power *vis-à-vis* suppliers. The opinion not only declares that „[i]f over a period farmers are subject to

⁵⁶⁵ DASKALOVA 2019, p. 281.

⁵⁶⁶ The antecedents of the UTP Directive’s adoption are analysed in German by ACKERMANN 2019, pp. 192–215. The issue is dealt with in English by PAREDIS-KEIRSBILCK 2020, pp. 7–12.

⁵⁶⁷ ACKERMANN 2019, p. 192; PAREDIS-KEIRSBILCK 2020, p. 9.

⁵⁶⁸ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (2005) *Opinion on the large retail sector – trends and impacts on farmers and consumers* (2005/C 255/08).

⁵⁶⁹ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE 2005, 1.1.

⁵⁷⁰ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE 2005, 5.1.

⁵⁷¹ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE 2005, 7.1.

falling incomes and increasing costs, more farmers will go out of business”⁵⁷², but also concludes that the Member States and EU institutions „must avoid a total liberalisation of the market that would lead to further concentration,”⁵⁷³ which can cause „that in the future food retailing would be in the hands of a very small number of players, which could lead to less consumer choice and higher prices.”⁵⁷⁴

The 2009 EC Communication already distinguished between unfair trading practices as possible outcomes of the bargaining power asymmetries of contracting parties and anti-competitive practices. On the former ones, the Communication notes that

„[c]ontractual imbalances associated with unequal bargaining power have a negative impact on the competitiveness of the food supply chain as smaller but efficient actors may be obliged to operate under reduced profitability, limiting their ability and incentives to invest in improved product quality and innovation of production processes. A better awareness of contractual rights and stronger action against unfair contractual practices could contribute to preventing these drawbacks since actors with limited bargaining power suffer from a lack of information on their rights. Moreover, they may hesitate to contest contract clauses for fear of losing the contract altogether.”⁵⁷⁵

Furthermore, the Commission’s statements on the latter issue suggest that it assesses anti-competitive practices solely in terms of consumer harm. As regards anti-competitive practices, the Commission uses the expression ‘distort[ing] competition *to the detriment of consumers*’.⁵⁷⁶ This would seem to suggest that the 2009 EC Communication views competition law enforcement solely in terms of the objective of consumer welfare taken over from the Chicago school of thought; however, EU competition law is designed to achieve much more than that. *Stylianou* and *Iacovides* have explored in their research at least seven different goals of the Union competition law: efficiency, welfare, freedom/competitors, market structure, fairness, European integration, and competition process, that is, „EU competition law is not monothematic but pursues a multitude of goals.”⁵⁷⁷

⁵⁷² EUROPEAN ECONOMIC AND SOCIAL COMMITTEE 2005, 9.2.

⁵⁷³ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE 2005, 11.2.

⁵⁷⁴ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE 2005, 11.6.

⁵⁷⁵ EUROPEAN COMMISSION (2009) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A better functioning food supply chain in Europe*, COM(2009) 591, 3.1.1.

⁵⁷⁶ EUROPEAN COMMISSION 2009, 3.1.2.

⁵⁷⁷ Konstantinos STYLIANOU–Marios C IACOVIDES (2019) *The Goals of EU Competition Law – A Comprehensive Empirical Investigation* [Online]. Available at: <https://ssrn.com/abstract=3735795>.

Following the Commission Communication, in 2012 the European Parliament gave its resolution on imbalances in the food supply chain.⁵⁷⁸ The EP divided the practices complained of by producers into two groups and provided a non-exhaustive list. On the one hand, there are practices which restrict the producers' access to retailers, on the other hand, there are unfair contractual conditions or unilateral changes to contract terms.⁵⁷⁹ The former arise mainly in the pre-contractual phase, while the latter when the parties are already in a contractual relationship. According to the European Parliament, addressing imbalances in the food supply chain not only requires self-regulatory solutions but also normative regulation in the form of *adjustments to competition law*.⁵⁸⁰

In 2013, the European Commission published its Green Paper on the issue in order to stimulate discussion on different aspects of the problem.⁵⁸¹ The Green Paper not only deals with unfair trading practices in the food supply chain but also in the non-food supply chains in general. It stipulates that only a subset of unfair trading practices falls within the scope of antitrust law,⁵⁸² of which – to a limited extent – abuse of dominance can serve as a legal instrument to handle these practices. Besides the toolbox of antitrust law, the Green Paper also mentions the possible treatment of unfair trading practices within the framework of civil/commercial law and of special legislation.⁵⁸³ Legal instruments related to relative market power, i.e. other abuse-type conducts constitute no part of antitrust law in its conventional sense. At EU level, Article 102 TFEU covers some UTPs, but – because of the limits of EU antitrust law in this regard⁵⁸⁴ – there are other regulatory solutions to handle these practices. For example, the Directive 2005/29/EC can be extended to business-to-business relations; in addition, the Late Payments Directive⁵⁸⁵ and some sector-specific regulations⁵⁸⁶ can be emphasised.⁵⁸⁷

⁵⁷⁸ EUROPEAN PARLIAMENT (2012) *Imbalances in the food supply chain* (2013/C 227 E/03).

⁵⁷⁹ Eight different practices (for example, advance payment for accessing negotiation, listing fees, entry fees, shelf space pricing, etc.) are classified in the first group and twenty-four in the second group (for example, unilateral and retrospective changes to contractual conditions, payment delays, unrealistic delivery terms, unilateral withdrawal of products from store shelves, etc.). See EUROPEAN PARLIAMENT 2012, 10.

⁵⁸⁰ EUROPEAN PARLIAMENT 2012, 20.

⁵⁸¹ EUROPEAN COMMISSION (2013) *Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe*, Brussels, 31 January 2013, COM(2013) 37 final.

⁵⁸² EUROPEAN COMMISSION 2013, 3.1.

⁵⁸³ EUROPEAN COMMISSION 2013, 3.1.

⁵⁸⁴ PAREDIS-KEIRSBILCK 2020, p. 10.

⁵⁸⁵ Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

⁵⁸⁶ The EC mentions Regulation (EU) No 261/2012 as regards contractual relations in the milk and milk-products sector but it is no longer in force.

⁵⁸⁷ EUROPEAN COMMISSION 2013, 3.1.

Among the direct effects of unfair trading practices, the 2014 EC Communication⁵⁸⁸ mentions „undue costs or lower-than-expected revenues for the trading partner in the weaker bargaining position.” In a rather interesting link, the Communication mentions that „unpredictable changes of contract terms may also lead to overproduction and result in unnecessary food waste,” as well as the negative change in the ability or willingness to fund investments on the weaker party’s side may also be a long-term disadvantage.⁵⁸⁹

Furthermore, the Communication formulates the definition of unfair trading practices. These are

*„practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another.”*⁵⁹⁰

This definition has been taken over word-for-word by the final version of the UTP Directive.⁵⁹¹

In its 2016 report, the European Commission was against the harmonisation of unfair trading practices at EU level because of the positive developments in certain parts of the food chain as well as owing to the different regulatory approaches to be needed to handle these practices.⁵⁹² On the contrary, a few months later, the European Parliament saw in unfair trading practices „an obstacle to the development and smooth functioning of the internal market,” and besides the weaker party which may suffer excessive costs or lower-than-expected revenues, „consumers potentially face a loss in product diversity, cultural heritage and retail outlets as a result of UTPs.”⁵⁹³ Nevertheless, there have been strong criticism in the literature about the impact of UTPs and the consequences of their regulation. Although the EU documents do not suggest this, *Schebesta et al.* write that „the empirical basis for the prevalence of UTPs, and the effect of their prohibition is relatively dire; the actual effect and effectiveness of the future UTPD is therefore uncertain.”⁵⁹⁴ The claim with regard to the lack of prevalence of unfair trading practices is contradicted by a finding in a Commission Communication based on

⁵⁸⁸ EUROPEAN COMMISSION (2014) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Tackling unfair trading practices in the business-to-business food supply chain*, Strasbourg, 15 July 2014, COM(2014) 472 final.

⁵⁸⁹ EUROPEAN COMMISSION 2014, 4.

⁵⁹⁰ EUROPEAN COMMISSION 2014, 1.

⁵⁹¹ UTP Directive, Article 1, 1.

⁵⁹² EUROPEAN COMMISSION (2016) *Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain*, Brussels, 29 January 2016, COM(2016) 32 final, 4.

⁵⁹³ EUROPEAN PARLIAMENT 2016, K–M.

⁵⁹⁴ Hanna SCHEBESTA–Tom VERDONK–Kai P PURNHAGEN–Bert KEIRSBILCK (2018) Unfair Trading Practices in the Food Supply Chain: Regulating Right? *European Journal of Risk Regulation*, 9(4), p. 700.

empirical research. An EU-wide survey found that „83% of the respondents asserting that they were subject to UTPs said that UTPs increased their costs and 77% stated that UTPs reduced their revenues.”⁵⁹⁵

After this rather unclear history, and two years after it considered harmonisation at EU level to be unjustified, the European Commission submitted its proposal to the European Parliament and the Council.⁵⁹⁶ The proposal differs from the final version of the 2019/633 Directive on a number of important points. One of the most important differences is the change in the Directive’s scope *ratione personae*:⁵⁹⁷ while the proposal covered only those cases when a small or medium-sized enterprise (hereinafter referred to as ‘SME’) as a supplier bargains with a non-SME buyer,⁵⁹⁸ the adopted version of the Directive establishes turnover thresholds.⁵⁹⁹

As can be seen from the above-mentioned EU documents, the rationale for dealing more than 10 years with unfair trading practices in the agri-food sector lies in the unequal, asymmetrical bargaining power of food supply chain actors. UTPs may occur at every stage of the food chain, but agricultural producers are in the worst situation when it comes to selling their products. Not only the preparatory documents but also the EU legal basis chosen for the adoption of the Directive can lead us to the main policy objective behind the adoption of this legal act. The choice that the Directive was adopted on the basis of Article 43(2) TFEU⁶⁰⁰ is not without concern, however it determines the essence: the UTP Directive was adopted within the framework of developing and implementing the Common Agricultural Policy. The debated legal basis brings to the fore the following issues: (a) the scope *ratione materiae* of the Directive exceeds agricultural products in connection with which „measures under the CAP may principally be taken”, (b) it is unclear that the principle of proportionality and subsidiarity have been regarded, and (c) there is no chance to expand the UTP rules to other sectors in the same Directive.⁶⁰¹ Thus, the impetus behind the adoption of the UTP Directive has been that agricultural policy objectives formulated in Article 39(1) could be better achieved: without strong empirical foundations, at a theoretical level, the UTP Directive may contribute to ensure

⁵⁹⁵ EUROPEAN COMMISSION 2014, 2.

⁵⁹⁶ EUROPEAN COMMISSION (2018) *Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain*, Brussels, 12 April 2018, COM(2018) 173 final.

⁵⁹⁷ DASKALOVA 2019, p. 282.

⁵⁹⁸ Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, Article 1, 2.

⁵⁹⁹ See its detailed analysis later.

⁶⁰⁰ See the Directive (EU) 2019/633: „Having regard to the Treaty on the Functioning of the European Union, and in particular Article 43(2) thereof...”

⁶⁰¹ PAREDIS–KEIRSBILCK 2020, p. 17.

a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture, as well as it may stabilise markets.⁶⁰²

The explanatory memorandum of the proposal emphasises that unfair trading practices may go hand in hand with exclusionary effects when the profits of market participants with weaker bargaining position are put under pressure resulting in a misallocation of resources and causing that otherwise competitive players leave the business.⁶⁰³ This is in strong connection with competition law objectives analysed in Part Three in the aspect whether consumer welfare or total welfare including both of the previous two is an appropriate objective of competition law. Covering and aiming to prevent possible exclusionary effects is a feature of both EU competition law and the UTP Directive.⁶⁰⁴

A significant number of practices regulated in the UTP Directive are exploitative in nature, and preventing exploitative abuses is an inherent⁶⁰⁵ but a debated⁶⁰⁶ area of Article 102 TFEU. A marked difference is that Article 102 TFEU only addresses exploitative abuses connected to pricing (unfair high prices, i.e. excessive pricing)⁶⁰⁷, and conversely, the UTP Directive covers much more forms of exploitation which go beyond pricing practices and are non-pricing in nature. It seems that the exploitative conducts covered by the UTP Directive not falling under the scope of Article 102 TFEU can be perceived as an extension to Article 102 TFEU in the agricultural and food sector.

The normative analysis of the Directive

i. The overall structure

The Directive contains 15 articles, the first three of which are substantive norms; Articles 4 to 15 contain procedural and other provisions. The Directive follows a minimum harmonisation approach,⁶⁰⁸ that is, Member States may adopt stricter rules than the ones included in the Directive. This is in line with Recitals (8) and (9) of Council Regulation (EC)

⁶⁰² TFEU, Article 39, 1. b) and c).

⁶⁰³ EUROPEAN COMMISSION 2018, 1.

⁶⁰⁴ DASKALOVA 2019, p. 281.

⁶⁰⁵ WHISH–BAILEY 2012, p. 202: „It is clear from its very wording that Article 102 is capable of application to exploitative behaviour: Article 102(2)(a) gives as an example of an abuse the imposition of unfair purchase or selling prices or other unfair trading conditions.”

⁶⁰⁶ Michal S. Gal uses the adjectives ‘intriguing’ and ‘controversial’ to describe the situation of exploitative abuses, in particular, of excessive pricing in EU competition law. See Michal S. GAL (2013) *Abuse of dominance – exploitative abuses*. In: IOANNIS LIANOS–DAMIEN GERADIN (eds.) *Handbook on European Competition Law – Substantive Aspects*. Cheltenham: Edward Elgar Publishing, pp. 385 and 422.

⁶⁰⁷ GAL 2013, p. 385.

⁶⁰⁸ UTP Directive, Recital (1), (39) and (44).

No 1/2003 which allow for Member States to adopt stricter rules than Article 102 TFEU and to prohibit other unfair trading practices, be them unilateral or contractual.⁶⁰⁹

ii. The definition of unfair trading practices

Article 1 of the UTP Directive formulates the definition of unfair trading practices, which has already appeared during the process of preparatory works. The definition has three main elements. It refers to practices which

- a grossly deviate from good commercial conduct,
- b are contrary to good faith and fair dealing, and
- c unilaterally imposed by one trading partner on another.⁶¹⁰

These are not alternative building blocks but ones that shall be met simultaneously in order to deem a trading practice unfair. Council Regulation (EC) No 1/2003's Recital (9) already defined the notion of unfair trading practice.^{611,612} The quasi-definition of unfair trading practices in the Council Regulation (EC) No 1/2003 is as follows:

„Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.”⁶¹³

⁶⁰⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Recitals (8)-(9).

⁶¹⁰ UTP Directive, Article 1, 1.

⁶¹¹ ACKERMANN 2020, p. 216.

⁶¹² Here it is essential to mention some translation problems. The German and English version of the Council Regulation (EC) No 1/2003's Recital (9) and of the UTP Directive are coherent in that both languages use the same term in both legal acts. In German the term *unlautere Handelspraktiken*, while in English the term *unfair trading practices* is used. On the contrary, the Hungarian versions of the respective acts are not uniform: the Council Regulation's Recital (9) operates with the term *tisztességtelen kereskedelmi gyakorlat*, while the UTP Directive with the term *tisztességtelen piaci gyakorlat*. As mentioned earlier, in recent times, *tisztességtelen kereskedelmi gyakorlat* is a notion used in Hungary with regard to business-to-consumer relations. In contrast, *tisztességtelen piaci gyakorlat* refers to business-to-business relations. However, Recital (9) of the 2003 Council Regulation addresses B2B relationships, since the last sentence of Recital (9) mentions 'trading partners'. Nevertheless, the Hungarian version uses the term *tisztességtelen kereskedelmi gyakorlat* instead of *tisztességtelen piaci gyakorlat*. In light of the fact that Directive 2005/29/EC on unfair commercial practices in B2C relationships is translated into Hungarian as '*tisztességtelen kereskedelmi gyakorlatok*', the boundaries are blurred concerning the Hungarian notions because the legal instrument of unfair trading practice is translated in two different ways: as either *tisztességtelen kereskedelmi gyakorlat* or *tisztességtelen piaci gyakorlat*.

⁶¹³ Council Regulation (EC) No 1/2003, Recital (9).

These provisions correspond to the definition of unfair trading practices formulated in the UTP Directive. Although the first sentence of the cited preamble refers to the possibility of the Member States adopting laws on unfair trading practices, the EU itself with the UTP Directive – almost two decades after the adoption of Council Regulation (EC) No 1/2003 – adopted a legal act on UTPs. The act pursues specific objectives, namely that of the Common Agricultural Policy, and it does not require negative effects on competition. The definition of unfair trading practice in the UTP Directive reflects this approach, as the wording is rather vague with the use of such expressions as ‘deviation from good commercial conduct’, ‘good faith’, and ‘fair dealing’. It does not say anything about actual or presumed effects on competition. The possible effects of unfair trading practices on competition have rather been indirect considerations during preparatory works, the reason for which is that our understanding of the impact of unfair trading practices on both farmers and consumers is limited.⁶¹⁴ Nevertheless, one of the communications of the European Commission declares that unfair trading practices „may affect the SME’s capacity to survive in the market, undertake new financial investments in products and technology, and develop their cross-border activities in the Single Market,”⁶¹⁵ which suggests that unfair trading practices adversely affect innovation.⁶¹⁶ One can see that rather social objectives and considerations connected to agriculture dominate regarding the Directive and the run-up thereto instead of traditional EU competition law objectives. The definition as regards the finding of the existence of an unfair trading practice requires neither competition prevention, restriction and distortion, nor affecting the trade between Member States as in Articles 101 and 102 TFEU, which are necessary conditions to be fulfilled by anti-competitive agreements and abuse of dominance.

Of the three elements of the definition, only the third one is evident. The requirement ‘unilateral imposition by a trading partner on another’ is obviously identical to the characteristic of abuse of dominance, and it deserves no further explanation. On the contrary, the features of ‘grossly deviating from good commercial conduct’ and ‘contrary to good faith and fair dealing’ raise a number of questions that cannot be answered satisfactorily. What does the Directive

⁶¹⁴ Jan FALKOWSKI (2017) *The economic aspects of unfair trading practices: measurement and indicators*. In: Federica Di MARCANTONIO–Pavel CIAIAN (eds.) (2017) *Unfair trading practices in the food supply chain – A literature review on methodologies, impacts and regulatory aspects*. Luxembourg: Publications Office of the European Union, p. 20.

⁶¹⁵ EUROPEAN COMMISSION 2014, p. 3.

⁶¹⁶ For the extremely complex relationship between innovation and competition, see Øystein MOEN–Tord TVEDTEN–Andreas WOLD (2018) Exploring the relationship between competition and innovation in Norwegian SMEs, *Cogent Business & Management*, 5(1), Article: 1564167.

mean by the expressions ‘gross deviation’, ‘good commercial conduct’, ‘good faith’, and ‘fair dealing’? Presumably, the Directive was intended to provide an avenue for Member States to extend regulation to further practices not covered by the Directive, if they wished to provide more extensive protection for the vulnerable actors in the food supply chain. However, marking the route for a broader regulation in the Member States through this definition is not too successful owing to the vagueness of the definition.

iii. The scope of the Directive

First, let us look at the personal scope of the Directive. As already mentioned above, it was envisaged during the preparation of the Directive that only small and medium-sized enterprises would be protected. The final text of the Directive changed this and the scope of protection is linked to the level of annual turnover of the given supplier and buyer in a tiered way. There are turnover thresholds determined to compare the annual turnover of the supplier and of the buyer as to whether the existence of an unequal bargaining power can be found.^{617,618} This assessment method is not free of contradictions because of its single-factor nature. The simplified assessment makes the regulation predictable⁶¹⁹ but raises serious concerns. For example: what happens if a supplier which has an annual turnover of EUR 1.999.999 bargains with a buyer which has an annual turnover of EUR 2.000.001?⁶²⁰ Although this is an extreme example, at a theoretical level it may happen. The turnover threshold in itself may be an appropriate proxy for assessing bargaining power, but the characteristics of any product and geographical market in question may influence not only the (absolute) market power but also the relative market power of market actors bargaining with each other. The fact that the UTP Directive is intended to regulate the market power of two market players vis-à-vis each other

⁶¹⁷ See UTP Directive, Article 1, 2.: This Directive applies to certain unfair trading practices which occur in relation to sales of agricultural and food products by:

(a) suppliers which have an annual turnover not exceeding EUR 2 000 000 to buyers which have an annual turnover of more than EUR 2 000 000;

(b) suppliers which have an annual turnover of more than EUR 2 000 000 and not exceeding EUR 10 000 000 to buyers which have an annual turnover of more than EUR 10 000 000;

(c) suppliers which have an annual turnover of more than EUR 10 000 000 and not exceeding EUR 50 000 000 to buyers which have an annual turnover of more than EUR 50 000 000;

(d) suppliers which have an annual turnover of more than EUR 50 000 000 and not exceeding EUR 150 000 000 to buyers which have an annual turnover of more than EUR 150 000 000;

(e) suppliers which have an annual turnover of more than EUR 150 000 000 and not exceeding EUR 350 000 000 to buyers which have an annual turnover of more than EUR 350 000 000.

⁶¹⁸ See also DASKALOVA 2019, p. 282.

⁶¹⁹ Anna PIŠCZ (2020) *EU Directive on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain: Dipping a Toe in the Regulatory Waters?* In: Zlatan MEŠKIĆ–Ivana KUNDA–Dušan V. POPOVIĆ–Enis OMEROVIĆ (eds.) *Balkan Yearbook of European and International Law 2019*, p. 117.

⁶²⁰ See this argument and a similar example: PAREDIS–KEIRSBILCK 2020, p. 33.

does not mean that the general characteristics of the market in question and the position and role of the market players in the respective market do not affect their market power vis-à-vis each other.

Suppliers which have an annual turnover of more than EUR 350.000.000 are not protected against UTPs. However, it is worth recalling, for example, that Coca-Cola has revenues in excess of several billion euros, not only on the global market but also in Europe, and yet there are examples (albeit only in the US) of a retail chain being able to put pressure on the world's biggest beverage company. „Wal-Mart decided that it did not approve of the artificial sweetener Coca-Cola planned to use in a new line of diet colas. In a response that would have been unthinkable just a few years ago, Coca-Cola yielded to the will of an outside firm and designed a second product to meet Wal-Mart's decree.”⁶²¹

The regulation is asymmetric in terms of the direction of protection, and buyers are not protected against suppliers if the latter have superior bargaining power over the former. As with the setting of turnover thresholds, this could also raise concerns. According to *Piszc*, there is no justification for not providing protection for buyers.⁶²²

Another important provision to be emphasised is that the UTP Directive also applies in relation to sales of agricultural and food products by suppliers which have an annual turnover not exceeding EUR 350 000 000 to all buyers which are public authorities,⁶²³ therefore public authorities have to respect the UTP Directive in all cases when they bargain with a supplier of agricultural and/or food products whose turnover does not exceed 350 million euros. The Directive explicitly declares that it does not apply to agreements between suppliers and consumers.⁶²⁴ Buying alliances are covered by the Directive,⁶²⁵ since the legal act means by the term ‘buyer’ also the groups of natural or legal persons who buy agricultural and/or food products.⁶²⁶

In order to apply the Directive, it is sufficient that only one of the parties be established in any of the Member States of the European Union.⁶²⁷ It is quite questionable how a supplier outside the EU will be able to bring a case against an EU-based buyer, seeing that the Member States may establish their own framework for the Directive's enforcement.

⁶²¹ HAUTER 2012, [e-book].

⁶²² PI SZCZ 2020, p. 115.

⁶²³ UTP Directive, Article 1, 2.

⁶²⁴ UTP Directive, Article 1, 2.

⁶²⁵ DASKALOVA 2019, pp. 282–283.

⁶²⁶ UTP Directive, Article 2, 2.

⁶²⁷ UTP Directive, Article 2, 2.

It is also of great importance that not only primary producers are protected but also the intermediaries who function as supplier from the viewpoint of buyers. Thus, for example, food processors also fall under the scope *ratione personae*. It may be justified with the prevention of the cascading effect⁶²⁸ to take place, that is to say, covering the whole food supply chain may contribute to that a food processor does not pass on possible negative effects to a primary producer, when a buyer conducts an unfair trading practice against a processor.

If one turns to the material scope of the Directive, further concerns may be raised. The legal act protects the suppliers of *agricultural and food products*. Article 2 defines what the UTP Directive means by agricultural and food products: products listed in Annex I to the TFEU as well as products not listed in that Annex, but processed for use as food using products listed in that Annex.⁶²⁹ As a possible risk of excluding non-food products from the material scope of the Directive, the issue of discriminatory treatment of non-food suppliers may be raised, given that the European Commission also acknowledged the imposition of UTPs on the suppliers of other products. Furthermore, the regulatory approach of exclusively dealing with unfair trading practices in the food sector may cause fragmentation in the legal system of Member States.⁶³⁰ Nevertheless, the minimum harmonisation nature of the UTP Directive enables that Member States adopt non-sectoral prohibitions, thus broadening the circle of protected suppliers.⁶³¹

iv. The listed unfair trading practices

The unfair trading practices included in the Directive are divided into two groups: there is a black list which consists of the practices prohibited *per se*,⁶³² and there is a grey list of those practices which are prohibited unless they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer^{633, 634}. Therefore, the former ones are prohibited, while the latter ones are conditionally permitted practices.⁶³⁵

⁶²⁸ The term ‘cascading effect’ is not a legal term but comes from the field of computer science. „A cascading effect is an unforeseen chain of events that occurs when an event in a system has a negative impact on other, related systems.” See Lucie LANGER–Markus KAMMERSTETTER (2015) *The Evolution of the Smart Grid Threat Landscape and Cross-Domain Risk Assessment*. In: Florian SKOPIK–Paul SMITH (eds.) *Smart Grid Security – Innovative Solutions for a Modernized Grid*. Rockland, Massachusetts: Syngress, pp. 49–77.

⁶²⁹ UTP Directive, Article 2, 1.

⁶³⁰ PAREDIS–KEIRSBILCK 2020, p. 29.

⁶³¹ PIŚCZ 2020, p. 118.

⁶³² UTP Directive, Article 3, 1.

⁶³³ UTP Directive, Article 3, 2.

⁶³⁴ See DASKALOVA 2019, p. 283; PIŚCZ 2020, p p. 119–120.

⁶³⁵ Sofie DE POURCQ–Evelyn TERRY (2020) *Prohibited and Conditionally Permitted Unfair Trading Practices*. In: Bert KEIRSBILCK–Evelyn TERRY (eds.) *Unfair Trading Practices in the Food Supply Chain – Implications of Directive (EU) 2019/633*. Cambridge–Antwerp–Chicago: Intersentia, pp. 37–60.

The question arises as to why exactly these trading practices were regulated in the first place. The Proposal can provide us with a possible answer.

„[P]ractices that occur after the transaction has started without being agreed in advance in clear and unambiguous terms [are] unlikely to generate efficiencies for the parties. Therefore [the Directive] accommodates contractual arrangements between parties unless they cannot reasonably be seen as creating efficiencies, for instance if they give vague and unspecified powers to the stronger party to unilaterally decide on such practices at a point in time after the transaction has started (unpredictability) or because some practices are by their nature unfair.”⁶³⁶

As can be seen, the Proposal speaks about efficiencies, in the cited part in particular about efficiencies for the parties. Besides, the Proposal also mentions the efficiency of the food supply chain.⁶³⁷ These references to efficiency may be considered as infiltrations to the discourse from general EU competition law, given that with the appearance of the more economic approach, most competition lawyers and economists see enhancing economic efficiency as the utmost objective of competition law. A problem, however, emerges in connection with the Proposal's and the UTP Directive's references to efficiency: there is no clear-cut and concise content in economics literature as to what we (should) understand by the term 'efficiency'.⁶³⁸ Actually, these references to efficiency may be underpinned by the declaration of the Proposal that the UTP Directive complements, *inter alia*, common competition rules of the EU,⁶³⁹ thus – to a certain extent – both the adoption of the Directive and EU competition law are motivated by enhancing the efficiency of internal market functioning. Contrary to the horizontal rules of EU competition law, the efficiency-enhancing nature of the Directive is limited to the food supply chain. Nevertheless, the question arises as to how the increase in efficiency can be measured in this context.

Let us turn to the black-list conducts. The first one⁶⁴⁰ addresses late payment with regard to agricultural and food products. Given that EU law already includes another directive

⁶³⁶ EUROPEAN COMMISSION 2018, p. 9.

⁶³⁷ EUROPEAN COMMISSION 2018, p. 1 and 13.

⁶³⁸ Damien GERADIN (2006) *Efficiency claims in EC competition law and sector-specific regulation*. In: Hanns ULLRICH (ed.) *The Evolution of European Competition Law – Whose Regulation, Which Competition?* Cheltenham: Edward Elgar Publishing, p. 313.

⁶³⁹ EUROPEAN COMMISSION 2018, p. 28.

⁶⁴⁰ UTP Directive, Article 3, 1, a).

(hereinafter referred to as ‘Late Payment Directive’)⁶⁴¹ concerning this type of unfair practice, one has to define the relationship between this provision of the UTP Directive and the Late Payment Directive. Although the Late Payment Directive is in force from 2011, it has not reached significant results owing to enforcement difficulties. Although market participants are aware of the provisions of the Late Payment Directive, the fear factor is a serious problem which is the main reason of under-enforcement.⁶⁴² As *Daskalova* puts it, the provision on late payment of the UTP Directive is not too revolutionary.⁶⁴³ The relationship between the two legal acts is characterised by the principle of *lex specialis derogat legi generali*: the scope *ratione materiae* of the UTP Directive’s respective provision is limited to sales with regard to agricultural and food products, while the Late Payment Directive has general scope. The prohibition on late payments of the UTP Directive shall be without prejudice to the consequences of late payments and remedies as laid down in the Late Payment Directive, which shall apply, by way of derogation from the payment periods set out in that Directive, on the basis of the payment periods set out in this Directive.⁶⁴⁴ Concerning the core concept of this provision of the UTP Directive, one has to distinguish perishable products from non-perishable ones. The payment term for perishable products is 30 days, that is to say, it is the half of the payment term for non-perishable ones which is 60 days. In comparison, the Late Payment Directive considers 30 calendar days as a starting point for the maximum payment term but also declares that Member States shall ensure that the period for payment fixed in the contract does not exceed 60 calendar days, unless otherwise expressly agreed in the contract and provided it is not grossly unfair to the creditor.⁶⁴⁵ It means that the payment term with regard to the sales of perishable agricultural and food products is halved as compared with the Late Payment Directive’s default payment term. At the same time, the maximum payment term for non-perishable products did not change as a consequence of the UTP Directive, but there is a significant difference. The 60 days of the UTP Directive is non-negotiable in nature, while the Late Payment Directive provides an opportunity to lengthen this 60-day period if this is agreed expressly in the agreement and it is not grossly unfair to the creditor.⁶⁴⁶ The starting point for the payment term in the UTP Directive

⁶⁴¹ See Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

⁶⁴² EUROPEAN COMMISSION (2015) *Ex-Post Evaluation of Late Payment Directive*. Luxembourg: Publications Office of the European Union, ENTR/172/PP/2012/FC – LOT 4, p. 8 and 68: „The main reason for failing to exercise their rights under the Directive is the fear, among creditor firms, of damaging good business relationships. Lack of efficient remedy procedures is another barrier preventing companies from exercising their rights to compensation and interest.”

⁶⁴³ DASKALOVA 2019, p. 288.

⁶⁴⁴ UTP Directive, Article 3, 1.

⁶⁴⁵ Late Payment Directive, Article 3, 5.

⁶⁴⁶ DE POURCQ–TERRYIN 2020, p. 43.

depends on whether the delivery of products takes place on a regular basis⁶⁴⁷ or not⁶⁴⁸.⁶⁴⁹ The prohibition of late payments do not influence the applicability of value-sharing clauses.⁶⁵⁰ Since 2018, not only the sugar sector⁶⁵¹ but also all other agricultural sectors have the possibility to apply these clauses as provided for in Article 172 of the CMO Regulation.^{652,653} Article 3 determines exemptions when the provision of the prohibition on late payment shall not apply. There are three groups of transactions exempted. The first exemption refers to those payments which take place in the framework of school fruit and vegetables schemes⁶⁵⁴.⁶⁵⁵ The aim of the introduction of this exemption is to „safeguard the smooth functioning of the school scheme.”⁶⁵⁶ The second exemption refers to those buyers which are public entities providing healthcare. Nevertheless, these privileged entities shall continue to meet the requirements of the Late Payment Directive, that is, they are covered by a maximum of 60-day payment period.⁶⁵⁷ The third exemption covers supply agreements between suppliers of grapes or must for wine production and their direct buyers, provided that these agreements are or become multiannual, as well as the specific terms of payment are placed in standard contracts which have been made binding and renewed time to time by the respective Member State. This provision was

⁶⁴⁷ See UTP Directive, Article 3, 1., a), i):

„[...] for perishable agricultural and food products, later than 30 days after the end of an agreed delivery period in which deliveries have been made or later than 30 days after the date on which the amount payable for that delivery period is set, whichever of those two dates is the later;

for other agricultural and food products, later than 60 days after the end of an agreed delivery period in which deliveries have been made or later than 60 days after the date on which the amount payable for that delivery period is set, whichever of those two dates is the later [...].”

⁶⁴⁸ See UTP Directive, Article 3, 1., a), ii):

„[...] for perishable agricultural and food products, later than 30 days after the date of delivery or later than 30 days after the date on which the amount payable is set, whichever of those two dates is the later;

for other agricultural and food products, later than 60 days after the date of delivery or later than 60 days after the date on which the amount payable is set, whichever of those two dates is the later [...].”

⁶⁴⁹ DE POURCQ–TERRYN 2020, p. 42.

⁶⁵⁰ UTP Directive, Article 3, 1.

⁶⁵¹ Commission Delegated Regulation (EU) 2016/1166 of 17 May 2016 amending Annex X to Regulation (EU) No 1308/2013 of the European Parliament and of the Council as regards purchase terms for beet in the sugar sector as from 1 October 2017, Article 1.

⁶⁵² CMO Regulation, Article 172a is inserted by Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017 amending Regulations (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), (EU) No 1306/2013 on the financing, management and monitoring of the Common Agricultural Policy, (EU) No 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the Common Agricultural Policy, (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products and (EU) No 652/2014 laying down provisions for the management of expenditure relating to the food chain, animal health and animal welfare, and relating to plant health and plant reproductive material, Article 4, 17.

⁶⁵³ See also Jay MODRALL (2017) EU competition policy in the agriculture sector, *Cultivate – Food and agribusiness newsletter*, 2017/14, p. 18; DE POURCQ–TERRYN 2020, pp. 44–45.

⁶⁵⁴ Article 23 of the CMO Regulation contains the provisions on the aid for the supply of fruit and vegetables, processed fruit and vegetables and banana products to children.

⁶⁵⁵ UTP Directive, Article 3.

⁶⁵⁶ UTP Directive, Recital (18).

⁶⁵⁷ Late Payment Directive, Article 4, 4., b). See also DE POURCQ–TERRYN 2020, p. 45.

introduced because of the special characteristics of grape harvesting and wine markets, taking into account that „grapes are harvested only during a very short period but used to produce wine that may be sold several years later.”⁶⁵⁸

The second black-list conduct is short notice order cancellation.⁶⁵⁹ The prohibition does not mention and does not cover agricultural and food products which are not perishable, so the scope of this provision is even narrower than that of the UTP Directive in general. It is irrebuttably presumed that an order cancellation less than 30 days before the delivery is at short notice. A further condition shall be fulfilled: the supplier cannot reasonably be expected to find an alternative means of commercialising or using those products. Member States are also authorised to set periods shorter than 30 days for specific sectors in duly justified cases. The question emerges as to whether this provision on shorter periods means to provide protection to the most perishable agricultural and food products and this can be considered a duly justified case. I have to mention another confusion. The relationship between the provision on short notice order cancellations and the first grey-list conduct raises practical complications. The latter enables contracting parties to agree (in clear and unambiguous terms) that the buyer may return unsold agricultural and food products to the supplier without paying for those unsold products or without paying for the disposal of those products, or both. Given that this grey-list conduct does not exclude perishable agricultural and food products, a buyer may be better off if it agrees preliminarily with the supplier on the possibility of returning the products. This practical incoherency may bring about that because of the *per se* prohibition of short notice order cancellations, buyers will rather seize the opportunity to return the products to the respective supplier.⁶⁶⁰ Anyways, in neither case did they have to pay, but cancelling the order at short notice may result in more serious consequences on the buyer's side. The Proposal sees short notice order cancellations as expressions of disproportionate allocation of risk in favour of the buyer and as being manifestly unfair.⁶⁶¹

The third black-list conduct refers to the prohibition of when the buyer unilaterally changes the terms of a supply agreement for agricultural and food products that concern the frequency, method, place, timing or volume of the supply or delivery of the agricultural and food products, the quality standards, the terms of payment or the prices, or as regards the

⁶⁵⁸ DE POURCQ–TERRYN 2020, p. 45.

⁶⁵⁹ UTP Directive, Article 3, 1., b).

⁶⁶⁰ DASKALOVA 2019, p. 289.

⁶⁶¹ EUROPEAN COMMISSION 2018, p. 13.

provision of services.⁶⁶² These are what Daskalova calls the core terms of the contract.⁶⁶³ The literature is divided as to whether the provision applies only to retroactive changes⁶⁶⁴ or even to non-retroactive changes⁶⁶⁵. Although it seems like a lax and broad provision that provides full protection for suppliers, Recital (21) weakens this protection by declaring that the provision does not apply in situations when there is an agreement between a supplier and a buyer that specifically stipulates that the buyer can specify a concrete element of the transaction at a later stage in respect of future orders.⁶⁶⁶ The laxity of this provision, however, lies in the fact that it does not require the existence of market power of the buyer.⁶⁶⁷ Nevertheless, this can be traced back to the general difference between the assessment method of EU competition law and of the Directive.

The fourth black-list conduct, which prohibits that buyers require payments from suppliers that are not related to the sale of the agricultural and food products of the respective supplier,⁶⁶⁸ is broadly formulated, open to interpretation and, thus, may cause problems.⁶⁶⁹ The broad scope of this provision is – to a certain extent – narrowed by the payment-related conducts of the grey list. One can conclude from the grey list that the UTP Directive accepts those payments from the supplier to the buyer which are in connection with the advertising or marketing of products as well as which are charged as a condition for stocking, displaying or listing its agricultural and food products, or of making such products available on the market, or for staff for fitting-out premises used for the sale of the supplier's products. The necessary requirement to be fulfilled by these payment-related grey-list conducts is that they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer. Given that there are no mentioned example in the Directive, the question arises „as to where the grey zone ends and where the ‘prohibition zone’ begins. Assuming that the drafters did not aim to create contradictions, one may understand that any practice listed under Article 3(2) falls outside the scope of Article 3(1)(d).”⁶⁷⁰ This provision had not been included in the Proposal, therefore it may give the impression that it was incorporated as an auxiliary (and lax) provision to cover those payment-

⁶⁶² UTP Directive, Article 3, 1., c).

⁶⁶³ DASKALOVA 2019, p. 289.

⁶⁶⁴ DASKALOVA 2019, p. 290; ACKERMANN 2020, p. 285.

⁶⁶⁵ DE POURCQ–TERRYN 2020, p. 47.

⁶⁶⁶ UTP Directive, Recital (21).

⁶⁶⁷ DASKALOVA 2019, p. 290. See also her reference to Case T-83/91 – Judgment of the Court of First Instance (Second Chamber) of 6 October 1994: Tetra Pak International SA v Commission of the European Communities.

⁶⁶⁸ UTP Directive, Article 3, 1., d).

⁶⁶⁹ DE POURCQ–TERRYN 2020, p. 50.

⁶⁷⁰ DASKALOVA 2019, p. 291.

related practices which are not prohibited by other provisions, nevertheless, it makes the systematic interpretation more difficult. However, the European Parliament mentioned the charges for fictitious services as one form of the unfair trading practices,⁶⁷¹ and the European Commission also identified as a key category of UTPs when one party asks the other party for advantages or benefits of any kind without performing a service related to the advantage or benefit asked.⁶⁷² From a conventional competition law perspective, *Daskalova* writes that both national and EU competition laws cover those conducts which relate to unrelated payments. From the perspective of EU, not only Article 102 but also Article 101 aims to handle certain forms of these practices which may have either exclusionary or exploitative effect, or both. As can be seen from *Daskalova*'s analysis, unrelated payments are typically, but not exclusively, charged by (food) retail chains.⁶⁷³ One of the most significant cases will be presented later with regard to the the national level of Germany.⁶⁷⁴

The fifth black-list conduct imposes a ban on the conduct when the buyer requires the supplier to pay for the deterioration or loss, or both, of agricultural and food products that occurs on the buyer's premises or after ownership has been transferred to the buyer, where such deterioration or loss is not caused by the negligence or fault of the supplier.⁶⁷⁵ This phenomenon is called 'shrinkage': „theft by consumers or by employees of the retailer, loss and misplacement, consumers tampering with the product or workers damaging the goods in the process of handling.”⁶⁷⁶ Although interpretation concerns may arise when trying to determine whether the deterioration or loss is caused by the negligence or fault of the supplier,⁶⁷⁷ this narrowing aims to balance the risks which have to bear by the supplier and which by the buyer.⁶⁷⁸ Charging suppliers with these costs is exploitative in nature due to the lack of objective commercial justification,⁶⁷⁹ and, if the general conditions are met, this conduct can fall under the scope of abuse of dominance.

The sixth black-list conduct refers to the situation when the buyer refuses to confirm in writing the terms of a supply agreement between the buyer and the supplier for which the supplier has asked for written confirmation; this shall not apply where the supply agreement

⁶⁷¹ EUROPEAN PARLIAMENT 2016, F.

⁶⁷² EUROPEAN COMMISSION 2016, p. 5.

⁶⁷³ DASKALOVA 2019, pp. 291–292.

⁶⁷⁴ See the Decision of 3 July 2014 of the *Bundeskartellamt* in the case no. B2-58/09 against EDEKA Zentrale AG & Co. KG.

⁶⁷⁵ UTP Directive, Article 3, 1., e).

⁶⁷⁶ DASKALOVA 2019, p. 293.

⁶⁷⁷ DE POURCQ–TERRY 2020, p. 50.

⁶⁷⁸ DASKALOVA 2019, p. 293.

⁶⁷⁹ DASKALOVA 2019, p. 293.

concerns products to be delivered by a member of a producer organisation, including a cooperative, to the producer organisation of which the supplier is a member, if the statutes of that producer organisation or the rules and decisions provided for in, or derived from, those statutes contain provisions having similar effects to the terms of the supply agreement.⁶⁸⁰ Written contracts contribute to the higher level of legal certainty, not only in general from the viewpoint of law enforcement but also between contracting parties. It is in suppliers' interest to regulate their relationship with their buyers on the basis of predictable, clear and reliable contract provisions. Encouraging agricultural producers to conclude written contracts first appeared in the milk sector in the first years of 2010's. The previous and first Single Common Market Organisation,⁶⁸¹ which is no longer in force, was amended by Regulation (EU) No 261/2012.⁶⁸² The High Level Group on Milk, which was set up in October 2009, *inter alia*, recommended to the European Commission to enhance the use of formal written contracts concluded in advance.⁶⁸³ Moreover, the amending Regulation (EU) No 261/2012 provides useful information on the general condition of the milk sector. „The use of formalised written contracts concluded in advance of delivery containing basic elements is not widespread. However, such contracts may help to reinforce the responsibility of operators in the dairy chain and increase awareness of the need to better take into account the signals of the market, to improve price transmission and to adapt supply to demand, as well as to help to avoid certain unfair commercial practices.”⁶⁸⁴ The Regulation (EU) No 1308/2013, the current common market organisation in force consists of several provisions in connection with the obligation to conclude written contracts. In the milk and milk products sector each Member State may decide whether every delivery of raw milk in its territory by a farmer to a processor of raw milk must be covered by a written contract between the parties and/or may decide that first purchasers must make a written offer for a contract for the delivery of raw milk by the farmers.⁶⁸⁵ It can be seen from the provision's wording that a Member State can also decide not to make use of this possibility, but in this case a producer, a producer organisation, or an association of producer organisations may require that any delivery in raw milk to a processor of raw milk be the subject of a written contract between the parties and/or be the subject of a written offer for a contract

⁶⁸⁰ UTP Directive, Article 3, 1., f).

⁶⁸¹ Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products.

⁶⁸² Regulation (EU) No 261/2012 of the European Parliament and of the Council of 14 March 2012 amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector.

⁶⁸³ See: https://ec.europa.eu/commission/presscorner/detail/en/IP_10_742 (Accessed: 31 August 2021).

⁶⁸⁴ Regulation (EU) No 261/2012, Recital (8).

⁶⁸⁵ CMO Regulation, Article 148, 1.

from the first purchasers.⁶⁸⁶ If a Member State decides to require written contracts and/or written offers for contracts, as well as if a producer, a producer organisation, or an association of producer organisations does so, these contracts have to fulfil several conditions.⁶⁸⁷ Furthermore, if a Member State decides that deliveries of raw milk by a farmer to a processor of raw milk must be covered by a written contract between the parties, it shall also decide which stage or stages of the delivery shall be covered by such a contract if the delivery of raw milk is made through one or more collectors⁶⁸⁸.⁶⁸⁹ If a producer, a producer organisation, or an association of producer organisations requires written contracts and/or written offers for contracts, all elements of the respective contracts for the delivery of raw milk concluded by farmers, collectors or processors of raw milk, including price, volume, duration, payment periods and procedures, collecting and delivering and force majeure provisions, shall be freely negotiated between the parties.⁶⁹⁰ Notwithstanding this provision, and as a derogation to the principle of contractual freedom, if a Member State decides to make a written contract for the delivery of raw milk compulsory, it may establish (i) an obligation for the parties to agree on a relationship between a given quantity delivered and the price payable for that delivery, and (ii) a minimum duration,⁶⁹¹ applicable only to written contracts between a farmer and the first purchaser of raw milk.⁶⁹² As another derogation to the principle of contractual freedom, if a Member State decides that the first purchaser of raw milk must make a written offer for a contract to the farmer, it may provide that the offer must include a minimum duration⁶⁹³ for the contract, set by national law for this purpose. Including a minimum duration does not mean that the respective farmer cannot refuse this minimum duration, however the refusal shall be done in writing. In case of a refusal, the parties shall be free to negotiate all elements of the

⁶⁸⁶ CMO Regulation, Article 148, 1a.

⁶⁸⁷ See Article 148(2) of CMO Regulation: „The contract and/or the offer for a contract shall (a) be made in advance of the delivery, (b) be made in writing, and (c) include, in particular, the following elements: (i) the price payable for the delivery, which shall: — be static and be set out in the contract, and/or — be calculated by combining various factors set out in the contract, which may include market indicators reflecting changes in market conditions, the volume delivered and the quality or composition of the raw milk delivered, (ii) the volume of raw milk which may and/or must be delivered and the timing of such deliveries, (iii) the duration of the contract, which may include either a definite or an indefinite duration with termination clauses, (iv) details regarding payment periods and procedures, (v) arrangements for collecting or delivering raw milk, and (vi) rules applicable in the event of force majeure.”

⁶⁸⁸ For the purposes of Article 148, a "collector" means an undertaking which transports raw milk from a farmer or another collector to a processor of raw milk or another collector, where the ownership of the raw milk is transferred in each case.

⁶⁸⁹ CMO Regulation, Article 148, 1.

⁶⁹⁰ CMO Regulation, Article 148, 1a. and 4.

⁶⁹¹ A minimum duration shall be at least six months, and shall not impair the proper functioning of the internal market.

⁶⁹² CMO Regulation, Article 148, 4.

⁶⁹³ A minimum duration shall be at least six months, and shall not impair the proper functioning of the internal market.

contract.⁶⁹⁴ The Member States which make use of any of these options shall notify the Commission of how they are applied.⁶⁹⁵

Besides the milk and milk products sector, the CMO Regulation includes a stronger obligation concerning the requirement of written agreements in the sugar sector. While in the milk and milk products sector, Member States only have the possibility to require a written form for contractual relations between operators in the sector, with regard to the sugar sector the CMO Regulation declares that the terms for buying sugar beet and sugar cane, including pre-sowing delivery contracts, shall be governed by written agreements within the trade concluded between, on the one hand, Union growers of sugar beet and sugar cane or, on their behalf, the organisations of which they are members, and, on the other hand, Union sugar undertakings or, on their behalf, the organisations of which they are members.⁶⁹⁶

Not only the milk and milk products sector as well as the sugar sector have special provisions with regard to written contract/agreements/offers, but also there are general rules formulated by the CMO Regulation. Member States may decide as regards any sector listed in Article 1(2) of the CMO Regulation⁶⁹⁷ that every delivery in its territory of those products by a producer to a processor or distributor must be covered by a written contract between the parties; and/or that the first purchasers must make a written offer for a contract for the delivery in its territory of those agricultural products by the producer.⁶⁹⁸ The next option is the same as in the milk and milk products sector: where Member States do not make use of the previous possibilities, a producer, a producer organisation or an association of producer organisations, in respect of agricultural products in the listed sector may require that any delivery of its products to a processor or distributor be the subject of a written contract between the parties and/or be the subject of a written offer for a contract from the first purchasers⁶⁹⁹.⁷⁰⁰ Where the Member State decides that deliveries of the products covered by this Article by a producer to a processor must be covered by a written contract between the parties, it shall also decide which

⁶⁹⁴ CMO Regulation, Article 148, 4.

⁶⁹⁵ CMO Regulation, Article 148, 5.

⁶⁹⁶ CMO Regulation, Article 125, 1.

⁶⁹⁷ The list includes cereals, rice, sugar, dried fodder, seeds, hops, olive oil and table olives, flax and hemp, fruit and vegetables, processed fruit and vegetable products, bananas, wine, live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage, tobacco, beef and veal, milk and milk products, pigmeat, sheepmeat and goatmeat, eggs, poultrymeat, ethyl alcohol of agricultural origin, apiculture products, silkworms, other products.

⁶⁹⁸ CMO Regulation, Article 168, 1.

⁶⁹⁹ A special rule applies to micro, small or medium-sized enterprises as first purchasers: the contract and/or the contract offer is not compulsory without prejudice to the possibility for the parties to make use of a standard contract drawn up by an interbranch organisation. See CMO Regulation, Article 168, 1a.

⁷⁰⁰ CMO Regulation, Article 168, 1a.

stage or stages of the delivery shall be covered by such a contract if delivery of the products concerned is made through one or more intermediaries.⁷⁰¹ Nevertheless, the provisions adopted shall not impair the proper functioning of the internal market.⁷⁰² In this case, the Member State may establish a mediation mechanism to cover cases in which there is no mutual agreement to conclude such a contract, thereby ensuring fair contractual relations.⁷⁰³ If a Member State decides to require written contracts and/or written offers for contracts, as well as if a producer, a producer organisation, or an association of producer organisations does so, these contracts have to fulfil several conditions.⁷⁰⁴ By way of derogation from the requirement of written contracts and/or offers, a contract or an offer for a contract shall not be required where the products concerned are delivered by a member of a cooperative to the cooperative of which he is a member if the statutes of that cooperative or the rules and decisions provided for in, or derived from, these statutes contain provisions having similar effects to the provisions mentioned in Article 168(4). Not only the principle is the same for the general rules as for the milk and milk products sector, i.e. all elements of contracts for the delivery of agricultural products concluded by producers, collectors, processors or distributors shall be freely negotiated between the parties,⁷⁰⁵ but also the same exceptions apply: an at least six-month minimum duration can be established by Member States despite the principle of contractual freedom. Nevertheless, this minimum duration can be refused by the farmer in writing.⁷⁰⁶ Two further conditions shall be fulfilled by the Member States which make use of these possibilities: the substantial one is that they shall not impair the proper functioning of the internal market, while the procedural one is that they shall notify the Commission of how they apply any of these measures.⁷⁰⁷

All in all, although „[c]ompetition law does not take a stance on the form that agreements take”,⁷⁰⁸ the stronger party’s refusal to conclude written contract with the other

⁷⁰¹ CMO Regulation, Article 168, 2.

⁷⁰² CMO Regulation, Article 168, 2.

⁷⁰³ CMO Regulation, Article 168, 3.

⁷⁰⁴ CMO Regulation, Article 168, 4: Any contract or offer for a contract shall: (a) be made in advance of the delivery; (b) be made in writing; and (c) include, in particular, the following elements: (i) the price payable for the delivery, which shall: — be static and be set out in the contract, and/or — be calculated by combining various factors set out in the contract, which may include market indicators reflecting changes in market conditions, the quantities delivered and the quality or composition of the agricultural products delivered, (ii) the quantity and quality of the products concerned which may or must be delivered and the timing of such deliveries, (iii) the duration of the contract, which may include either a definite duration or an indefinite duration with termination clauses, (iv) details regarding payment periods and procedures, (v) arrangements for collecting or delivering the agricultural products, and (vi) rules applicable in the event of force majeure.

⁷⁰⁵ CMO Regulation, Article 168, 6.

⁷⁰⁶ CMO Regulation, Article 168, 6.

⁷⁰⁷ CMO Regulation, Article 168, 7.

⁷⁰⁸ DASKALOVA 2019, p. 293.

party is the refusal to ensure predictability of the respective contractual relations. From the perspective of conventional competition law, this refusal and having verbal agreements is not an infringement, however, it shows a possible sign of one party having superior bargaining power over the other. Albeit written contracts do not necessarily prevent that the party being in superior bargaining position change the content of the contract to the detriment of the weaker party, but prescribing the obligation to conclude written contracts unequivocally contributes to fill in an enforcement gap which arises from the fact that the parties concerned have only a verbal agreement. The traditional competition law relevance of the obligation of concluding written agreements is that it reduces the chances of those abusive conducts which are related to the content of the contracts. It must be emphasised, however, that „the European legislator does not require each supply agreement to be specified in writing. This is only required if the supplier asks for a written confirmation.”⁷⁰⁹

The seventh black-list conduct is when the buyer unlawfully acquires, uses or discloses the trade secrets of the supplier within the meaning of Directive (EU) 2016/943 of the European Parliament and of the Council.⁷¹⁰ The only strength of this provision is that it involves the misuse of trade secrets into the enforcement mechanism established by the UTP Directive.⁷¹¹ The acquisition, use or disclosure of trade secrets is a traditional unfair competition law conduct.

*„From a policy perspective, the legal protection of trade secrets encourages efficiency and the circulation of R&D and innovation information. Legal protection and contractual protection of trade secrets work as a partial substitute for excessive investments in physical security, and legal protection of trade secrets facilitates disclosure in contract negotiations over the use or sale of know-how that otherwise would not occur in the absence of such protection. Protecting trade secrets is therefore rational from a societal and law and economics perspective since it decreases transaction costs and facilitates that transactions occur.”*⁷¹²

⁷⁰⁹ DE POURCQ–TERRYIN 2020, p. 51.

⁷¹⁰ UTP Directive, Article 3, 1., g).

⁷¹¹ DASKALOVA 2019, p. 294.

⁷¹² Henrik BENGSSON (2017) *International Report*. In: Pranvera KËLLEZI–Bruce KILPATRICK–Pierre KOBEL (eds.) *Abuse of Dominant Position and Globalization & Protection and Disclosure of Trade Secrets and Know-How*. Springer International Publishing, p. 292.

Although the cited thought says that the legal protection of trade secrets encourages efficiency, and most authors see competition law's primary objective in enhancing efficiency, „little has been said about the application of competition rules to trade secrets.”⁷¹³ In relation to the United States of America, it becomes apparent that finding the balance between trade secret protection and efficient competition is not an easy task. As *First* puts it, „[a]lthough the initial Sherman Act cases reveal a careful understanding of the legal properties of trade secret protection and a desire to limit the ability of trade secret holders to use trade secret licenses to restrict competition, once past these early cases the courts have too often fallen into a reflexive pattern of protecting trade secret holders at the expense of competition and consumer welfare.”⁷¹⁴ The balance must be found by the enforcement authorities not only in the United States but also in the EU and at national level.

From the food and beverage industry excellent examples can be mentioned for trade secrets: Coca Cola's secret recipe or Kentucky Fried Chicken's eleven herbs and spices on their fried chicken.⁷¹⁵ These examples are not those which are in the greatest danger against retail chains' misuse, but there are many trade secret holder suppliers who compete with the private label products⁷¹⁶ of supermarkets. This situation is tried to be addressed by the UTP Directive in order that buyers could not misuse confidential supplier information to develop their own private label brands.⁷¹⁷ The appearance of private labels is in strong connection with the emerging buyer power of retail chains. In the context of private labels, it is manufacturers rather than producers who are the likely victims of buyer power abuse by retailers. Supermarkets may force manufacturers „to grant ever increasing price reductions (also indirectly, e.g. access fees) or accept the transfer of commercial risks that may threaten their survival and reduce their incentives to innovate.” Not only upstream may it have negative effects but also downstream by engaging in exclusionary behaviour.⁷¹⁸ Nevertheless, the assessment of private labels is far too complex from the viewpoint of competition law. Concerning inter-brand competition, it may enhance competition through increasing the available choice of options. It is unlikely that

⁷¹³ Katarzyna A. CZAPRACKA (2008) Antitrust and Trade Secrets: The U.S. and the EU Approach, *Santa Clara High Technology Law Journal*, 24(2), p. 208.

⁷¹⁴ Harry FIRST (2011) *Trade secrets and antitrust law*. In: Rochelle C. DREYFUSS–Katherine J. STRANDBURG (eds.) *The Law and Theory of Trade Secrecy – A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing, pp. 332–380.

⁷¹⁵ BENGTTSSON 2017, p. 292.

⁷¹⁶ On the competition law assessment of private labels, see: Chris DOYLE–Richard MURGATROYD (2011) The Role of Private Labels in Antitrust, *Journal of Competition Law & Economics*, 7(3), pp. 631–650; Hila NEVO–Roger VAN DEN BERGH (2017) Private Labels: Challenges for Competition Law and Economics, *World Competition*, 40(2), pp. 271–298.

⁷¹⁷ DASKALOVA 2019, p. 294.

⁷¹⁸ NEVO–VAN DEN BERGH 2017, p. 296.

private label products obstruct the innovation of branded products, but retailers with market power may cause competition concerns if they disproportionately encourage the sales of private label products to the detriment of branded products. Private labels may also boost competition between retailers by raising the intensity of non-price competition. Moreover, private label products contribute to the buyer power of retailers when negotiating with their suppliers. If one assumes that the savings made by retailers are passed to the consumers, no concerns arise from a consumer welfare-approached competition law. However, abusing buyer power has implications on the prices paid by the abusing retailer's rivals to the suppliers; it may increase the rivals' prices resulting in waterbed effect^{719, 720}.

A further problem may arise from the fact that the relationship between the UTP Directive and the Directive (EU) 2016/943 is not clear as to which takes precedence over the other. While the latter includes safeguards in detail for the interest of both parties, the former does not. A reasonable solution to unblock this problem would be that the safeguards provided for by the Directive (EU) 2016/943 also apply during the enforcement of the UTP Directive.⁷²¹

The eight black-list conduct takes place when the buyer threatens to carry out, or carries out, acts of commercial retaliation against the supplier if the supplier exercises its contractual or legal rights, including by filing a complaint with enforcement authorities or by cooperating with enforcement authorities during an investigation.⁷²² Commercial retaliation includes, for example, „delisting products, reducing the quantities of products ordered or stopping certain services which the buyer provides to the supplier such as marketing or promotions on the suppliers' products.”⁷²³ Making use of the possibilities provided for by legal rights and initiating enforcement procedures shall not be thwarted by buyers because this is not in line with the notion of competition on the merits.⁷²⁴ By this provision, the UTP Directive aims to address the fear factor⁷²⁵ mentioned several times in the preparatory documents.⁷²⁶ The fear factor generally

⁷¹⁹ For more on the waterbed effect, see: Paul W. DOBSON–Roman INDERST (2008) *The Waterbed Effect: Where Buying and Selling Come Together* [Online]. Available at: <https://tinyurl.hu/eBbJ/> (Accessed: 9 September 2021). Roman INDERST–Tommaso M. VALLETTI (2011) Buyer Power and the 'Waterbed Effect', *The Journal of Industrial Economics*, 59(1), pp. 1–20.

⁷²⁰ DOYLE–MURGATROYD 2011, p. 650.

⁷²¹ DE POURCQ–TERRYN 2020, p. 52.

⁷²² UTP Directive, Article 3, 1., h).

⁷²³ DE POURCQ–TERRYN 2020, p. 52. See also: DASKALOVA 2019, pp. 294–295; UTP Directive, Recital 25.

⁷²⁴ DASKALOVA 2019, p. 295.

⁷²⁵ See in detail: Till GÖCKLER (2017) *Angstfaktor und unlautere Handelspraktiken – Eine Untersuchung anlässlich des Grünbuchs der Europäischen Kommission über unlautere Handelspraktiken in der b2b-Lieferkette*. Tübingen: Mohr Siebeck.

⁷²⁶ See Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, Explanatory Memorandum: „A weaker party to a commercial transaction is often unwilling to lodge a complaint for fear of compromising an existing commercial relationship with the stronger party.” See also: EUROPEAN PARLIAMENT 2016, point U and X; EUROPEAN

describes a deficit of law enforcement or an enforcement barrier. The fear factor is based on the assumption that an undertaking affected by an unfair trading practice will refrain from enforcing its rights despite being aware of them for fear of losing its business relationship with its trading partner or of other reprisals. Since the undertaking concerned is also reluctant to turn to the competition authority in such cases, no official enforcement of the standard can take place for the same reason. Fear factor is known as the *Ross-und-Reiter-Problematik*⁷²⁷ in German competition law. In order to counteract this, the sixth amendment of *GWB* in 1998 introduced a provision which enables the competition authority to take action *ex officio* at the request of the complainant. This is intended to ensure that the name of the complainant does not appear in the files of the competition authority as soon as the relevant proceedings are initiated.⁷²⁸ In the UTP Directive, the fear factor is tried to be overcome by, on the one hand, expanding the categories of right of action holders, and, on the other hand, encouraging enforcement through the confidentiality of complaints.⁷²⁹ Complaints and confidentiality are regulated in detail in Article 5 of the UTP Directive. As an innovative element,⁷³⁰ not only suppliers themselves but also producer organisations, other organisations of suppliers and associations of such organisations have the right to submit a complaint to the enforcement authority of the Member State in which the supplier is established or to the enforcement authority of the Member State in which the buyer that is suspected to have engaged in a prohibited trading practice is established. Moreover, other organisations that have a legitimate interest in representing suppliers have the right to submit complaints, at the request of a supplier, and in the interest of that supplier, provided that such organisations are independent non-profit-making legal persons.⁷³¹ With regard to confidentiality, the UTP Directive declares that Member States shall ensure that, at the request of the complainant, the enforcement authority shall take the necessary measures for the appropriate protection of the identity of the complainant or the members or suppliers and for the appropriate protection of any other information in respect of which the complainant considers that the disclosure of such information would be harmful to the interests of the complainant or of those members or suppliers. The complainant shall identify any

COMMISSION 2014, p. 7; EUROPEAN COMMISSION 2013, p. 7. EUROPEAN COMMISSION 2016, p. 6 posits that „fear factor can easily obstruct authorities from penalising market operators imposing UTPs because authorities require sufficient information to be able to follow up on a complaint.”

⁷²⁷ See more: Georg KÜPPER (1997) Mißbräuchliche Ausübung von Nachfragemacht, insbesondere Lösung des sog. Roß und Reiter-Problems, *Betriebs-Berater*, 52(22), pp. 1105–1115.

⁷²⁸ ACKERMANN 2020, pp. 218–220.

⁷²⁹ Muriel CHAGNY (2020) *Enforcement in the Directive*. In: Bert KEIRSBILCK–Evelyn TERRY (eds.) *Unfair Trading Practices in the Food Supply Chain – Implications of Directive (EU) 2019/633*. Cambridge–Antwerp–Chicago: Intersentia, pp. 63–65.

⁷³⁰ DASKALOVA 2019, p. 284.

⁷³¹ UTP Directive, Article 5, 1. and 2.

information for which it requests confidentiality.⁷³² However, the right of defence of the possible infringer shall be respected. As the Proposal for the Directive put it, „[i]n particular for the confidential treatment of complaints, a balance must be struck in relation to the rights of defence.”⁷³³ Besides initiating investigations on the basis of complaints, Member States shall also ensure that the respective enforcement authority could initiate and conduct investigations on its own initiative, *ex officio*.⁷³⁴

The ninth black-list conduct refers to the situation when the buyer requires compensation from the supplier for the cost of examining customer complaints relating to the sale of the supplier's products despite the absence of negligence or fault on the part of the supplier.⁷³⁵ Here the interpretation concern arises in the same context as in the case of imposing charges on suppliers because of shrinkage: the enforcement authority shall decide whether negligence or fault on the part of the respective supplier took place.

After the nine black-list conducts comes the grey list:⁷³⁶ these practices are permitted when they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer.⁷³⁷ „By taking this approach, [the EU] implicitly accepts that it is fair to stipulate these terms.”⁷³⁸ With the exception of the first practice in the grey list, all practices are related to some kind of payment from the supplier to the buyer.⁷³⁹

The first grey-list conduct is when the buyer returns unsold agricultural and food products to the supplier without paying for those unsold products or without paying for the disposal of those products, or both.⁷⁴⁰ It is quite clear that it is in the respective buyer's commercial interest to sell the products purchased by the buyer from the supplier, and if the buyer cannot do so, the main principle is that the buyer should bear the resulting losses. With this prohibition, the Directive aims to avoid that the buyer could buy products he intends to sell without any commercial risk. Nevertheless, it is dubious whether the *conditionally permitted*

⁷³² UTP Directive, Article 5, 3. See also: DASKALOVA 2019, p. 284.

⁷³³ Explanatory Memorandum to the Proposal a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, p. 11. See also: CHAGNY 2020, p. 64.

⁷³⁴ UTP Directive, Article 6, 1, a). See also: PISZCZ 2020, p. 123.

⁷³⁵ UTP Directive, Article 3, 1., i)

⁷³⁶ See: ACKERMANN 2020, pp. 285–286.

⁷³⁷ It is worth noting in passing that the number of conducts both on the black and grey list in the Directive increased in comparison with the Proposal. A four-point black list and a four-point grey list became a nine-point black list and a six-point grey list. See: PISZCZ 2020, p. 119.

⁷³⁸ DE POURCQ–TERRY 2020, p. 53.

⁷³⁹ DE POURCQ–TERRY 2020, p. 53.

⁷⁴⁰ UTP Directive, Article 3, 2., a).

nature of this provision provides enough protection to suppliers. The basic assumption of the UTP Directive is that there are „significant imbalances in bargaining power between suppliers and buyers of agricultural and food products”,⁷⁴¹ therefore the positive impact of this provision, and also in general of these six grey-list practices, is questionable, given that a stronger buyer will probably be able to force a weaker supplier to accept „clear and unambiguous contractual terms” falling under the scope of these six practices.

The second one on the list is when the supplier is charged payment as a condition for stocking, displaying or listing its agricultural and food products, or of making such products available on the market.⁷⁴² If agreed upon clear and unambiguous terms, buyers may make use of the possibility to demand listing fees or slotting allowances⁷⁴³ from their suppliers.⁷⁴⁴ „A slotting allowance is a fee paid by a grocery manufacturer to a grocery retailer at the time of the introduction of a product to the retailer’s inventory, ostensibly to reimburse the retailer for the initial expenses it incurs by adopting the product.”⁷⁴⁵ The Federal Trade Commission’s report broadens the scope of this definition, and it also includes lump-sum, up-front payments from *producers* to retailers in order that the latter could place the product of the former on its shelves.⁷⁴⁶

⁷⁴¹ UTP Directive, Recital (1).

⁷⁴² UTP Directive, Article 3, 2., b).

⁷⁴³ See, for example, in detail: Joseph P. CANNON–Paul N. BLOOM (1991) Are Slotting Allowances Legal under the Antitrust Laws? *Journal of Marketing & Public Policy*, 10(1), pp. 167–186; Kenneth KELLY (1991) The Antitrust Analysis of Grocery Slotting Allowances: The Procompetitive Case, *Journal of Public Policy & Marketing*, 10(1), pp. 187–198; Mary W. SULLIVAN (1997) Slotting Allowances and the Market for New Products, *The Journal of Law & Economics*, 40(2), pp. 461–494; Gregory T. GUNDLACH–Paul N. BLOOM (1998) Slotting Allowances and the Retail Sale of Alcohol Beverages, *Journal of Public Policy & Marketing*, 17(2), pp. 173–184; J. Chris WHITE–Lisa C. TROY–R. Nicholas GERLICH (2000) The role of slotting fees and introductory allowances in retail buyers’ new-product acceptance decisions, *Journal of the Academy of Marketing Science*, 28(2), pp. 291–298; Azzeddine M. AZZAM (2001) Slotting Allowances and Price-Cost Margins: A Note, *Agribusiness*, 17(3), pp. 417–422; Stephen F. HAMILTON (2003) Slotting Allowances as a Facilitating Practice by Food Processors in Wholesale Grocery Markets: Profitability and Welfare Effects, *American Journal of Agricultural Economics*, 85(4), pp. 797–813; Timothy J. RICHARDS–Paul M. PATTERSON (2004) Slotting Allowances as Real Options: An Alternative Explanation, *The Journal of Business*, 77(4), pp. 675–696; John L. STANTON–Kenneth C. HERBST (2006) Slotting allowances: short-term gains and long-term negative effects on retailers and consumers, *International Journal of Retail & Distribution Management*, 34(3), pp. 187–197; K. SUDHIR–Vithala R. RAO (2006) Do Slotting Allowances Enhance Efficiency or Hinder Competition? *Journal of Marketing Research*, 43(2), pp. 137–155; Øystein FOROS–Hans JARLE KIND (2008) Do Slotting Allowances Harm Retail Competition? *Scandinavian Journal of Economics*, 110(2), pp. 367–384; Robert INNES–Stephen F. HAMILTON (2013) Slotting Allowances under Supermarket Oligopoly, *American Journal of Agricultural Economics*, 95(5), pp. 1216–1222.

⁷⁴⁴ For a non-academic article, see: Phil EDWARDS (2016) *The hidden war over grocery shelf space* [Online]. Available at: <https://www.vox.com/2016/11/22/13707022/grocery-store-slotting-fees-slotting-allowances> (Accessed: 15 September 2021).

⁷⁴⁵ KELLY 1991, p. 187.

⁷⁴⁶ FEDERAL TRADE COMMISSION (2001) *Slotting Allowances and Other Marketing Practices in the Grocery Industry*, February 2001, p. 1 [Online]. Available at: <https://bit.ly/3EyV91t> (Accessed: 16 September 2021).

The lawfulness of these charges has to be decided on a case-by-case basis. For example, a German judgment by the *Bundesgerichtshof* considered the listing fee⁷⁴⁷ in question unfair, while there are also opinions in which these charges are considered lawful when in alignment with „the costs and the potential risks connected to contracting”.⁷⁴⁸ In the English-language literature, *Sullivan* writes that „slotting allowances are consistent with competitive behavior”.⁷⁴⁹ *Sudhir and Rao* also find – in spite of the controversial nature of slotting allowances – little support for the anticompetitive rationales in the data.⁷⁵⁰ On the contrary, the Vertical Restraint Guidelines⁷⁵¹ of the EU acknowledges that listing fees and slotting allowances may go hand in hand with exclusionary effects.⁷⁵² Obviously, they are primarily criticised by manufacturers and small retailers, nevertheless they are defended by retailers who make use of them as „risk-transfer mechanism”.⁷⁵³ The reason for treating listing fees and stocking allowances as a conditionally permitted practice may come from the controversial nature of these phenomena. Nevertheless, the general critique can also be formulated against this provision, that is to say, concerns may arise from the weak protection owing to the conditional nature of grey-list conducts.

The third one takes place when the buyer requires the supplier to bear all or part of the cost of any discounts on agricultural and food products that are sold by the buyer as part of a promotion.⁷⁵⁴ This provision is complemented by a further requirement: if the buyer initiates a promotion, prior to this, the buyer shall specify the period of the promotion and the expected quantity of the agricultural and food products to be ordered at the discounted price.⁷⁵⁵

The fourth conduct is when the buyer requires the supplier to pay for the advertising by the buyer of agricultural and food products.⁷⁵⁶ The fifth one happens when the buyer requires the supplier to pay for the marketing by the buyer of agricultural and food products.⁷⁵⁷ As mentioned by *De Pourcq–Terry*, the UTP Directive „does not describe how advertising or marketing costs should be understood. The provisions furthermore broadly describe the payment that may be allowed, as they do refer in general to advertising and marketing ‘by the buyer of agricultural and food products’. They do not explicitly refer to advertising of *the*

⁷⁴⁷ In German: *Listungsentgelte* or *Eintrittsgeld*.

⁷⁴⁸ DE POURCQ–TERRY 2020, p. 56.

⁷⁴⁹ SULLIVAN 1997, p. 461.

⁷⁵⁰ SUDHIR–RAO 2006, p. 137.

⁷⁵¹ EUROPEAN COMMISSION (2010) *Guidelines on Vertical Restraints*, SEC(2010) 411.

⁷⁵² DASKALOVA 2019, p. 296.

⁷⁵³ GUNDLACH–BLOOM 1998, p. 173.

⁷⁵⁴ UTP Directive, Article 3, 2., c).

⁷⁵⁵ UTP Directive, Article 3, 2; see also: DE POURCQ–TERRY 2020, p. 56.

⁷⁵⁶ UTP Directive, Article 3, 2., d).

⁷⁵⁷ UTP Directive, Article 3, 2., e).

agricultural and food product of the supplier. The exact scope of these provisions is therefore unclear.”⁷⁵⁸

The sixth grey-list conduct refers to the situation when the buyer charges the supplier for staff for fitting-out premises used for the sale of the supplier's products.⁷⁵⁹ This regulated conduct is considered less problematic than the previous two, given that it formulates a clear-cut connection with the products of the respective supplier and establishes „some mutual interest” in relation to the Directive.⁷⁶⁰

All in all, the conducts regulated in the UTP Directive have – in many cases – interfaces with EU competition law. According to *Daskalova*, these practices may have not only exploitative but also exclusionary effects. The enforcement gaps of EU competition law, however, are not completely filled in owing to the interpretation concerns raised by the formulation of provisions which may thwart the intended goals of the Directive.⁷⁶¹ By contrast, *Piszcz* finds the strength of the UTP Directive in that „[it] does not base the prohibition of UTPs on any open-ended concept of bargaining power, its abuse or unfairness. All of them, if used, would give the enforcement authority greater flexibility embedded in them. Most importantly, however, the approach adopted by the UTP Directive results in less ambiguity and, consequently, more legal certainty.”⁷⁶² In our view, there is no doubt that the conducts included in the list of unfair trading practices raise certain questions of interpretation, but a general prohibition without a detailed and specific assessment method could greatly widen the Directive’s scope for which it would be up to the law enforcement alone to determine the unlawfulness of a certain conduct. The general prohibition with the assessment method of turnover thresholds could constitute a too wide intervention to contractual relations of the respective contracting parties.

Because of minimum harmonisation, a general prohibition would mean that all Member States shall also include a general prohibition in their national laws. It is more reasonable to regulate a list of practices which may go hand in hand with some interpretation concerns than to use a general prohibition. The former can be corrected and interpreted by the enforcement authorities, while the latter can wheel towards enhanced and excessive enforcement activism.

⁷⁵⁸ DE POURCQ–TERRYN 2020, p. 57.

⁷⁵⁹ UTP Directive, Article 3, 2., f).

⁷⁶⁰ DE POURCQ–TERRYN 2020, p. 58.

⁷⁶¹ DASKALOVA 2019, p. 296.

⁷⁶² PI SZ CZ 2020, p. 125.

v. The enforcement mechanism included in the Directive

The provisions on enforcement appear in the Directive's Articles 4 to 8. Pursuant to Article 4, each Member State shall designate one or more enforcement authorities. If more than one enforcement authority is designated, the Member State shall determine which enforcement authority is the contact point for both cooperation among the enforcement authorities and cooperation with the Commission. The Commission shall be informed about the designation.⁷⁶³ Member States are not obliged to set up a new authority; they have the possibility to confer the powers mentioned below on an existing authority.⁷⁶⁴

We have already mentioned the rules on complaints and confidentiality as well as that the UTP Directive aims to overcome the fear factor by expanding the scope of persons who are entitled to make a complaint beyond the direct victim of the respective unfair trading practice and by ensuring the confidentiality of complaints.

However, the powers of enforcement authorities are also worth mentioning. The approach taken by the UTP Directive is based on decentralisation, that is, the enforcement is transferred to the Member States' authorities.⁷⁶⁵ Similarly to European competition law traditions, the enforcement of the UTP Directive is established on public law proceedings and not on private law proceedings. The public law enforcement of these provisions was likely to be chosen because of the fear factor. If the direct victim of an unfair trading practice should initiate a private law proceeding as claimant against a buyer of the claimant's products as defendant, the objective and the likely positive impacts of the UTP Directive became questionable.

In order that the public enforcement could be effective and professional, Member States shall confer on the enforcement authority the power to initiate and conduct investigations on its own initiative or on the basis of a complaint, to require buyers and suppliers to provide all necessary information in order to conduct investigations of prohibited trading practices, to carry out unannounced on-site inspections within the framework of its investigations, in accordance with national rules and procedures, to take decisions finding an infringement of the prohibitions and requiring the buyer to bring the prohibited trading practice to an end, to impose, or initiate proceedings for the imposition of, fines and other equally effective penalties and interim measures on the author of the infringement, in accordance with national rules and procedures, as well as to publish its decisions. The penalties imposed by the enforcement authority shall be

⁷⁶³ UTP Directive, Article 4.

⁷⁶⁴ PiSZCZ 2020, p. 122.

⁷⁶⁵ PiSZCZ 2020, p. 121.

effective, proportionate and dissuasive, taking into account the nature, duration, recurrence and gravity of the infringement. The burden of proof is not harmonised within the UTP Directive, that is each Member State has the right to regulate the provisions with regard to it.⁷⁶⁶

However, the infringer's rights of defence shall be respected in accordance with the general principles of Union law and the Charter of Fundamental Rights of the European Union. The respect for the rights of defence shall also be ensured when the complainant requests confidential treatment of information.⁷⁶⁷

vi. Further provisions

Concerning the transposition of the UTP Directive, Member States were obliged to adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 1 May 2021 at the latest. These measures shall apply from 1 November 2021 at the latest.⁷⁶⁸ By 1 November 2021, the Commission had to present an interim report on the state of the transposition and implementation of the Directive to the European Parliament and to the Council, as well as to the European Economic and Social Committee and the Committee of the Regions.⁷⁶⁹ Furthermore, by 1 November 2025, the Commission shall carry out the first evaluation of this Directive and shall present a report on the main findings of that evaluation to the European Parliament and to the Council, as well as to the European Economic and Social Committee and the Committee of the Regions. Such report shall be accompanied, if appropriate, by legislative proposals.⁷⁷⁰

For the sake of ensuring a sufficient degree of publicity, Member States shall ensure that their enforcement authorities publish an annual report on their activities falling within the scope of the UTP Directive, which shall, *inter alia*, state the number of complaints received and the number of investigations opened or closed during the previous year. For each closed investigation, the report shall contain a summary description of the matter, the outcome of the investigation and, where applicable, the decision taken, subject to the confidentiality requirements.⁷⁷¹

⁷⁶⁶ UTP Directive, Recital (24).

⁷⁶⁷ UTP Directive, Article 6.

⁷⁶⁸ UTP Directive, Article 13, 1.

⁷⁶⁹ UTP Directive, Article 12, 4.

⁷⁷⁰ UTP Directive, Article 12, 1.

⁷⁷¹ UTP Directive, Article 10, 1.

2.2.4 *A brief outlook to general EU rules determining the relationship between EU and national level*

Before I turn to the analysis of agri-food competition law at national level, some general remarks must be made on the relationship between EU and national competition law which is addressed by the provisions included in Article 3 of Council Regulation (EC) No 1/2003. This legal act is relevant to agri-food competition law because it delimits to a great extent the scope of national legislation of EU Member States, such as Germany and Hungary, which would like to adopt further competition-related provisions related to agriculture and the food supply chain.

It is not always unambiguous whether unfair trading practices, irrelevant that adopted in general to all economic sectors or only to a certain sector, are unilateral or contractual in nature. The classification of a given type (form) of unfair trading practice has implications as to whether national legislation can lawfully regulate it as antitrust. By lawfully I mean that national legislation does not violate and contradicts EU law. By not going into details, in general two orientating points have to be kept in mind by national legislation. First, an unfair trading practice, if it is contractual in nature, i.e. appears as a mutually agreed term of a contract between two business partners being at different levels of the supply chain (vertical agreement), cannot be regulated as antitrust provision in a stricter manner than it is regulated in EU competition law. Second, an unfair trading practice, if it is unilateral in nature, i.e. has no agreement behind it, can be regulated as antitrust provision in a stricter manner than the reach of Article 102 TFEU. An unfair trading practice which appears as a contractual term in a vertical agreement can only be regulated in laws pursuing an objective different from that pursued by Articles 101-102 TFEU. However, the picture is nuanced by the Commission's approach which seems to treat unilaterally imposed *contractual* terms in vertical agreements as unilateral conducts.⁷⁷² This approach leaves greater room for national legislation to manoeuvre than the approach of labelling unilaterally imposed contractual terms as agreements.

Both Germany and Hungary have national laws which go beyond EU competition law (see Part One, Subchapter 2.2.2). The German regulation on abuse of economic dependence as an antitrust provision is in line with EU law because it clearly covers unilateral conducts. The Hungarian rules on abuse of significant market power in Act CLXIV of 2005 are not codified as antitrust rules and pursue objectives different than EU competition law. They aim to ensure

⁷⁷² See the in-depth analysis of the issue: Ronny GJENDEMSJØ–Ignacio Herrera ANCHUSTEGUI (2019) The Scope for National Regulation of Unfair Trading Practices. In: Johan GIERTSEN–Erling Johannes HUSABØ–Øystein L. IVERSEN–Berte-Elen KONOW (eds.) *Rett i vest – Festskrift til 50-årsjubileet for jurist-utdanningen ved Universitetet i Bergen*. Bergen: Fagbokforlaget, pp. 293–316.

fairness in business relationships, therefore – in spite of that the Act also enumerates prohibited contractual terms of vertical agreements – they are in line with EU law because of the different objective to be pursued by the prohibition. This finding is also true for the sectoral regulation in Act XCV of 2009 covering certain unfair practices of distributors related to agri-food products.

3 Agri-food competition law at national level

This chapter deals with national agri-food competition law *in extenso*. I present the domestic regulation of three countries: Hungary, Germany, and the United States. Concerning the latter, I only address federal statutes. With regard to Hungary and Germany, I introduce both the situation before and after the implementation of the UTP Directive. It is more important in the case of Hungary than of Germany, since the latter had not had special regulation as regards unfair trading practices in agriculture and the food supply chain before the Directive was adopted within the European Union.

Regarding Germany and Hungary, a further principle must be respected. National exceptions to the prohibition of anti-competitive agreements only apply to cases when the trade between Member States is not affected.⁷⁷³ This is important to bear in mind when speaking about the Hungarian [Section 93/A(1) of the Hungarian Competition Act] and the German [Section 28 of *GWB* and Section 6 of *AgrarOLkG*] exemption.

3.1 Hungary

In Hungary, as already mentioned, both exception and specific norms can be found. The analysis is started with the former.

3.1.1 Exception norms

As to the exception norms of Hungarian agri-food competition law, I present the following:

- A. Section 93/A of Act LVII of 1996 on the Prohibition of Unfair Market Conduct and Competition Restriction;
- B. Section 7(6) of Act CLXIV of 2005 on the Trade;

⁷⁷³ ACKERMANN 2020, p. 147. See also: GROTELOH 2016, Rn. 59.

Section 93/A of Act LVII of 1996

The provision indicated in Point A is codified in the general competition statute of Hungary.

The provisions are as follows:

(1) In relation to an agricultural product, the prohibition set out in Section 11 shall not be deemed to have been infringed if the distortion, restriction or prevention of economic competition resulting from the agreement under Section 11 does not exceed what is necessary to obtain an economically justified and fair income and the market participant affected by the agreement is not prevented from obtaining such income.

(2) The Minister responsible for Agricultural Policy shall determine whether the conditions for exemption provided for in paragraph (1) are fulfilled.

(3) When investigating a breach of the prohibition in Section 11 in relation to an agricultural product, the Hungarian Competition Authority shall obtain the opinion of the Minister responsible for Agricultural Policy pursuant to paragraph (2) and shall act on the basis of the opinion. The Minister responsible for Agricultural Policy shall issue his opinion within sixty days of receipt of the request from the Hungarian Competition Authority, during which period the Hungarian Competition Authority shall suspend its proceedings.

(4) The Competition Council shall suspend the imposition of a fine in the case of an agreement contrary to Section 11 where the violation has been committed in relation to an agricultural product. In such a case, the acting Competition Council shall set a time limit and require the parties to the agreement or concerted practice to bring their conduct into conformity with the provisions of the law. If the time limit expires without result, the acting Competition Council shall impose a fine.

(5) Paragraphs (1) to (4) can only apply to a case, if it does not involve the application of Article 101 TFEU. The necessity to apply Article 101 TFEU shall be established by the Authority in its competition proceedings pursuant to Article 3(1) of Council Regulation (EC) No 1/2003 before a final decision is taken.

A brief history on the location of the provisions and their justification

Originally, the provisions mentioned here were not included in the Hungarian Competition Act but amended Act CXXVIII of 2012 on Interbranch Organisations and Certain Aspects of Agricultural Market Regulation.⁷⁷⁴ The provisions were codified as Section 18/A of Act CXXVIII of 2012. Later, when Act CXXVIII of 2012 was repealed with effect from the date of 1 September 2015,⁷⁷⁵ the provisions were relocated to the Hungarian Competition Act and were codified as Section 93/A.⁷⁷⁶ It was an interesting legislative solution that the provisions which established an exemption under the general prohibition of anti-competitive agreements had been originally codified in a sector-specific and not in the general competition statute. This formal choice was corrected by placing the exception into the Hungarian Competition Act, however the substantial concerns raised against the provision have not disappeared.

The general explanatory memorandum to the amending Act CLXXVI of 2012 posited the following:

„The practice of the Hungarian Competition Authority highlights the fundamental shortcoming of Hungarian agricultural law, namely that Hungarian competition law does not take into account the vulnerability of agriculture due to its different characteristics compared to other sectors (seasonal presence of products on the market, weather effects, security of supply, i.e. food is a basic product of consumer purchases), and the different (preferred) treatment, which is also present in EU law, is missing from Hungarian competition law. However, the economic need for this is evident and the EU legal framework would also allow for more room to manoeuvre. These legal shortcomings prevent the Competition Authority from taking into account the sectoral characteristics of agriculture in its proceedings. In view of this, it is justified to relax the strictness of domestic competition rules to the extent of EU obligations, i.e. to lay down more permissive provisions for agricultural products.”⁷⁷⁷

⁷⁷⁴ The amending provision was Section 1 of Act CLXXVI of 2012 on the Amendment of Act CXXVIII of 2012 on Interbranch Organisations and Certain Aspects of Agricultural Market Regulation. It came into force on 28 November 2012.

⁷⁷⁵ The repealing provision was Section 32 of Act XCVII of 2015 on Certain Aspects of the Organisation of Agricultural Product Markets, Producer and Interbranch Organisations.

⁷⁷⁶ The amending provision was Section 16 of Act LXXVIII of 2015 on the Amendment of Act LVII of 1996 on the Prohibition of Unfair Market Conduct and Competition Restriction as well as of Certain Provisions Relating to the Proceedings of the Hungarian Competition Authority.

⁷⁷⁷ See in Hungarian: Explanatory Memorandum to the Act CLXXVI of 2012 on the Amendment of Act CXXVIII of 2012 on Interbranch Organisations and Certain Aspects of Agricultural Market Regulation.

This explanatory memorandum, besides the justification of the analysed provisions, provides unusual doctrinal insights on the relationship between agricultural law and competition law. It is utterly strange that one may read reflections on the relationship between two areas of law from in an explanatory memorandum. It considers a shortcoming of *agricultural law* that there were no special competition law provisions applying to the agricultural sector until the date of the adoption of the provisions. This shows that, even at national level, the Legislator has subsumed special competition rules for agriculture under agricultural law, similarly to the approach of the EU.

The detailed explanatory memorandum says that – differently from EU law⁷⁷⁸ – the Hungarian Competition Act did not include any positive distinction for the agricultural sector, therefore the Hungarian Competition Act employed the same benchmark tool to all sectors of the economy. Given that the prohibition of anti-competitive agreements in the Hungarian Competition Act only applies to cases when there is no EU relevance, that is to say, it is not a provision harmonising EU law, the Hungarian Legislator is entitled to change the respective provision's content. If a restricting practice is horizontal in nature (it takes place within the framework of a sectoral interest group or an interbranch organisation), that is, all market participants in the sector are equally involved, no competing market participant can be put at an advantage compared to the others, there is no anti-competitive-agreement in its classic sense. The conduct has only effects on the vertical supply chain, i.e. the operators concerned are equally protected against market players of the supply chain downstream (for example, agricultural producers as suppliers *vis-à-vis* their buyers). This approach is in line with Article 39 TFEU which aims to ensure a fair standard of living for the agricultural community.⁷⁷⁹

In the proceedings before the Hungarian Competition Authority, the Minister responsible for Agricultural Policy shall be consulted to decide whether the restrictive practice is horizontal in nature and whether the price advantage achieved by the agreement does not exceed a reasonable level. Given that the Minister has the most comprehensive and up-to-date information on agri-food markets, it is appropriate to confer on him the power to assess these two issues. Nevertheless, it should also be possible for parties involved in restrictive practices to bring their conduct into line with the law on the basis of indications from Hungarian

⁷⁷⁸ It refers to the Article 42 of the TFEU.

⁷⁷⁹ See the Detailed Explanatory Memorandum to Section 1 of the Act CLXXVI of 2012 on the Amendment of Act CXXVIII of 2012 on Interbranch Organisations and Certain Aspects of Agricultural Market Regulation.

Competition Authority, without incurring a fine, thus giving them the possibility of voluntary compliance. Failure to do so, however, should be subject to the possibility to impose fines.⁷⁸⁰

The main difference between the first version of these provisions included in Act CXXVIII of 2012 and the version codified in the Hungarian Competition Act was that in the latter version the provisions shall not apply if the application of Article 101 TFEU may arise.⁷⁸¹ The first version of the rules declared that the acting Competition Council suspends the imposition of a fine, if an agreement or concerted practice in relation to an agricultural product between competitors violates Article 101 TFEU.⁷⁸² Concerning the legislative amendment, the next subchapter provides a more detailed analysis, because the modification of the first-version provisions became necessary after the likeliness of an infringement of EU competition law had arisen. In the case the exemption criteria from the general prohibition were found to be met by the Minister and the Hungarian Competition Authority terminated the procedure as a consequence of the Minister's resolution.

Some problematic points can be made about the wording of the exception. Both conditions of the provision are vaguely formulated: the distortion, restriction or prevention of economic competition shall not exceed what is necessary to obtain an economically justified and fair income; and the operator of the market affected by the agreement shall not be prevented from obtaining such income. The main question is who is covered by the term 'operator of the market': this provision should be limited to protect agricultural producers, but the term 'operator of the market' includes much more, and it seems that any market participant in the supply chain may become the subject of this provision. Not only agricultural producers can conclude an agreement concerning the price of an agricultural product, but also any market participant downstream. For example, all retail chains in the market can agree that they sell apples at the same price. Given that the exception *expressis verbis* is not limited to protect agricultural producers, if the Minister declares that both conditions are fulfilled by the parties of the agreement, even retail chains can be excluded from the scope of general prohibition.

The enforcement of the provisions

⁷⁸⁰ See the Detailed Explanatory Memorandum to Section 1 of the Act CLXXVI of 2012 on the Amendment of Act CXXVIII of 2012 on Interbranch Organisations and Certain Aspects of Agricultural Market Regulation.

⁷⁸¹ Act LVII of 1996, Section 93/A(5).

⁷⁸² See the provision: Section 18(4) of Act CXXVIII of 2012 on Interbranch Organisations and Certain Aspects of Agricultural Market Regulation.

So far, the Minister responsible for Agricultural Policy has issued only two resolutions which had an impact on the respective proceeding of the Hungarian Competition Authority. Both were issued in 2013, so they referred to Section 18/A of Act CXXVIII of 2012. While one found that the conditions for exemption were met, the other found that they were not. Let us start with the latter one.

The Hungarian Competition Authority found that two bidders in public procurement procedures for fruit and vegetable procurement in Hungary after November 2010 had colluded with each other in a likely unfair manner, in particular by withdrawing from the tender in the knowledge of the results, by failing to submit supplementary documents, and by preliminarily deciding which of them should win. Pursuant to Section 18/A(1) of Act CXXVIII of 2012, no infringement of the prohibition could be established in relation to an agricultural product if the distortion, restriction or prevention of economic competition resulting from the agreement did not exceed what is necessary to obtain an economically justified and fair benefit; participants on the respective market affected by the agreement were not prevented from obtaining that benefit; and Article 101 TFEU should not apply.

On the basis of the information available, the Minister concluded that, *in the case of unfair collusion between two market participants as bidders for public contracts, there is no possibility of all market participants having access to an economically justified and reasonable benefit*, whereby at least one of the conditions for exemption under Section 18/A(1) of Act CXXVIII of 2012 is not fulfilled. Given that all the conditions shall be fulfilled for Section 18/A(1) of the Act CXXVIII of 2012 to apply, the Minister has not examined the other condition. It means that the respective agreement was not exempted from the general prohibition.⁷⁸³

In the other case, in which a resolution was issued by the Minister for Agricultural Policy, the conditions for exempting the respective agreement from the general prohibition were met. First, let us take a look at the facts of the case in question. Since 13 July 2012, press reports appeared that an agreement had been reached between watermelon growers, food retailers – the large multinational supermarket chains subject to the procedure –, and representatives of FruitVeB⁷⁸⁴ and the Watermelon Association⁷⁸⁵, with the cooperation of the Ministry of Rural Development (hereinafter: the Ministry), that the multinational supermarket chains would sell

⁷⁸³ Resolution no. JF/483/1/2013 of the Minister for Agricultural Policy in the proceeding no. Vj/72/2011 of the Hungarian Competition Authority.

⁷⁸⁴ FruitVeB is the abbreviated name of Hungarian Fruit and Vegetables Interbranch Organisation and Product Council.

⁷⁸⁵ Watermelon Association is the abbreviated name of Hungarian Watermelon Non-Profit Association.

Hungarian watermelons at the jointly agreed price of at least 99 Hungarian Forints. On the basis of the information obtained, the Hungarian Competition Authority concluded that the undertakings subject to the procedure were likely to have infringed both the national⁷⁸⁶ and EU⁷⁸⁷ prohibition, and therefore initiated competition proceedings against them on 27 August 2012. The Ministry, which does not carry out economic activities, was not subject to the proceedings due to the lack of scope of the Hungarian Competition Act. Pursuant to Section 18/A(3) of Act CXXVIII of 2012, the Competition Authority turned to the Minister responsible for Agricultural Policy to issue the resolution which includes a professional opinion, and suspended the proceedings. The resolution arrived to the Competition Authority on 19 February 2013. In its competition proceedings, the Competition Authority used the following evidence: public press releases, reports, audio recordings made public by the press, the response to the domestic request for legal assistance, and statements made by the subjects of proceedings and interested parties in the context of the notification and in the competition proceedings.

Given that the investigation showed that it was likely that the conduct under investigation concerning the agricultural product infringed both the EU and national prohibition of anti-competitive agreements, the Competition Authority requested the opinion of the Minister of Rural Development⁷⁸⁸ (hereinafter referred to as the Minister) as to whether the distortion, restriction or prevention of economic competition resulting from the alleged agreement restricting competition exceeds what is necessary to obtain an economically justified and fair return for each undertaking subject to the procedure or whether the operator on the market affected by the agreement is not prevented from obtaining such a return. Since the Competition Authority also initiated its proceedings on the basis of Article 101 TFEU, and thus, pursuant to Section 18/A(1) of Act CXXVIII of 2012 the provision of EU law was also „applied”, it was not obligatory to request the opinion of the Minister. The Competition Authority did so only in the event that it concluded in the course of the competition proceedings that Article 101 TFEU was not applicable. This interpretation was shared by the Minister in his resolution. The Competition Authority noted that requesting the opinion of the Minister was necessary only if Article 101 TFEU did not apply to the case. As mentioned above, the request to issue a resolution can only apply to cases when the application of Article 101 TFEU does not arise. Nevertheless, the first version of the provisions included a questionable sentence which declared that the Competition Council shall suspend the imposition of the fine even in the case

⁷⁸⁶ See: Act LVII of 1996, Section 11.

⁷⁸⁷ TFEU, Article 101(1).

⁷⁸⁸ Then, the Minister of Rural Development was the minister responsible for agricultural policy.

when it was imposed because of an Article 101 TFEU infringement. This provision was contrary to EU law because national laws shall not undermine the applicability of EU law. The anomaly was corrected by repealing this sentence when the provisions were relocated from Act CXXVIII of 2012 to the Hungarian Competition Act.

The resolution of the Minister⁷⁸⁹ declared that the conditions were met in order that the agreement could be exempted from general prohibition. Thus, it was up to the Competition Authority whether there is an effect on trade between Member States and whether Article 101 TFEU shall apply. If yes, based on the provisions then in force, the resolution of the Minister should have become irrelevant, the undertakings concerned should have been liable for the infringement of Article 101 TFEU, but the acting Competition Council should have suspended the imposition of the fine. The Competition Authority found that the conduct under investigation is capable of affecting trade between Member States, meaning that Article 101 TFEU applies. Following this finding, the Competition Authority investigated the possibility of continuing the procedure. In view of the fact that the conduct under investigation had certainly come to an end due to the nature of the product, the Authority concluded that Section 18/A(4) of Act CXXVIII of 2012 would preclude the application of a fine in the case of both national and EU competition law infringements, as the possibility to impose a fine is linked to the fact that the unlawful conduct has continued. The Competition Authority has found that this provision of Act CXXVIII of 2012 effectively precludes, or at least formally limits, the sanctioning of infringements of Article 101 TFEU. It therefore appears that this provision of Act CXXVIII of 2012 infringes, on the one hand, Article 5 of Council Regulation (EC) No 1/2003, which requires the national authority to be able to impose fines in the event of conduct contrary to Article 101 TFEU, and, on the other hand, Article 4(3) of the Treaty on European Union, which requires Member States to ensure the effective enforcement of Article 101 TFEU. However, given that the question as to whether Section 18/A(4) of Act CXXVIII of 2012 is in conflict with EU law could only be clarified by a preliminary ruling of the European Court of Justice and that only competent domestic courts have the power to decide on the initiation of preliminary procedure in the course of any court proceedings, the Competition Authority does not have the power to resolve any conflict between Act CXXVIII and Regulation (EC) No 1/2003 or the TFEU.

The Competition Authority then, first, examined whether the finding of an infringement had sufficient general and specific deterrent effect on the conduct alleged to be infringing. In

⁷⁸⁹ Resolution no. JF/482/1/2013 of the Minister for Agricultural Policy in the proceeding no. Vj-62/2012 of the Hungarian Competition Authority.

this context, the Authority took into account the amendment of Act CXXVIII made after the initiation of the competition proceedings, i.e. the fact that the conduct under investigation was organised by the same ministry as the one which, as a result of this amendment, was entitled to engage in the conduct in question under Section 11(1) of the Hungarian Competition Act. On this basis, the Competition Authority found that, in the current legal environment, a formal finding of an infringement would not be sufficiently dissuasive and could not be expected to remedy the competition problem and bring about a meaningful improvement in competition in the relevant market. Secondly, the Competition Authority examined whether the protection of the public interest justified the continuation of the procedure. It found that Section 18/A of Act CXXVIII of 2012 does not allow for effective action against restrictive agreements within the meaning of the Hungarian Competition Act, including the most harmful infringements, i.e. cartels, in relation to agricultural products. In addition, Section 18/A(4) of Act CXXVIII of 2012 also seeks to exclude sanctions for infringements of EU competition law prohibitions. On that basis, the Competition Authority considered that the legislature has called into question the content of the public interest defined in the Hungarian Competition Act for the sector concerned, which the Competition Authority is required to protect. In so doing, the legislature left both the Competition Authority and the undertakings concerned in uncertainty concerning the precise legal framework of lawful conducts. In view of the considerable uncertainty in the assessment of the public interest resulting from the above-mentioned circumstances, the Competition Authority considered that the public interest as set out in the Hungarian Competition Act was better served by devoting the Authority's resources to effective action against other infringements not affected by the uncertainty. Therefore, the continuation of the proceedings in the present case was no longer justified in view of the fact that the evidence currently available to it, further procedural steps, which would have required greater resources due to uncooperative customers, would have probably been necessary to bring the proceedings to a successful conclusion.⁷⁹⁰

This competition procedure and the parallel events were heavily criticised from a number of quarters;⁷⁹¹ obviously, not the Hungarian Competition Authority was the target of

⁷⁹⁰ Decision no. Vj-62/2012 of the Hungarian Competition Authority.

⁷⁹¹ CSÉPAI Balázs (2015) The Ceasefire Is Over, *European Competition Law Review*, Vol. 36, pp. 404–405; TÓTH Tihamér (2015) The Fall of Agricultural Cartel Enforcement in Hungary, *European Competition Law Review*, Vol. 36, pp. 364–366; and ÁLVARO PINA (2014) Enhancing Competition and the Business Environment in Hungary, *OECD Economics Department Working Papers*, No. 1123, pp. 15–16 are cited by K.J. CSERES (2020) “Acceptable” Cartels at the Crossroads of EU Competition Law and the Common Agricultural Policy: A Legal Inquiry into the Political, Economic, and Social Dimensions of (Strengthening Farmers’) Bargaining Power, *The Antitrust Bulletin*, 65(3), p. 405.

criticism but the legislative intervention. Although the timing of the amendment was not very fortunate and even the wording raises concerns, the basic goal of this legislative step was quite justifiable, if one is aware of the trends in the Hungarian watermelon market. In order for Hungarian watermelon producers to make a reasonable income, retail chains would have to sell watermelons to consumers at around 99 Hungarian Forints. A peculiarity of Hungarian watermelons is that they ripen only by July. From then on, retail chains start to cut the price of watermelons and try to sell imported watermelons at incredibly depressed prices.⁷⁹² This puts Hungarian watermelon producers in an extremely difficult situation year by year.

Relevant provisions of Act CLXIV of 2005
The provision in Point B is as follows:

Section 7(6) of Act CLXIV of 2005

The provisions of this Section shall not apply in cases covered by Act XCV of 2009 on the prohibition of unfair distribution practices against suppliers in relation to agricultural and food products.

In general, the Hungarian regulation on relative market power (other abuse-type conducts) is based on Act CLXIV of 2005. The name of the legal instrument in Hungarian law is ‘abuse of significant market power’. As already indicated, it is quite misleading because *significant market power as such* is required and a necessary prerequisite for the existence of dominance.

The legal instrument ‘abuse of significant market power’ is codified in Sections 7–7/B of Act CLXIV of 2005. The Act’s scope covers trade activities.⁷⁹³ Trade activity is defined as retail and wholesale activities and commercial agency activities.⁷⁹⁴ It means that the scope of Act CLXIV of 2005 is narrower than that of abuse of dominance, for the latter applies to all economic activities, while the former only to trade activities.

⁷⁹² There were occasions when a retailer sold watermelons at 49 Hungarian Forints. The low level of final consumer price is to the detriment of producers and not of retail chains. As farmers being the weakest actors in the food supply chain, retailers „roll over” these costs to producers, and it results in a price of 25 Hungarian forints paid by retailers to producers (as suppliers) which does not even cover the production costs. See, for example: <http://www.atv.hu/belfold/20160727-tuntetes-teherautokrol-dobaltak-le-a-dinnyet-a-tesco-parkolajaban-kepek> [Accessed: 12 October 2021].

⁷⁹³ Act CLXIV of 2005, Section 1.

⁷⁹⁴ Act CLXIV of 2005, Section 2, 9.

Without analysing the general rules on abuse of significant market power, some fundamentals are worth mentioning regarding this legal instrument and its structure. Similarly to abuse of dominance, abuse of significant market power also consists of a general prohibition which declares that abuse of significant market power against a supplier is prohibited.⁷⁹⁵ After the general prohibition, an indicative (illustrative) list of practices is enumerated which are considered as abuse. This is the same structure which can be found with regard to abuse of dominance: a general prohibition, then an indicative (illustrative) list.⁷⁹⁶ Here I do not aim to analyse in detail the possible forms (examples) of abuse, but I repeat the definition of significant market power: a market situation as a result of which the trader becomes or has become a reasonably unavoidable contractual partner in the delivery of his products or services to customers and is able to influence the market access of a product or product group regionally or nationally due to its market share.⁷⁹⁷ This definition is complemented with further provisions: significant market power shall be deemed to exist *vis-à-vis* a supplier if the consolidated net turnover of the group of companies concerned from its trading activities in the preceding year exceeds HUF 100 billion. In addition to this, a trader shall also be deemed to have significant market power if, *on the basis of the structure of the market, the existence of entry barriers, the market share, financial strength and other resources of the undertaking, the size of its commercial network, the size and location of its outlets, the totality of its commercial and other activities*, the undertaking, group of undertakings or purchasing group is or becomes in a position of unilateral bargaining power *vis-à-vis* the supplier.^{798,799}

From the viewpoint of legal theory, the example norm cited above word-for-word is an example of the principle *lex specialis derogat legi generali*. This means that in case the scope of Act XCV of 2009 covers a situation, it prevails, that is to say, the provisions on abuse of significant market power shall not apply.

Nevertheless, particular attention must be paid to the different terminology used in Act CLXIV of 2005 and in Act XCV of 2009. The general term, as shown, is *abuse of significant market power*. Act CLXIV of 2005 uses neither the expression *unfair trade (trading) practices*, nor any type of expression which includes the word *unfair*. The terminology of Act CLXIV of 2005 approaches the phenomenon from the viewpoint of abuse, as well as it does perceive abuse of significant market power as a lower-level-threshold abuse of dominance. This is also

⁷⁹⁵ Act CLXIV of 2005, Section 7(1).

⁷⁹⁶ See Act LVII of 1996, Section 21.

⁷⁹⁷ Act CLXIV of 2005, Section 2, 7.

⁷⁹⁸ Act CLXIV of 2005, Section 7(3-4).

⁷⁹⁹ Further findings already mentioned in Subchapter 2.2.2.B are not repeated here.

reflected in the literature: *Tóth* considers the provisions on abuse of significant market power as additional rules to abuse of dominance, substantially lowering the level of market power which is required to find the existence of an abuse.⁸⁰⁰ The consequence of the example norm mentioned here is that there are specific norms with regard to agricultural and food products when relative market power comes to the fore (see Subchapter 2.1.2.).

3.1.2 Specific norms

Regarding specific norms, the following two acts are analysed:

- A. Section 7/A–7/B of Act CLXIV of 2005 on the Trade;
- B. Act XCV of 2009 on the Prohibition of Unfair Distribution Practices Against Suppliers in Relation to Agricultural and Food Products.

Section 7/A–7/B of Act CLXIV of 2005 on the Trade

The provisions in Point A are as follows:

Section 7/A of Act CLXIV of 2005

(1) For the purposes of Act LVII of 1996 on the Prohibition of Unfair Market Conduct and Competition Restriction, a dominant position shall be deemed to exist on the market for the retail sale of daily consumer goods as the relevant market, if the previous year's (consolidated) net turnover from the retail sale of daily consumer goods of the enterprise or of the affiliated enterprises within the meaning of Section 4(23) of Act LXXXI of 1996 on corporate tax and dividend tax jointly exceeds HUF 100 billion.

(2) For the purposes of this Section, daily consumer goods are the products defined in Section 2, point 18a, excluding perfumes, drug products, household cleaning products, chemical products and sanitary paper products.

Section 7/B of Act CLXIV of 2005

(1) In connection with the sale of beer, soft drinks, fruit drinks, fruit juices and fruit nectars, mineral water and sparkling water (soda water), no declaration may be made under which more than 80% of the total purchases of the declared product by a catering establishment,

⁸⁰⁰ TÓTH 2020, p. 88.

including sales at a casual event, or accommodation establishment (hereinafter for the purposes of this Section collectively referred to as a catering establishment selling beverages) in a calendar year or for a casual event, are from the same manufacturer.

(2) A catering establishment selling beverages shall ensure the sale of beer – except beer sold on tap –, soft drinks, fruit drinks, fruit juices and fruit nectars, mineral water and sparkling water (soda water) from at least two different manufacturers per product.

(3) In the case of the sale of beer on tap, the declaration of rights under paragraph (1) may be made if the catering establishment selling the beverage ensures the continuous sale on tap of at least one beer produced by an artisanal brewery (producer) over which the artisanal brewery is not directly or indirectly controlled by a brewer not classified as an artisanal brewery within the meaning of the Act LVII of 1996 and which does not cooperate in the production of beer with a brewer not classified as an artisanal brewery.

(4) The on-tap sales of beer produced by an on-tap small-scale brewery by a drinking establishment acting under paragraph (3) shall be ensured by the drinking establishment in such a way that, taking into account the average of its purchases of beer on tap over a calendar year, the beer produced by the on-tap small-scale brewery represents at least 20% of the total beer purchased by the drinking establishment for on-tap sales during the year or at a casual event.

(5) Any declaration contrary to paragraphs (1) to (4) shall be null and void.

(6) The prohibition set out in paragraph (1) shall not apply to an agreement concluded between undertakings which are not independent of each other.

(7) For the purposes of this section

(a) beer means beer within the meaning of Act LXVIII of 2016 on Excise Duties (hereinafter referred to as the "Act"),

(b) a declaration of rights means a unilateral contractual clause or declaration of rights used or required by a producer with significant market power,

(c) small-scale brewery means a small-scale brewery within the meaning of the Act.

(8) For the purposes of this Section, a manufacturer shall be deemed to be a manufacturer with significant market power if the consolidated annual net sales of the group of companies, including all parent companies and subsidiaries within the meaning of Act C of 2000 on Accounting exceed

- a) HUF 30 billion in the case of a beer producer;
- b) HUF 10 billion in the case of a producer of soft drinks, fruit drinks, fruit juices and fruit nectars, mineral water and sparkling water (soda water).

There is a great controversy with regard to Section 7/A(1) of Act CLXIV of 2005. On the one hand, it is not clear why this provision is codified among the rules on abuse of significant market power, and, on the other hand, the reason behind the content of this provision is also questionable. Neither the general nor the detailed explanatory memorandum provides us with assistance in this case. The general explanatory memorandum makes quite questionable claims and is poorly formulated: „Highly capitalised retail chains have a dominant market position, which they exploit in every possible way. This must be combated to protect the interests of consumers and domestic small and medium-sized enterprises. Capital-intensive retail chains can afford to make losses for years in order to drive down prices, thus making it impossible for businesses that cannot compete on price to survive on profits.”⁸⁰¹ From a legal and economic perspective, it is not true that retail chains would have dominant position, at least in the conventional sense of dominance. However, the findings of the general explanatory memorandum make some sense, if one looks at Section 7/A(1) of Act CLXIV of 2005, which declares that dominance shall be found, if the undertaking’s net turnover exceeded HUF 100 billion in the previous year. For example, in 2019, all of the three most profitable retail chains (Tesco, Spar, Lidl) had a net turnover of more than HUF 500 billion.⁸⁰² Although these amounts of net turnover refer to the turnover generated from the sales of all products, it is ambiguous that the turnover generated from the sales of daily consumer goods also exceeds HUF 100 billion. It means that – pursuant to section 7/A(1) of Act CLXIV of 2005 – these retail chains have a dominant position *ex lege*. This does not mean that they would have abused their

⁸⁰¹ See the part ‘General Justification’ of the Explanatory Memorandum to the Act CXII of 2014 on the Amendment of Act CLXIV of 2005 on Trade in Relation to the Operation of Undertakings in Order to Achieve Fair Market Conduct.

⁸⁰² See: FEKETE Beatrix (2020) *Itt vannak a friss adatok: még mindig a Tesco a legnagyobb Magyarországon, de gőzerővel robog felé a Lidl* [Online]. Available at: <https://www.portfolio.hu/uzlet/20201001/itt-vannak-a-friss-adatok-meg-mindig-a-tesco-a-legnagyobb-magyarorszagon-de-gozerovel-robog-fele-a-lidl-451162> (Accessed: 14 October 2021).

dominant position, but in the event of an abuse, the Hungarian Competition Authority's position would be very simple to determine whether they were dominant: all the Competition Authority would have to do is look at the annual net revenues of the undertaking in question in the respective market. According to the detailed justification of this provision, this irrebuttable presumption (*praesumptio iuris et de iure*) does not itself create any disadvantage, only if the undertaking abuses its dominant position in some way; but it does create a clear situation for the Competition Authority, which can of course also find that a dominant position has been created in other cases.⁸⁰³ As put by Tóth, this regulatory solution has one advantage: it creates predictability, and the undertakings concerned must be aware that they are in a dominant position *ex lege* and must accordingly refrain from a number of business practices.⁸⁰⁴ This revenue threshold is exactly the same as the one set for abuse of significant market power pursuant to Section 7(3) of Act CLXIV of 2005. The difference is that in case a dominant position is likely to be found, only the turnover generated from the sales of daily consumer goods shall be taken into account, while in case a significant market power is likely to be found, the turnover generated from the sales of all products shall be taken into account. It means that it is more difficult to reach the position of dominance than of significant market power, given that in order to reach the former, only the turnover generated from the sales of daily consumer goods counts, so the product scope to be considered is narrower. Pursuant to Section 2, point 18a of Act CLXIV of 2005, daily consumer goods cover – with the exception of products sold in the context of catering activities – foodstuffs, perfumes, drugstore products, household cleaning products and chemical products, sanitary paper products, intended to meet the daily needs of the population, which are typically consumed, used or discarded by the consumer within a maximum of one year. Nevertheless, this scope is further narrowed by Section 7/A(2) of Act CLXIV of 2005 with regard to this fixed threshold of dominance: it excludes perfumes, drugstore products, household cleaning products and chemical products, sanitary paper products. It means that in Hungary *a dominant position exists on the retail market ex lege, if the concerned undertaking's net turnover from the sale of foodstuffs exceeded HUF 100 billion in the year preceding the year of the investigation*. There are two problems with this provision: one is formal, while the other is substantial. It is not clear why the provision is positioned in Act CLXIV of 2005 and not in LVII of 1996, in the Hungarian Competition Act. Although the

⁸⁰³ See the part 'Detailed Justification of Section 3' of the Explanatory Memorandum to the Act CXII of 2014 on the Amendment of Act CLXIV of 2005 on Trade in Relation to the Operation of Undertakings in Order to Achieve Fair Market Conduct.

⁸⁰⁴ TÓTH 2020, p. 88.

provision's scope only covers undertakings present in retailing and Act CLXIV of 2005 is about trade, but given the significance of this provision and its purely competition law-related nature, it should be included among the rules on abuse of dominance (Chapter V of the Hungarian Competition Act). The rules on determining whether an undertaking is in a dominant position are regulated in Section 22(1) of the Hungarian Competition Act. It would be more reasonable to introduce an additional provision which declares that an undertaking in the retail market is in a dominant position if its net turnover from the sales of foodstuffs exceeds HUF 100 billion. Positioning this abuse of dominance-related provision among the rules on significant market power may suggest that enforcing the rules on abuse of dominance in food retailing requires such a low intervention threshold that it is rather regulated among the rules of a legal instrument related to relative market power. The other problem arisen by this provision is that it establishes such a low intervention threshold for finding the existence of a dominant position that in Hungary, for example, the six most profitable retail chains are all dominant based on their general net turnover in 2019.⁸⁰⁵ Even the sixth one (*Aldi*) generated a net turnover of HUF 246 billion: it is not difficult to imagine that of this HUF 246 billion, more than HUF 100 billion came from the sales of foodstuffs.

Let us turn our attention to Section 7/B of Act CLXIV of 2005.⁸⁰⁶ Though these rules are related to beverages in the catering industry, drinks are also meant by the term 'food' pursuant to Article 2 of Regulation (EC) No 178/2002, thus our analysis also cover these norms. On the issue, a good starting point is provided by the general part of the Explanatory Memorandum. The provisions aim to create the possibility to reduce the exclusive distribution contracts that are common practice in the on-trade (hotel-restaurant-café) market. In the on-trade market, large producers tie up the vast majority of their turnover in exclusive agreements to the detriment of smaller producers. The provisions reduce this restrictive effect on competition to the benefit of smaller players (such as small breweries). It does not seek to prohibit discounts granted through exclusivity agreements or the provision of free facilities containing an advertising medium, if these agreements otherwise comply with the legal conditions. Infringements of the provisions are dealt with by the Hungarian Competition Authority.⁸⁰⁷ It is clear from these provisions that the Hungarian regulation puts great emphasis on the process of competition as such, even willing to sacrifice it on the altar of efficiency. As

⁸⁰⁵ See: FEKETE 2020.

⁸⁰⁶ The amending act was Act CXL of 2020.

⁸⁰⁷ See the part 'General Justification' of the Explanatory Memorandum to the Act CXL of 2020 on the Amendment of Act CLXIV of 2005 on Trade.

can be seen, there are also „safe harbours” formulated here: the group of companies concerned has significant market power, if its net turnover exceeds HUF 30 billion in the case of a beer producer, and HUF 10 billion in the case of a producer of soft drinks, fruit drinks, fruit juices and fruit nectars, mineral water and sparkling water (soda water). All of these provisions aim to serve the interests of small and medium-sized enterprises in the food sector. Within the context of the Commission’s Guidelines on Vertical Restraints, these Hungarian provisions aim to cease ‘single branding’ agreements in relation to certain types of beverages. The 80%-threshold introduced by Section 7/B(1) of Act CLXIV of 2005 is fully in line with the definition of non-compete arrangements in the Guidelines on Vertical Restraints: „A non-compete arrangement is based on an obligation or incentive scheme which makes the buyer purchase more than 80% of his requirements on a particular market from only one supplier.”⁸⁰⁸ The main risk which may arise from a non-compete arrangement is the foreclosure of the market to other competing suppliers, however single branding is exempted in EU law, if neither the supplier’s nor the buyer’s market share exceeds 30%, and they are subject to a non-compete obligation for a maximum period of five years.⁸⁰⁹ As can be seen, the Hungarian regulation adopts a stricter approach in the catering industry with regard to certain types of beverages, given that in Hungary the existence of a significant market power position requires a certain extent of turnover threshold and not a certain extent of market share when speaking about non-compete clauses.

The national regulation of UTPs before the implementation of the UTP Directive

The national provisions on unfair trading practices in B2B-relations applying to agriculture and the food supply chain are codified in Act XCV of 2009. Its official title is the Prohibition of Unfair Distribution Practices Against Suppliers in Relation to Agricultural and Food Products. It becomes clear *prima facie* that the terminology used in Hungarian law is different than at EU level. The title of Act XCV of 2009 shows that the prohibitions formulated cover a narrower activity: only the practices of retailers and not each kind of sales throughout the food supply chain in general.

i. The comparison of scope rationae materiae

⁸⁰⁸ EUROPEAN COMMISSION (2010) *Guidelines on Vertical Restraints*, SEC(2010) 411, (129).

⁸⁰⁹ *Ibidem*, (130)–(131).

Act XCV of 2009 applies only to sales in agricultural and food products, as its title suggests. Pursuant to the Act, the definition of agricultural and food products is divided into two parts: on the one hand, it covers products that meet the definition in Article 2 of Regulation (EC) No 178/2002 (hereinafter referred to as the Food Regulation) and, on the other hand, only those products which do not require further processing before being sold to the final consumer. Article 2 of the Food Regulation defines food (or foodstuff) as follows: any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans. What is relevant for us is what Article 2 does not consider as food: including, but not limited to, feed, live animals unless they are prepared for placing on the market for human consumption, plants prior to harvesting, tobacco and tobacco products, etc. On the contrary, the UTP Directive refers to Annex I to the Treaty on the Functioning of the European Union and even extends this definition to include products not listed in that Annex, but processed for use as food using products listed in that Annex. The two categories of products are far from overlapping. To give a few examples: (a) the Directive covers all live animals, whereas Act XCV of 2009 only covers animals prepared for placing on the market and intended for human consumption; (b) the Directive also covers dead animals unfit for human consumption such as fish, crustaceans and molluscs, whereas Act XCV of 2009 – as mentioned in point (a) – only covers live animals fit for human consumption; (c) the Directive covers residues and waste from the food industries as well as prepared animal fodder, whereas Act XCV of 2009 does not apply to feed, given that, according to the Food Regulation, feed is not equal to food; (d) the Directive also applies to unmanufactured tobacco, tobacco refuse, whereas Act XCV of 2009 does not apply to tobacco and tobacco products.

ii. The comparison of scope rationae personae

In relation to the personal scope, *Firniksz and Dávid* have already mentioned that the Directive does not only apply to conduct between retail chains and their suppliers but also covers processors who engage in unfair trading practices towards their suppliers.⁸¹⁰ This is not the case in Act XCV of 2009 which only covers unfair distribution practices by retailers. The other significant difference is that Act XCV of 2009 does not differentiate according to annual turnover thresholds, as the Directive does.

⁸¹⁰ FIRNIKSZ–DÁVID 2020, p. 286.

These have two implications. In one respect, the personal scope of the Directive is narrower than the Hungarian legislation, but in another respect it is broader. On the one hand, the Directive's scope *rationae personae* is narrower because of the turnover thresholds employed, since Act XCV of 2009 does not provide for any additional criteria in this respect. On the other hand, the Directive's scope *rationae personae* is broader because it covers the whole food supply chain, not only the unfair practices of retailers, as in Hungary. Given that the Directive aims to realise minimum harmonisation, the Hungarian regulation shall be extended to also cover the whole food supply chain (all transactions between a supplier and a buyer with regard to sales of agricultural and food products). Nevertheless, the lack of turnover thresholds may remain in force in Hungary since adopting or maintaining stricter rules is permitted within the framework of implementation. The question arises whether the regulation without turnover thresholds but covering the whole food supply chain would not cause disproportionate intervention into the relations of market actors of the food supply chain. In our opinion, it would.

iii. Listed practices

Act XCV of 2009 includes no separate grey list and black list. After declaring that unfair distribution practices are forbidden,⁸¹¹ in an exhaustive list it enumerates all practices which constitute an unfair practice *per se*. That is, practices not included in the list cannot be considered unfair. The following practices are covered by the Act:⁸¹²

(a) the trader imposes conditions on the supplier which result in the unilateral imposition of risk-sharing terms favouring the trader;

(b) the use of a contract term, with the exception of the obligation in connection with non-conformity, which provides with regard to the products supplied by the supplier to the trader

(ba) the obligation for the supplier to repurchase or take back the products, with the exception of products which remain in the trader's stock when they are first introduced into the trader's range and products which are taken over from the supplier as close to their sell-by date and remain in the trader's stock after the expiry of their sell-by date or the best-before date, or

⁸¹¹ Act XCV of 2009, Section 3(1).

⁸¹² See also: PAPP Mónika (2019) *Hungary*. In: Anna PISZCZ–Adam JASSER (eds.) *Legislation Covering Business-to-business Unfair Trading Practices in the Food Supply Chain in Central and Eastern European Countries*. Warsaw: University of Warsaw Faculty of Management Press, pp. 156–160. [Note: I use different translations than Mónika Papp in the above-mentioned study.]

- (bb) the repurchase or repossession by the supplier at a price which – arising from the characteristics of the product and its availability for further use by the supplier – is inappropriately reduced in relation to the purchase price;
- (c) the trader passes on to the supplier all or part of the costs being in the business interest of the trader, in particular the costs of installation, operation, maintenance, transport of the product from the logistics unit used by the trader to another logistics unit or to the shop, either by the trader or through the use of a third party intermediary;
- (d) the trader, either itself or through the use of a third party intermediary, charges a fee to the supplier for getting included in the trader's group of suppliers or remaining therein, or for getting included the supplier's products in the trader's stock or remaining therein;
- (e) the trader, either itself or through the use of a third party intermediary, charges a fee to the supplier on any legal ground
- (ea) for services not actually provided by the trade,
 - (eb) for activities related to the sale by the trader to the final consumer which do not provide any additional service to the supplier, in particular the display of the product in the trader's premises in a specific place in a manner which does not provide any additional service to the supplier, the storage or refrigeration of the product, or the keeping of live animals,
 - (ec) for services not required by the supplier and not being in the supplier's interest,
 - (ed) for distribution-related services required by the supplier and actually provided by the trader not proportionately, or taking into account the tax rate on the product, if the consideration for the service is determined at a fixed proportion of the price at which the goods are supplied;
- (f) the trader
- lays down that the supplier shall pay a full or partial contribution to a discount provided by the trader to the final consumer for a period longer than the period for which the discount is granted to the consumer, or for a quantity greater than the quantity involved in the given discount, or
 - lays down that the supplier shall pay a contribution higher than the discount provided for the final consumer,
 - fails to comply with the provision in Section 3(2a); it declares that the trader shall present financial statements to the supplier with regard to the discount granted and the quantity of products concerned; it shall take place no later than 30 days after the end date of the discount provided by the trader with the consent of the supplier to the final consumer, or no later than 30 days after drawing up the inventory necessary to the

financial report pursuant to Act C of 2000 on Accounting, if the previous year's total net revenue of the trader does not exceed HUF 100 million.

(g) the trader passes on to the supplier the costs resulting from a penalty imposed by a public authority on the trader for an infringement of the law within the trader's sphere of activity;

(h) the payment of the price of the products by the trader to the supplier, or – after informing the trader – to the person to whom the supplier has assigned the price, with the exception of the case of non-conformity, takes place

(ha) more than 30 days after taking of physical possession of the products by the trader or by another person acting on his behalf [hereinafter referred to as 'take-over'], provided that the supplier handed over the correct invoice to the trader within 15 days after the take-over,

(hb) more than 15 days after the receipt of a correctly issued invoice, provided that the supplier handed over the correct invoice to the trader more than 15 days after the take-over;

(i) the trader lays down that the supplier shall provide a discount to the trader, if the trader's payment takes place in accordance with the payment deadline;

(j) the trader precludes the application of interest rate, of penalties because of late payment, or of other ancillary contractual obligations ensuring the performance of the contract against himself;

(k) the trader lays down that the supplier has an exclusive obligation to sell to the trader, not including the trader's private label products, without any proportionate remuneration, or that the supplier shall ensure the application of the most favourable terms compared with other traders;

(l) the use of a non-written contractual provision between the trader and the supplier, if the non-written contractual provision is not put into writing within three working days of the supplier's request for it;

(m) the trader notifies the supplier of an order for the product or of a change to it after a reasonable period of time;

(n) a unilateral modification of the contract by the trader for a reason which cannot be objectively justified and which is not due to an event external to the trader's operation;

(o) the trader fails to disclose to the public his business terms and conditions, deviates from his public business terms and conditions, or applies a term or condition which is not included in his public terms and conditions;

(p) the trader restricts the supplier's legitimate use of a trade mark;

(q) the trader offers the product to final consumers at a price lower than the price indicated on the invoice issued by the supplier, or – in case of the trader's own production – at a price lower

than the cost price including general operating expenses, with the exception of cases when – because of the trader’s ceasing of trading or profile change – the trader sells out his stock for a maximum of 15 days with the prior notification of the concerned agricultural authority, as well as when the trader sells out products of having no full value, including the case when a product has been accumulated in the trader’s stock for an unforeseeable reason and is close to its expiry date;

(r) the trader charges a fee (in the form of discount, commission or any other fee) to the supplier on any legal ground which can be enforced based on the quantity distributed by the trader, with the exception of the case when an ex-post discount is applied which can be considered as an incentive for the trader to increase the distributed quantity and which is a proportionate amount related to the commercial characteristics of the product and based on the additional sales determined by the parties in relation to the sales achieved or estimated in a previous period, without taking into account the tax rate on the product;

(s) the trader fails to reimburse the supplier for the amount of the public health product tax payable by the supplier on the product supplied to the trader within the time limit laid down in point (h);

(t) the trader fails to comply with Section 3(2b) or Section 3(2c); the former declares that the trader shall notify the supplier of his claim for compensation at least five days before the claim is made, while the latter declares that the supplier shall inform the trader of the tax amount chargeable on the products in accordance with points (ed) and (r).

(u) the trader forms the final consumer price of products identical to each other in terms of composition and organoleptic characteristics in a discriminatory way on the basis of the country of origin of the product;

(x) the trader unilaterally reduces the purchase price determined by the supplier despite the supplier’s objection, or the trader threatens the supplier with the termination of the contractual relationship, the cancellation of the order, the reduction of the ordered quantity, the cancellation of sales promotions or any other means causing the supplier financial or moral loss, in order to obtain a contract amendment aimed at reducing the purchase price.⁸¹³

As can be seen, this list is extremely detailed. The wording of the practices covered by Act XCV of 2009 is extremely casuistic, which is a great difference in relation to the UTP Directive. Act XCV of 2009 covers more than twice as many conducts as the Directive. However, there are three practices in the Directive that do not correspond to any of the unfair

⁸¹³ Act XCV of 2009, Section 3(2).

practices of Act XCV of 2009. These are the following: (i) the buyer unlawfully acquires, uses or discloses the trade secrets of the supplier within the meaning of Directive (EU) 2016/943 of the European Parliament and of the Council;⁸¹⁴ (ii) the buyer threatens to carry out, or carries out, acts of commercial retaliation against the supplier if the supplier exercises its contractual or legal rights, including by filing a complaint with enforcement authorities or by cooperating with enforcement authorities during an investigation;⁸¹⁵ (iii) the buyer requires compensation from the supplier for the cost of examining customer complaints relating to the sale of the supplier's products despite the absence of negligence or fault on the part of the supplier.⁸¹⁶ Act XCV of 2009 shall be amended with these practices in order that it could be in accordance with the Directive's minimum harmonisation approach. Although if one were less strict, a practice listed in the Act may be appropriate for the third, above-mentioned practice indicated in point (iii). Pursuant to Act XCV of 2009, the trader, either itself or through the use of a third party intermediary, shall not charge a fee to the supplier on any legal ground for services not required by the supplier and not being in the supplier's interest.⁸¹⁷ Requiring compensation from the supplier for examining customer complaints is a fee charged certainly not required by the supplier and not being in the supplier's interest. One of the elements of the practice indicated in point (ii), 'threatening' also appears in a practice covered by Act CXV of 2009, nevertheless the Hungarian prohibition refers to cases when different types of threats take place in order that the trader could reduce the purchase price despite the supplier's objection.⁸¹⁸ In our opinion, all the other twelve practices listed in the Directive can be found in some form in Act XCV of 2009.

iv. The sanction system

The sanction system of Act XCV of 2009 can be divided into two parts: first, if the enforcement authority, the National Food Chain Safety Office (throughout the thesis referred to as 'NFCISO') finds an infringement, it may inform the trader before making a final decision that he can make a commitment statement within ten days to bring his conduct into line with the provisions of the law; second, if this does not happen, the enforcement authority imposes a

⁸¹⁴ UTP Directive, Article 3, 1. (g).

⁸¹⁵ UTP Directive, Article 3, 1. (h).

⁸¹⁶ UTP Directive, Article 3, 1. (i).

⁸¹⁷ Act XCV of 2009, Section 3(1) ec).

⁸¹⁸ Act XCV of 2009, Section 3(1) x).

fine.⁸¹⁹ The minimum fine shall be HUF 100 000,⁸²⁰ the maximum HUF 500 million,⁸²¹ but not more than ten percent of the trader's net turnover in the year preceding the decision establishing the infringement.⁸²² The 10% threshold is the same maximum amount as in competition law.

Examining the sanction types of nine years based on public data, 206 infringements took place. The majority of these can be considered as violations of substantive law, which are covered by the Section 3(2) of the Act. There are, however, some cases of procedural violations, typically failure to provide information. With regard to the total number of cases, I can conclude that the procedures were closed with the imposition of a fine to an extent of about 70 per cent of all cases, while a commitment statement was made in the remaining 30 per cent of all cases. The data indicate that judicial review proceedings have been initiated in respect of 45 administrative proceedings, representing approximately 22 per cent of cases. If one looks at the amount of fines imposed, it is clear that 2011 and 2012 stand out, as more than one billion forints of fines were imposed in both years. In 2013, it fell to approximately HUF 215 million, and only year 2015 (HUF 224 million) and 2016 (HUF 227 million) could approach it. In 2014, a record low total amount of fine of HUF 6.5 million was imposed. Starting from 2017 (HUF 81 million), a slow increase can be observed, as both 2018 (HUF 108 million) and 2019 (HUF 166 million) exceeded the previous years.⁸²³

As a consequence, I can conclude that the Hungarian enforcement mechanism works with the predominant feature of applying financial sanctions.

The national regulation of UTPs after the implementation of the UTP Directive

Hungary has not modified its regulation on unfair trading practices as a consequence of the implementation obligation coming from the EU, therefore there are some discrepancies between the UTP Directive and Act XCV of 2009. From the foregoing it is clear that these differences are related to the personal and material scope, as well as to the practices enumerated. Concerning the enforcement mechanism in general and the sanction system in particular, the Hungarian regulation is in line with the EU Directive.

An example may shed light to the problems arising from the implementation which is not fully correct. For example, the Act XCV of 2009 does not cover unfair practices committed

⁸¹⁹ Act XCV of 2009, Section 6(1).

⁸²⁰ Approximately EUR 270.

⁸²¹ Approximately EUR 1 362 800.

⁸²² Act XCV of 2009, Section 6(2).

⁸²³ Based on public data from <https://portal.nebih.gov.hu>.

by processors against producers. Suppose that a processor cancels orders of a perishable agricultural product at such short notice that the supplier cannot reasonably be expected to find an alternative means of commercialising or using those products. A national regulation which would completely be in accordance with the UTP Directive would also cover this violation, but the Act XCV of 2009 does not do so because of its difference in personal scope in relation to the UTP Directive. It means that suppliers are not protected against the unfair practices of processors pursuant to the Hungarian regulation, and thus Act XCV of 2009 does not fulfil the requirement of minimum harmonisation.

This could bring to the fore the application of the direct effect of directives. Simply put, based on the *Faccini Dori* case, the matter can be short-circuited. As declared, „an individual may not rely on a directive in order to claim a right against another individual and enforce such a right in a national court.”⁸²⁴ It means that if a supplier submits a claim to the national authority, and the authority dismisses it based on the finding that Act XCV of 2009 does not provide protection against the unfair practices of processors *vis-à-vis* suppliers, and the supplier initiates judicial review proceedings against the decision of the authority, before the administrative court the supplier cannot refer to the fact that Hungary has not implemented the UTP Directive appropriately and to the direct effect of the UTP Directive which would have meant protection for the supplier if implemented correctly.

3.2 Germany

The analysis on the German regulation is also started with exception norms. Next, I turn my attention to specific norms.

3.2.1 Exception norms: Section 28 of *GWB* and Section 6 of *AgrarOLkG*

The German exception norms codified in Section 28 of *GWB* and Section 6 of *AgrarOLkG* are presented together. The latter formulates special provisions in relation to the former, that is, Section 6 of *AgrarOLkG* takes precedence over Section 28 of *GWB*.⁸²⁵ It means that one can draw up a chain of the *lex specialis derogat legi generali* principle. The general

⁸²⁴ See: Case C-91/92 – Judgment of the Court of 14 July 1994: Paola Faccini Dori v Recreb Srl.

⁸²⁵ BUNDESKARTELLAMT (2003) *Ausnahmebereiche des Kartellrechts – Stand und Perspektiven der 7. GWB-Novelle* (Diskussionspapier für die Sitzung des Arbeitskreises Kartellrecht am 29. September 2003), p. 23; see also: Bernhard SCHULZE-HAGEN (1977) *Die landwirtschaftlichen Zusammenschlüsse nach deutschem und europäischem Wettbewerbsrecht*. Cologne: Carl Heymanns Verlag, p. 86. These studies do not expressly mention *AgrarOLkG*'s rules but its antecedents. That is, in general, they are of the opinion that agricultural market organisation rules take precedence over sector-specific competition rules included in the general competition act.

prohibition of anti-competitive agreements in Section 1 of *GWB* is ruled out by Section 28 of *GWB* which is ruled out by Section 6 of *AgrarOLkG*. Conversely, Section 6 of *AgrarOLkG* prevails over Section 28 of *GWB* which prevails over Section 1 of *GWB*.

Section 28 of *GWB*

(1) Section 1 shall not apply to agreements between agricultural producers or to agreements and decisions of associations of agricultural producers and federations of such associations which concern

1. the production or sale of agricultural products, or
 2. the use of joint facilities for storing, treating or processing agricultural products,
- provided that they do not maintain resale prices and do not exclude competition. Plant breeding and animal breeding undertakings as well as undertakings operating at the same level of business shall also be deemed to be agricultural producers.

(2) Section 1 shall not apply to vertical resale price maintenance concerning the sorting, labelling or packaging of agricultural products.

(3) Agricultural products shall be the products listed in Annex I to the Treaty on the Functioning of the European Union as well as the goods resulting from the treatment or processing of such products, insofar as they are commonly treated or processed by agricultural producers or their associations.

Section 6 of *AgrarOLkG*

(1) Section 1 of the *GWB* shall not apply to activities carried out by an agricultural organisation in the area covered by its recognition and which comply with the Union law referred to in Section 1(1) 1., also in conjunction with Section 1(2) or Section 1(3), as well as Part 2 of this Act and the statutory instruments issued on the basis of this Act with respect to agricultural organisations. In all other respects, the provisions of the *GWB* shall remain unaffected.

(2) The Federal Ministry is authorised, in agreement with the Federal Ministry for Economic Affairs and Energy, by ordinance subject to the consent of the *Bundesrat*, to,

1. regulate the exchange of information on facts relating to recognised agricultural organisations between the bodies responsible for recognition and the cartel authorities, insofar as the exchange is necessary for the action of the respective other authority,
2. regulate, to the extent that an agricultural organisation violates an applicable provision of antitrust law, the suspension or revocation of recognition, including the procedure, and,
3. regulate the requirements necessary for the implementation of such provisions as well as the procedure, to the extent that Union law provides for specific antitrust provisions for certain agricultural organisations.

Similarly to EU law, the German regulation also acknowledges the special nature of agriculture. This acknowledgement is realised by and through the sectoral exemption under the general prohibition of anti-competitive agreements.⁸²⁶ Agricultural producers have reduced adaptability to unexpected events of the concerned market, as well as their activity is significantly limited by the length and uncertain outcome of the production process, resulting in price volatility. The concentration downstream (processors and retailers) also makes agricultural production more difficult when it comes to the sales of agricultural products from producers to processors or retailers.⁸²⁷

The practical significance of *GWB*'s Section 28 is decreased by Section 6 of *AgrarOLkG*,⁸²⁸ given that the latter declares that the prohibition of agreements restricting competition does not apply to activities of agricultural organisations in the area covered by their recognition and which comply with the Union law. In other words, Section 6 of *AgrarOLkG* is a supplement to Section 28 of *GWB* and broader in its scope. Concerning Section 6 of *AgrarOLkG*, the scope of activities is determined by the purpose according to the statutes or the articles of association of the recognised organisation, which are decisive for the recognition.⁸²⁹ The norm addressees (subjects) of Section 6 of *AgrarOLkG* are agricultural organisations which—pursuant to the definition formulated in Section 1 of *AgrarOLkG*—are producer organisations, associations of producer organisations, and interbranch organisations. The term 'activity' covers all conceivable forms of action, i.e. it is not limited, for example, to formal decisions or legally binding contracts. This corresponds to the broad scope of application

⁸²⁶ See also: Deutscher Bundestag: Unterrichtung durch die Bundesregierung – *Bericht der Bundesregierung über die Ausnahmereiche des Gesetzes gegen Wettbewerbsbeschränkungen (GWB)*. Drucksache 7/3206 – 4 February 1975. Available at: <https://dserver.bundestag.de/btd/07/032/0703206.pdf> [Accessed: 19 October 2021].

⁸²⁷ SCHWEIZER 2020, Rn. 11.

⁸²⁸ SCHWEIZER 2020, Rn. 14. *Schweizer* does not exactly mention Section 6 of *AgrarOLkG* but its antecedent, Section 11 of *Marktstrukturgesetz*.

⁸²⁹ BUTH 2020, Rn. 39.

of Section 1 of *GWB*. The *AgrarOLkG*'s Section 6(1)—in its Sentence 2—also clarifies that the *GWB* remains applicable in all other respects. Thus, in particular the provisions on abuse of dominance and merger control continue to apply. Insofar as there is no exemption pursuant to Section 6(1) of *AgrarOLkG*, Section 28 *GWB* may also continue to be applied.⁸³⁰

The subjects of the exemption included in *GWB*'s Section 28 are agricultural producers, associations of agricultural producers and federations of agricultural producers' associations. By the term 'agricultural producers' the provision also means plant and animal breeding undertakings. Contracts, decisions and concerted practices which would otherwise violate the prohibition in *GWB*'s Section 1 are only permitted if they concern the production or sale of agricultural products, or the use of joint facilities for storing, treating or processing agricultural products. Whether this is the case is not to be decided subjectively according to the purpose of the parties involved, but objectively. Without aiming to give an exhaustive list, it means, *inter alia*, that agreements can be made on the limitation of production of certain products in terms of area or quantity, that is to say, on cultivating only certain products, cultivating them only in certain quantities or not cultivating them at all; it is permissible to agree on the use of certain seeds, or on the early slaughter on laying hens; agreements on the sale of agricultural products which directly determine the route from the producer to the consumer are also permissible.⁸³¹

In deviation from EU law, agricultural products within the meaning of *GWB*'s Section 28 are not only the products listed in Annex I TFEU, but also the goods resulting from the treatment or processing of such products, insofar as they are commonly treated or processed by agricultural producers or their associations.⁸³²

Pursuant to Section 28(1) of the *GWB*, there are two negative criteria to be met in order that the agreement in question could be exempted from the prohibition of anti-competitive agreements.⁸³³ On the one hand, agreements shall not contain price fixing. On the other hand, they shall not exclude competition.⁸³⁴ If the agreement does not only contain provisions of price fixing but also on production and sales, from a civil law perspective the former are void, while the latter are not, pursuant to the rules on partial invalidity included in Section 139 of the *Bürgerliches Gesetzbuch*. The prohibition of price fixing applies to contracts, decisions and concerted practices, in principle also to mutual and unilateral price recommendations. It is

⁸³⁰ Christian BUSSE (2014) *Agrarmarktstrukturgesetz–AgrarMSG und Agrarmarktstrukturverordnung–AgrarMSV: Das Recht der anerkannten Agrarorganisationen. Kommentar – Rechtstexte – Materialien*. Berlin: HLBS Verlag, p. 144.

⁸³¹ SCHWEIZER 2020, Rn. 33–35.

⁸³² GROTELOH 2016, Rn. 57.

⁸³³ BUTH 2020, Rn. 23.

⁸³⁴ *GWB*, Section 28(1), Sentence 1.

irrelevant whether the agreement increases or decreases the price.⁸³⁵ Price fixing can be direct or indirect, e.g. through contractual penalties in case of non-compliance with a certain price.⁸³⁶ When it comes to associations of agricultural producers, differentiation must be made whether price fixing takes place internally or externally. The prohibition only applies to the latter one: when associations of agricultural producers agree on sales price with each other.⁸³⁷ However, it is permitted for agricultural producers to set a price which the association is obliged to observe: this is not vertical price maintenance, given that the association itself is not a special economic level but only an organisational intermediate between producers and buyers.⁸³⁸ The second criterium, the prohibition of competition exclusion shall, obviously, be decided in light of the relevant product and geographical market. Competition is excluded if there are no or only a few competitors on the relevant market, that is, there is no appreciable competition. Buyers thus have neither choice nor selection possibilities. For the assessment of the number of competitors, which is decisive for the question of appreciable competition, the individual case has to be taken into account.⁸³⁹ Since 1 July 2005, associations of agricultural producers and federations of such associations do not have to notify the *Bundeskartellamt* on agreements and decisions falling under Section 28(1) of *GWB*.⁸⁴⁰

Some differences can be found between Section 28 of *GWB* and Section 6 of *AgrarOLkG*. These are the following from the viewpoint of the latter one: (a) Only those agricultural organisations are privileged which have been formally recognised, but not the ones in the process of being formed. (b) The statutory activities of agricultural organisations can cover the products listed in Annex I TFEU. However, according to Section 2(2) of *AgrarOLkG*, non-Annex I products can also be covered, if EU law contains provisions on the recognition of this product or a statutory instrument according to Section 2(3) of *AgrarOLkG* declares *AgrarOLkG* applicable to this product. (c) The exemption under antitrust law pursuant to Section 6(1) of *AgrarOLkG* refers to activities in the area covered by the recognition. (d) The exemption under antitrust law for decisions of agricultural organisations is extended in comparison with Section 28(1) of *GWB* in that the prohibition of price fixing does not apply. Thus, agricultural organisations can prescribe to their competent body the observance of prices determined in terms of amount, as well as both maximum and minimum prices are permissible.

⁸³⁵ SCHWEIZER 2020, Rn. 41–42 and 44.

⁸³⁶ BUTH 2020, Rn. 24.

⁸³⁷ BUTH 2020, Rn. 25.

⁸³⁸ SCHWEIZER 2020, Rn. 47–48.

⁸³⁹ BUTH 2020, Rn. 25.

⁸⁴⁰ BUTH 2020, Rn. 28.

In addition, however, price fixing directly *vis-à-vis* the members is also permitted, provided that they are exceptionally entitled to sell their products themselves.⁸⁴¹

Purchasing cartels which jointly procure equipment, feed, fertiliser, etc. are in principle not covered by Section 6(1) of the *AgrarOLkG*, since permissible activities shall concern the products which are the statutory object of the respective agricultural organisation. Nevertheless, given that one of the tasks of the agricultural organisation is to establish common production and quality rules, it is permissible for them to prescribe the use of uniform means of production to their members; however, this power exists only to the extent that this is necessary to ensure the standardisation of the products; not permissible is the obligation to procure the means of production from a single supplier if they are offered by several suppliers.⁸⁴²

The *GWB*'s Section 1 also covers vertical resale price maintenance. The exemption under the prohibition of this is limited to agreements for the sorting, labelling and packaging of agricultural products. The practical significance of this exemption is slight. Corresponding agreements between the parties involved are only permissible insofar as mandatory legal regulations on sorting, labelling and packaging do not prevent such agreements.⁸⁴³ Labelling gives the opportunity to agricultural producers to identify their products, and it includes all pieces of information about the product itself, including its name. Sorting refers to the pieces of information about commercial classes, varieties, quality characteristics, etc. Packaging concerns materials used to wrap or protect agricultural products, which may be prescribed in form, colour or type. This exemption is the only way to ensure that even small agricultural producers can provide proof of origin for their products. This provision clarifies that price fixing in connection with these commitments can also be included in order to regulate sorting, labelling or packaging uniformly in the supply chain. It means that minimum price regulations are also conceivable for individual products if market conditions require such a commitment.⁸⁴⁴

Section 6(2) of *AgrarOLkG* provides the Federal Ministry of Food and Agriculture with the power to issue ordinances in three areas, which are to be exercised in agreement with the Federal Ministry for Economic Affairs and Energy and with the consent of the *Bundesrat*.⁸⁴⁵

3.2.2 Specific norms

⁸⁴¹ SCHWEIZER 2020, Rn. 66.

⁸⁴² SCHWEIZER 2020, Rn. 67.

⁸⁴³ SCHWEIZER 2020, Rn. 84.

⁸⁴⁴ BUTH 2020, Rn. 29–30.

⁸⁴⁵ BUSSE 2014, p. 144.

Concerning German specific norms there are two legal acts to be mentioned. The first is Sentence 2 of *GWB*'s Section 20(3), while the second is the one which implemented the UTP Directive.

Section 20(3) of *GWB*

It is necessary to note here that the analysis of general provisions of *GWB*'s Section 20 is not presented here; the scrutiny only concentrates on provisions which carry a *lex specialis* nature and character.

Section 20(3) of *GWB*

(3) Undertakings with superior market power in relation to small and medium-sized competitors may not abuse their market power to impede such competitors directly or indirectly in an unfair manner. An unfair impediment within the meaning of Sentence 1 exists in particular if an undertaking

1. offers food within the meaning of Section 2(2) of the German Food and Feed Code [Lebensmittel- und Futtermittelgesetzbuch] below cost price, or

2. ...

3. ...

unless there is, in each case, an objective justification. Cost price within the meaning of Sentence 2 shall be the price agreed between the undertaking with superior market power and its supplier for the provision of the good or service and from which general discounts that can be expected with reasonable certainty at the time the offer is made are proportionally deducted unless otherwise expressly agreed with regard to the specific goods or services. Offering food below cost price is objectively justified if this is suitable to prevent the deterioration or the imminent unsaleability of the goods at the dealer's premises through a timely sale, or in equally severe cases. Donating food to charity organisations for use within the scope of their responsibilities shall not constitute an unfair impediment.

Pursuant to Sentence 2 No. 1 of *GWB*'s Section 20(3), an unfair hindrance to small and medium-sized competitors exists, in particular, if norm addressees offer foodstuffs below their cost price, unless this is objectively justified. It is sufficient for an infringement to be established if it occurs only once. Through the examples of an unfair hindrance included in Sentence 2 within the meaning of Sentence 1, on the one hand, the causal link is irrefutably established

between the exercise of superior market power appearing in the form of offers below cost price and the danger to the competitiveness of small and medium-sized competitors, and, on the other hand, the lack of objective justification for such offers and thus the unfairness of the hindrance they impose on these competitors is rebuttably presumed. An additional determination that this hindrance noticeably affects the competitive conditions on the relevant market is no longer relevant. The scope of the prohibition of Sentence 2 No. 1 is therefore decisively determined by the standards for the existence of a below cost price offer and the requirements for the proof to be provided by the norm addressee that such an offer is objectively justified in the individual case.⁸⁴⁶ For the application of this provision it is sufficient to offer foodstuffs below cost price; purchasing them is not a requirement. The provision's wording implies that the possibility for reselling is a necessary aspect of the provision's application, and the mere „brokering” of sales for third parties, e.g. as a commercial or commission agent, is not covered.⁸⁴⁷

For the sake of legal certainty, with regard to offering foodstuffs below cost price, the legal act defines both the meaning of cost price and of objective justification. Cost price means the price agreed between the undertaking with superior market power and its supplier for the provision of the good or service and from which general discounts that can be expected with reasonable certainty at the time the offer is made are proportionally deducted unless otherwise expressly agreed with regard to the specific goods or services. Offering food below cost price is objectively justified if this is suitable to prevent the deterioration or the imminent unsaleability of the goods at the dealer's premises through a timely sale, or in equally severe cases. In particular, regular sales of perishable or damaged agricultural products are objectively justified. Even beyond this, it may be justified in individual cases to react to a declining demand for a product with appropriate price reductions, even if this is below the cost price paid at the time of procurement.⁸⁴⁸

Based on the information received from the *Bundeskartellamt* (throughout the thesis referred to as 'BKA') itself, no formal decision—which would be publicly available—has been adopted in connection with these provisions, therefore there is no case law at my disposal to deepen my analysis.

The national regulation of UTPs before the implementation of the UTP Directive

⁸⁴⁶ MARKERT 2020, Rn. 90.

⁸⁴⁷ MARKERT 2020, Rn. 91.

⁸⁴⁸ MARKERT 2020, Rn. 101.

In Germany, before the implementation of the UTP Directive there was no separate legal act which would have coherently dealt with business-to-business unfair trading practices. Neither horizontal nor sectoral rules existed at the national level, nevertheless certain contract, competition and unfair competition law tools were and still are available to handle these situations.⁸⁴⁹ These legal instruments do not directly aim to address unfair trading practices but could and can be called upon in cases when practices now covered by the black and grey list of the UTP Directive come to the fore. The ability of German laws to cover and address the practices listed in the UTP Directive has been the reason that no lively debates in Germany have emerged on unfair trading practices.⁸⁵⁰ This is also true for Hungary because of the existence of Act XCV of 2009 on the Prohibition of Unfair Distribution Practices Against Suppliers in Relation to Agricultural and Food Products. The baseline is completely different in these two analysed countries but both had had some kind of direct or indirect legislation on UTPs or UTP-like practices before the Directive was adopted, thus there was not much attention paid to the new EU legal act.

I do not present these German regulatory means here for two reasons. First, and this is more relevant, they are not sectoral (sector-specific) rules only applying to the agricultural and food sector;⁸⁵¹ and second, they have already been superbly demonstrated and analysed in detail by *Glöckner*.⁸⁵²

For us, the one and only finding of significant importance is that before the implementation of the UTP Directive, Germany had no special provisions on unfair trading practices taking place in agriculture and the food supply chain.⁸⁵³

The national regulation of UTPs after the implementation of the UTP Directive

⁸⁴⁹ See for more: Study on the legal framework covering business-to-business unfair trading practices in the food supply chain. Final report, Prepared for the European Commission, DG Internal Market, DG MARKT/2012/049/E, 26 February 2014, p. 169; Johan SWINNEN–Senne VANDEVELDE (2017) *Regulating UTPs: diversity versus harmonisation of Member State rules*. In: Federica DI MARCANTONIO–Pavel CIAIAN (eds.) (2017) *Unfair trading practices in the food supply chain – A literature review on methodologies, impacts and regulatory aspects*. Luxembourg: Publications Office of the European Union, p. 48; GLÖCKNER 2017; Jochen GLÖCKNER (2020) *The Directive on UTP in the Agricultural and Food Supply Chain – A German Perspective*. In: Bert KEIRSBILCK–Evelyn TERRY (eds.) *Unfair Trading Practices in the Food Supply Chain – Implications of Directive (EU) 2019/633*. Cambridge–Antwerp–Chicago: Intersentia, pp. 87–110.

⁸⁵⁰ GLÖCKNER 2020, p. 93.

⁸⁵¹ Fabrizio CAFAGGI–Paola IAMICELI (2018) *Unfair Trading Practices in the Business-to-Business Retail Supply Chain – An overview on EU Member States legislation and enforcement mechanisms*. Luxembourg: Publications Office of the European Union, p. 10.

⁸⁵² See: GLÖCKNER 2020, pp. 93–104.

⁸⁵³ SWINNEN–VANDEVELDE 2017, p. 48.

The UTP Directive's implementation in Germany has been carried out by an amendment to the *Agrarmarktstrukturgesetz* (hereinafter referred to as AgrarMSG).⁸⁵⁴ Not only the content of this act but also its title was changed; the act which already contains the implemented provisions of the UTP Directive is named *Gesetz zur Stärkung der Organisationen und Lieferketten im Agrarbereich*⁸⁵⁵ (its abbreviated title is *Agrarorganisationen-und-Lieferketten-Gesetz*, while its acronym is *AgrarOLkG*). Without going into detail about the differences between the draft amendment and the adopted amendment, it is worth mentioning that the draft was intended to implement the UTP Directive almost word-for-word. After the publication of the draft, among others, two organisations, the *Bundesvereinigung der Deutschen Ernährungsindustrie*⁸⁵⁶ and the *Deutscher Bauernverband*⁸⁵⁷ expressed their opinions on it. Without presenting these in more detail, it is enough to mention that both organisations recommended further tightening of the rules, for example, by doing so that the practices of the grey list be handled as the practices of the black list, that is, the grey-list practices should also be prohibited *per se*. They emphasised that the word-for-word implementation is not enough, because the agreements appearing in grey-list practices are not drawn up as a consequence of the mutual consent of the contracting parties.⁸⁵⁸ It seems that these opinions had some impact, because the provisions adopted have gone further than the obligatory minimum harmonisation standards set up by the Directive. In a few aspects, the German legislation adopted stricter rules. Three trading practices which are regulated in the grey list of the UTP Directive have been added to the black list in the German act, that is, these practices are also prohibited *per se*.⁸⁵⁹ These are the following: (a) the buyer returns unsold agricultural and food products to the supplier without paying for those unsold products and without paying for the disposal of those products;⁸⁶⁰ (b) the supplier contributes to the costs of storage of the delivered agricultural, fishery or food products at the buyer's premises through payments or price reductions;⁸⁶¹ (c) the supplier contributes to the costs of listing the agricultural, fishery or food products to be

⁸⁵⁴ Its English translation is *Act on the Structure of Agricultural Markets*.

⁸⁵⁵ In English: Act on the Strengthening of Organisations and Supply Chains in the Agricultural Sector.

⁸⁵⁶ Bundesvereinigung der Deutschen Ernährungsindustrie: Stellungnahme zum Referentenentwurf eines Zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, Berlin, 6 August 2020.

⁸⁵⁷ Deutscher Bauernverband: Stellungnahme zum Referentenentwurf eines 2. Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, Berlin, 6 August 2020.

⁸⁵⁸ See: CSIRSZKI Martin Milán (2021) Unfair trading practices in the agriculture and food supply chain – Some remarks on the Hungarian and German regulation, *CEDR Journal of Rural Law*, 7(1), pp. 65–66.

⁸⁵⁹ Bundesministerium für Ernährung und Landwirtschaft: *Schutz gegen unlautere Handelspraktiken*, 2 September 2021 [Online]. Available at: <https://www.bmel.de/DE/themen/internationales/aussenwirtschaftspolitik/handel-und-export/utp-richtlinie.html> (Accessed: 25 October 2021).

⁸⁶⁰ *AgrarOLkG*, Section 12. Cf. UTP Directive, Article 3, 2., a).

⁸⁶¹ *AgrarOLkG*, Section 14. Cf. UTP Directive, Article 3, 2., b).

supplied through payments or price reductions, excluding the contributions paid in case of the (first) market launch of the products.⁸⁶² The practices mentioned here in points b) and c) are regulated under the same letter in the UTP Directive, namely under Article 3(2), point b). The practice mentioned here in point a) is regulated under Article 3(2), point a) of the UTP Directive. The grey list included in Section 20 of the *AgrarOLkG* corresponds to the points c)–f) of Article 3(2) of the UTP Directive, while the black list of the *AgrarOLkG* is from its Section 12 to its Section 19.

The scope of protection provided for suppliers covered by the *AgrarOLkG* is also broader than in the UTP Directive. This is a temporary extension until 1 May 2025: in certain sectors, namely in dairy, meat as well as fruit, vegetable and horticultural sectors, including also the potato market, *AgrarOLkG* protects suppliers with an annual turnover of up to a maximum of four billion euros in the respective segment. The supplier in question is protected, if its total annual turnover does not exceed 20 percent of the total annual turnover of its buyer. The period of this additional protection may be lengthened by the German *Bundestag* in case the evaluation of rules on UTPs carried out by the Federal Ministry of Food and Agriculture, with the participation of the Federal Ministry for Economic Affairs and Energy, justifies it.⁸⁶³

The designated German enforcement authority is the *Bundesanstalt für Landwirtschaft und Ernährung*⁸⁶⁴ (throughout the thesis referred to as ‘BLE’).⁸⁶⁵ It means that, similarly to Hungary, the German legislation also aims to ensure the effective enforcement of the provisions on unfair trading practices with a specialised authority and not the general competition authority. However, decisions of the BLE shall be made in agreement with the BKA. It means that if the BLE finds that an unfair trading practice took place and also finds it necessary to remedy the violation in question and to prevent future violations, its decision shall be made in agreement with the BKA.⁸⁶⁶ In case the BLE intends to impose an administrative fine on the buyer, it shall also be made in agreement with the BKA which has the right to comment upon the amount of the fine.⁸⁶⁷ Moreover, the BLE has the power to publish guidance on the classification of products as perishable; and the BKA can also comment on this guidance.⁸⁶⁸ The *ex lege* transmission of personal data as well as of business and trade secrets is also ensured

⁸⁶² *AgrarOLkG*, Section 17. Cf. UTP Directive, Article 3, 2., b).

⁸⁶³ *AgrarOLkG*, Section 10(1), 2.

⁸⁶⁴ In English: Federal Agency for Agriculture and Food.

⁸⁶⁵ *AgrarOLkG*, Section 3(4).

⁸⁶⁶ *AgrarOLkG*, Section 28(2), Sentence 1.

⁸⁶⁷ *AgrarOLkG*, Section 28(2), Sentences 2–3.

⁸⁶⁸ *AgrarOLkG*, Section 28(2), Sentence 3.

between these two authorities, insofar as these pieces of information are relevant to the decision-making.⁸⁶⁹

The structure of Part III of *AgrarOLkG* is different from that of the UTP Directive. The German black list is placed from Section 11 to Section 19, while the grey list is codified in Section 20. Then, Section 23 of *AgrarOLkG* declares in principle that it is prohibited for the buyer to exploit the economic imbalance through unfair trading practices against its supplier. In the next sentence, *AgrarOLkG* includes a closed and exclusive list⁸⁷⁰ which contains those practices which constitute the exploitation of the economic imbalance. By ‘closed and exclusive list’ I mean that despite the existence of the general prohibition formulated in the first sentence of Section 23, this prohibition shall not be called upon when the BLE considers a practice the exploitation of the economic imbalance but this practice is not included in the black/grey list. That is, only those practices are considered the exploitation of the economic imbalance which are formulated in the list.

The *AgrarOLkG* declares *expressis verbis* that the provisions of *GWB*, in particular Sections 19 and 20 thereof (which contain the rules on abuse of dominance and abuse of relative or superior market power), as well as the duties, powers and responsibilities of the BKA shall remain unaffected.⁸⁷¹ Furthermore, the general provisions on the validity of contracts and contractual provisions, in particular Sections 134, 138 and 305 to 310 of the *Bürgerliches Gesetzbuch*,⁸⁷² shall remain unaffected by Sections 11 to 17 and 20 of the *AgrarOLkG*.⁸⁷³ If provisions of the contract are invalid in whole or in part on the basis of Sections 11 to 17 or 20 of the *AgrarOLkG*, the remainder of the contract shall remain valid. Insofar as the contractual provisions are ineffective on the basis of Sections 11 to 17 or 20 of the *AgrarOLkG*, the content of the contract shall be governed by the statutory provisions.⁸⁷⁴ As these provisions illustrate, the protection system with regard to unfair trading practices constitutes a fully independent system in German law: it replaces neither the protection provided by the legal instruments within the area of civil law (invalidity of contracts), nor abuse of dominance and abuse of relative or superior market power; it only complements these means to achieve a higher level of protection of agricultural and food products’ suppliers. However, the competition-related

⁸⁶⁹ *AgrarOLkG*, Section 28(2), Sentences 4–5.

⁸⁷⁰ The legal nature of the list, that is, it is a closed and exclusive list which cannot be extended to non-list practices by the enforcement authority (BLE) referring to the general prohibition included in the first sentence, can be concluded from the word ‘*ausschließlich*’. I could also say that the list is a catalogue of unfair trading practices.

⁸⁷¹ *AgrarOLkG*, Section 24.

⁸⁷² In English: Civil Code.

⁸⁷³ *AgrarOLkG*, Section 22(1).

⁸⁷⁴ *AgrarOLkG*, Section 22(2).

nature of unfair trading practices are indirectly acknowledged by the fact that during the enforcement of these provisions the BKA is a relevant factor, whose market and competition experience is expected by the sector-specific agriculture-related enforcement authority, the BLE. The enforcement requires cooperation of high intensity between these two authorities but the solution may become a best practice to be followed by other Member States. The BLE is aware of issues taking place in agriculture and the food supply chain, while the BKA may focus on the competition law aspects of the cases. The primacy of agriculture over competition policy is also illustrated by this national solution: the primary enforcement authority is the one which deals with agricultural issues, while the „secondary” one is the competition authority. That is, decisions are made by the BLE in agreement with the BKA, and not *vice versa*, not by the BKA in agreement with the BLE. This is in accordance with the approach of the EU as well as it adopts a similar solution as in Hungary: agricultural aspects are given priority, and at national level this is also reflected in institutional structure.

3.3 The United States of America

The US federal regulation on special competition-related provisions applying to the agricultural and food sector, as mentioned and presented earlier, has a long history, and these provisions have not been amended significantly since then but have developed through case-law interpretation. First, I start with the presentation of exception norms, second, I turn my attention to specific norms.

3.3.1 Exception norms: Section 6 of Clayton Act and Capper-Volstead Act

The US exception norms on agri-food competition are found in Section 6 of the Clayton Act and the Capper-Volstead Act. These legal sources are reasonable to be interpreted hand in hand with each other, given that the Capper-Volstead Act – labelled as the Magna Charta of farmers⁸⁷⁵ – was adopted as a result of deficiencies in Clayton Act’s Section 6,⁸⁷⁶ that is, Capper-Volstead Act extends the scope of Clayton Act’s Section 6.⁸⁷⁷

<i>Section 6 of the Clayton Act</i>

⁸⁷⁵ Ewell Paul ROY (1969) *Cooperatives: Today and Tomorrow*, 2nd edn. Danville, Illinois: Interstate Printers & Publishers, p. 215.

⁸⁷⁶ VARNEY 2010, p. 2.

⁸⁷⁷ Stephen D. HAWKE (1984) Antitrust Implications of Agricultural Cooperatives, *Kentucky Law Journal*, 73(4), p. 1035.

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Capper-Volstead Act

7 U.S. Code § 291 - Authorization of associations; powers

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

7 U.S. Code § 292 - Monopolizing or restraining trade and unduly enhancing prices prohibited; remedy and procedure

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any

part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceedings for such association, and such service shall be binding upon such association, the officers, and members thereof.

It is wrong to assume that antitrust laws do not apply to agricultural cooperatives at all: they are not completely immune.⁸⁷⁸ The scope of exemption entitled to them under antitrust laws is limited,⁸⁷⁹ however its exact extent is unclear.⁸⁸⁰

The essence of Clayton Act's Section 6 is to permit „the operation of agricultural or horticultural mutual assistance organizations when such organizations do not have capital stock or are not conducted for profit.”⁸⁸¹ The reason behind this is clear: the Sherman Act's provisions can be interpreted in such a way that they cover mutual assistance between local farmers managing small farms which violate the Act through the joint pricing and marketing of agricultural products by resulting in the elimination of competition.⁸⁸² This was ceased by Section 6, however, only with significant limitations: capital-stock and for-profit organisations are not covered by this provision.

First of all, a distinction has to be made: while the activities *below* cooperative level, such as marketing agreements between farmers and cooperatives and joint marketing contracts among affiliated cooperatives, are exempt from antitrust laws, the activities *on* cooperative level, such as the ones mentioned in the next two cases, are not.⁸⁸³ In its 1939 landmark judgment of the *United States v. Borden* case, the US Supreme Court emphasised that agricultural cooperatives do not enjoy full exemption under antitrust laws.⁸⁸⁴ The *Borden* judgment clearly shows that cooperatives shall not combine with non-exempt persons in

⁸⁷⁸ T.O. (1958) Agricultural Cooperatives and the Antitrust Laws: Clayton, Capper-Volstead, and Common Sense, *Virginia Law Review*, 44(1), p. 63.

⁸⁷⁹ Alice SCHUMACHER HORNEBER (1982) Agricultural Cooperatives: Gain of Market Power and the Antitrust Exemption, *South Dakota Law Review*, 27(3), p. 476.

⁸⁸⁰ William E. PETERS (1963) Agricultural Cooperatives and the Antitrust Laws, *Nebraska Law Review*, 43(1), p. 103.

⁸⁸¹ U.S. DEPARTMENT OF JUSTICE – ANTITRUST DIVISION (2021) *Antitrust Division Manual*, 5th edn., p. II-13.

⁸⁸² HAWKE 1984, pp. 1036–1037.

⁸⁸³ Alan M. ANDERSON (1981-1982) Agricultural Cooperative Antitrust Exemption-Fairdale Farms Inc. v. Yankee Milk Inc., *Cornell Law Review*, 67(2), pp. 401–402.

⁸⁸⁴ U.S. Supreme Court: *United States v. Borden Co.*, 308 U.S. 188 (1939).

restraint of trade.⁸⁸⁵ In 1960 – as a continuation of this restrictive analysis⁸⁸⁶ – the *Borden* holding was clarified and expanded in the *Maryland and Virginia Milk Producers Assn., Inc. v. United States* case.⁸⁸⁷ With this judgment „the Supreme Court established that the agricultural cooperative exemption does not extend to unilateral competition-stifling practices. The Court condemned a cooperative’s coercive and predatory trade practices which were so far outside the legitimate objectives of agricultural cooperatives as to be clear violations of the Sherman Act.”⁸⁸⁸ The ‘predatory action’ test was developed by the Supreme Court in light of the legislative history of Clayton Act’s Section 6 and the Capper-Volstead Act.⁸⁸⁹ The Capper-Volstead immunity is granted to a cooperative, if it has a legitimate object to be attained when engaged in agricultural business activities and no predatory trade practices are used by the cooperative to achieve this goal. It means that an ends-means analysis can be carried out consisting of four patterns: (a) legitimate goal – non-predatory action, (b) legitimate goal – predatory action, (c) illegitimate goal – non-predatory action, and (d) illegitimate goal – predatory action.⁸⁹⁰ Obviously, only the first pattern is exempted. Although it is established Supreme Court case law that antitrust law exemptions shall be interpreted narrowly,⁸⁹¹ the Capper-Volstead Act’s protection has been even extended to price-fixing agreements,⁸⁹² despite the fact that the Act’s wording does not mention it *expressis verbis*. Some say that price-fixing is the most effective tool of achieving bargaining balance and has to be interpreted as an aspect to be included in the term ‘marketing’.⁸⁹³ This also shows us the likely interpretation problems emerging from Section 6 of the Clayton Act: what is meant by ‘legitimate objects’? Besides collective processing, preparing for market, and handling, Section 1 of the Capper-Volstead Act declares that marketing is also a possible legitimate object to be carried out by a cooperative, however the boundaries of these terms leave room for different interpretations.

⁸⁸⁵ SCHUMACHER HORNEBER 1982, p. 480.

⁸⁸⁶ HAWKE 1984, p. 1044.

⁸⁸⁷ U.S. Supreme Court: *Maryland and Virginia Milk Producers Assn., Inc. v. United States*, 362 U.S. 458 (1960).

⁸⁸⁸ SCHUMACHER HORNEBER 1982, p. 480.

⁸⁸⁹ HAWKE 1984, p. 1045.

⁸⁹⁰ HAWKE 1984, pp. 1047–1048.

⁸⁹¹ See the cited cases in footnote 155 of Alison Peck (2015) *The Cost of Cutting Agricultural Output: Interpreting the Capper-Volstead Act*, *Missouri Law Review*, 80(2), p. 473: „*Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982); see also *Bankamerica Corp. v. United States*, 462 U.S. 122, 147-48 (1983); *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Abbott Labs. v. Portland Retail Druggists Ass’n, Inc.*, 425 U.S. 1, 11 (1976); *Fed. Mar. Comm’n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956); *United States v. Masonite Corp.*, 316 U.S. 265, 280 (1942).”

⁸⁹² Donald M. BARNES–Jay L. LEVINE (2021) *Farmer Cooperatives „Take Cover”: The Capper-Volstead Exemption is Under Siege*, *Arkansas Law Review*, 74(1), p. 16.

⁸⁹³ Charles Edward BLACK–Ronald Kent SUFRIN (1978) *Agricultural Cooperatives: Price-Fixing and the Antitrust Exemption*, *U.C.D. Law Review*, Vol. 11, pp. 553–554.

Furthermore, one must neither forget the express requirements of the Capper-Volstead Act which are greatly summarised by *Hawke*: producing agricultural products by the cooperative's members; operating for the mutual benefit of members; the volume of non-member business not exceeding that of member business; structured so that each and every member has one vote irrespective of the capital owned or the dividends paid per year not does not exceed eight percent on stock or membership capital; voluntary membership; performing of at least one of the statute's enumerated acts before the immunity. „Most of these requirements are inherent in an agricultural cooperative's basic structure and, therefore, should present little problem for the eligible cooperative.”⁸⁹⁴ It was explicitly held by the Supreme Court that even one non-farmer member in a cooperative deprives that cooperative of the exemption provided by the Capper-Volstead Act.⁸⁹⁵ This approach has also been adopted by district courts judgments recently.⁸⁹⁶ The inadvertent nature of the inclusion is irrelevant, so is the good faith belief of members in being part of a properly constituted cooperative.⁸⁹⁷

Today, the Capper-Volstead Act is under fire from critics. Many argue that cooperatives have grown to such a size that their protection under the Act is unjustified. It is generalisation. These voices fail to take into account that not only have cooperatives grown, but so have their buyers, particularly retail chains, and thus the imbalance in bargaining power has stayed. Due to the small number of court cases interpreting the Capper-Volstead Act, there are still many unanswered questions about the law. There are conflicting views as to whether the exemption covers supply management in the form of production restriction, as well as whether vertical integration of farmers nullifies the exemption. Moreover, in many cases, even deciding on who qualifies as a farmer may be a challenging question.⁸⁹⁸ The issue of immunity for production and supply restrictions under the Act is manifold, and arguments can be raised both pro and contra.⁸⁹⁹ A comprehensive and in-depth analysis of the question concludes that „Congress did give agriculture certain exemptions because of inherent difficulties endemic to agricultural markets, but those exemptions extend only as far as Congress intended. Output limitations –

⁸⁹⁴ HAWKE 1984, pp. 1039–1040.

⁸⁹⁵ U.S. Supreme Court: *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967); U.S. Supreme Court: *National Broiler Marketing Association, Petitioner, v. United States*, 436 U.S. 816 (1978).

⁸⁹⁶ John C. MONICA, JR.–Jetta C. SANDIN (2017) *Agricultural Antitrust Pitfalls*, *Maryland Bar Journal*, 50(5), p. 19. See: United States District Court, E.D. Pennsylvania: *In Re Mushroom Direct Purchaser Antitrust Litigation*, 621 F. Supp. 2d 274 (2008); United States District Court, E.D. Pennsylvania: *In Re Processed Egg Products Antitrust Litigation*, 206 F. Supp. 3d 1033 (2016).

⁸⁹⁷ BARNES–LEVINE 2021, pp. 10 and 13.

⁸⁹⁸ BARNES–LEVINE 2021, pp. 16–19, 19–23, and 23–24.

⁸⁹⁹ See the arguments summarised by VARNEY 2010, pp. 5–8.

however effective in controlling supply and fixing prices – do not appear to be among the tools that Congress intended to exempt in passing the Capper-Volstead Act.”⁹⁰⁰

The provision on jurisdiction in Section 2 of the Capper-Volstead Act is also noteworthy for a few comments. It gives authorisation to the Secretary of Agriculture „to obtain a cease and desist order if he finds that an association has monopolized or restrained trade to such an extent that the price of any agricultural product is unduly enhanced.”⁹⁰¹ The main issue is the extent and scope of this jurisdiction: is it exclusive or primary in relation to that of the FTC and the Department of Justice? The question was answered in the *Borden* case whose relevant findings on this are reproduced here in full:

*„We find no ground for saying that this limited procedure is a substitute for the provisions of the Sherman Act, or has the result of permitting the sort of combinations and conspiracies here charged unless or until the Secretary of Agriculture takes action. That this provision of the Capper-Volstead Act does not cover the entire field of the Sherman Act is sufficiently clear. The Sherman Act authorizes criminal prosecutions and penalties. The Capper-Volstead Act provides only for a civil proceeding. The Sherman Act hits at attempts to monopolize as well as actual monopolization. And § 2 of the Capper-Volstead Act contains no provision giving immunity from the Sherman Act in the absence of a proceeding by the Secretary. We think that the procedure under § 2 of the Capper-Volstead Act is auxiliary, and was intended merely as a qualification of the authorization given to cooperative agricultural producers by § 1, so that, if the collective action of such producers, as there permitted, results in the opinion of the Secretary in monopolization or unduly enhanced prices, he may intervene and seek to control the action thus taken under § 1. But as § 1 cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment, the qualifying procedure for which § 2 provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under § 1 of the Sherman Act for the purpose of punishing such conspiracies.”*⁹⁰²

It means that the Secretary of Agriculture has neither exclusive nor primary jurisdiction over antitrust offenses of agricultural cooperatives.⁹⁰³ Actually, „[t]he Secretary of Agriculture has

⁹⁰⁰ PECK 2015, p. 498.

⁹⁰¹ BARNES–LEVINE 2021, p. 8.

⁹⁰² See: U.S. Supreme Court (1939) *United States v. Borden Co.*, 308 U. S. 206.

⁹⁰³ Ralph H. FOLSOM (1980) *Antitrust Enforcement under the Secretaries of Agriculture and Commerce*, *Columbia Law Review*, 80(8), p. 1634.

never been called upon to determine whether an association has restrained trade to such an extent that it has unduly enhanced prices.”⁹⁰⁴

Besides the Capper-Volstead Act, another piece of agricultural legislation must be noted: as an expansion to the former one, the Cooperative Marketing Act of 1926 was passed to provide further protection for agricultural cooperatives. It authorises farmers to acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between them, and/or their associations or federations, and/or by and through a common agent created or selected by them.^{905,906} This law creates the possibility that no court action could be brought against farmers because of anti-competitive exchange of information.

3.3.2 *Specific norms*

The most relevant specific act in the United States is the Packers and Stockyards Act of 1921. Furthermore, I will also take a look at two other pieces of legislation, namely the Perishable Agricultural Commodities Act of 1930 and the Unfair Trade Practices Affecting Producers of Agricultural Products Act of 1968.

Packers and Stockyards Act of 1921

The aim of the Packers and Stockyards Act of 1921 – as „one of the most comprehensive regulatory measures ever enacted”⁹⁰⁷ – is „to insure effective competition and integrity in livestock, meat, and poultry markets.”⁹⁰⁸ Being a liberally construed remedial legislation and having broader authority than the one established by antitrust laws (Sherman, Clayton, and Federal Trade Commission Acts), the Act prohibits „monopolistic, unfair, deceptive, and unjustly discriminatory practices” with an enforcement mechanism of the Secretary of Agriculture which has an authorisation for exercising “complete inquisitorial, visitorial,

⁹⁰⁴ UNITED STATES DEPARTMENT OF AGRICULTURE (2002) *The Story of the Capper-Volstead Act*, Cooperative Information Report 59, p. 281.

⁹⁰⁵ 7 U.S. Code § 455. Dissemination of crop, market, etc., information by cooperative marketing associations.

⁹⁰⁶ As Mahaffie put it: „Elements of the exemption are also contained in the Cooperative Marketing Act of 1926 [...]” See: Charles D. MAHAFFIE JR. (1970) Cooperative Exemptions under the Antitrust Laws: A Prosecutor’s View, *Administrative Law Review*, 22(3), p. 436.

⁹⁰⁷ Donald A. CAMPBELL (1981) *The Packers and Stockyards Act Regulatory Program*. In: John DAVIDSON (ed.) *Agricultural Law*, § 3.01. New York: Shepards’s/McGraw-Hill.

⁹⁰⁸ The National Agricultural Law Center (n.d.) *The Packers and Stockyards Act: An Overview* [Online]. Available at: <https://nationalaglawcenter.org/overview/packers-and-stockyards/> (Accessed: 20 December 2021).

supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith.”⁹⁰⁹

As part of the Fair Trade Practices Program (FTPP) of the Agricultural Marketing Service in the U.S. Department of Agriculture (USDA), the Packers and Stockyards Division is responsible for not only the monitoring of the industries covered by the Act’s scope but also administering compliance reviews and investigations. There are four ways of handling violations: (a) notice of violations, (b) stipulation agreements, (c) administrative actions, and (d) court actions. While notice of violations and stipulation agreements lack formal action, bringing administrative or civil action by the enforcement authority is a more serious step having the possibility to impose stricter penalties on the firm or individual in question. Within the framework of an administrative action, the FTPP files a complaint and the accused party is entitled to have a hearing before an administrative law judge. The decision can be appealed to the USDA Judicial Officer, whose ruling can further be appealed to a U.S. Appeals Court and further to the Supreme Court. An administrative law judge can issue a cease and desist order and/or suspend business operations. Court actions by the USDA can also take place through the Department of Justice before a U.S. District Court. Not only civil but also criminal penalties are available. Regarding the poultry trust provisions, a maximum of \$85,150 fine per violation, while regarding other provisions in the P&S Act and regulations, a maximum of \$29,270 fine per violation can be imposed. Even imprisonment can serve as a possible and *ultima ratio* penalty for violations.⁹¹⁰

The concentration and consolidation of meat and livestock industries regulated by the Packers and Stockyards Act has not changed since its passage; it has even worsened and the sectors have become more integrated.⁹¹¹ This implies that the likeliness of unfair and unreasonable practices is still high or even higher than at the time of the Act’s adoption. Furthermore, the debate on whether the Act goes beyond antitrust laws in terms of the level of protection and whether the Act requires proving negative effects on competition still arises periodically.⁹¹² Although these two questions are quite connected to each other, the former one

⁹⁰⁹ Christopher R. KELLEY (2003) An Overview of the Packers and Stockyards Act, *Arkansas Law Notes* [Online]. Available at: <http://media.law.uark.edu/arklawnotes/2003/10/15/an-overview-of-the-packers-and-stockyards-act/> (Accessed: 20 December 2021), pp. 35–36.

⁹¹⁰ U.S. Department of Agriculture – Agricultural Marketing Service (n.d.) Packers and Stockyards Enforcement [Online]. Available at: <https://www.ams.usda.gov/services/enforcement/psd> (Accessed: 21 December 2021).

⁹¹¹ KELLEY 2003, p. 37.

⁹¹² Christopher M. BASS (2007) More than a Mirror: The Packers and Stockyards Act, Antitrust Laws, and the Injury to Competition Requirement, *Drake Journal of Agricultural Law*, 12(3), pp. 424 and 426; see also: John D. SHIVELY–Jeffrey S. ROBERTS (2010) Competition under the Packers and Stockyards Act: What Now? *Drake Journal of Agricultural Law*, 15(3), pp. 419–454.

can rather be answered to affirmatively,⁹¹³ while, in contrast, the latter one raises serious doubts, as can be read from contradictory court rulings.⁹¹⁴ These questions strongly intertwine with the doubt as to whether the Packers and Stockyards Act is an antitrust statute at all. If it is, adverse effects on competition shall, of course, be required to find a violation, on the contrary, if it is not, no proof shall be presented on negative impacts on competition to find a violation. There are diverging views.⁹¹⁵ In our opinion, not only the general scope of but also the unfairness included in the Packers and Stockyards Act are meant to be different than that of the antitrust laws.⁹¹⁶ Beyond antitrust laws which exclusively concentrate on harms to the overall competitive environment (or in recent times rather strictly on consumer welfare), the Packers and Stockyards Act is also concerned with „unjustifiable harm to individual farmers and ranchers” in equitable terms.⁹¹⁷

Following *Kelley*’s grouping, the Act can be divided into four main structural units. There are rules applying to (1) packers, (2) swine contractors, (3) live poultry dealers, and (4) stockyard owners, market agencies and dealers.⁹¹⁸

The term ‘packer’ is defined by the Act as „any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.”⁹¹⁹ Therefore, this definition is connected to that of the term ‘livestock’, reproduced here in full: „[it] means cattle, sheep, swine, horses, mules, or goats—whether live or dead.”⁹²⁰ The definition of live poultry dealer is as follows: „any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another, if poultry is obtained by such person in commerce, or if poultry obtained by such person is sold or shipped in commerce, or if poultry products from poultry obtained by such person are sold or shipped in commerce.”⁹²¹ Respectively, the definitions of the fourth umbrella category are the following: stockyard owner „means any person engaged in the business of conducting or

⁹¹³ If it did not go beyond antitrust laws regarding the level of protection, why would there be a separate statute on this issue?

⁹¹⁴ BASS 2007, pp. 426–427.

⁹¹⁵ SHIVELY–ROBERTS 2010, p. 425.

⁹¹⁶ ROSALES 2004, pp. 1511–1514.

⁹¹⁷ Michael C. STUMO–Douglas J. O’BRIEN (2003) Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships, *Drake Journal of Agricultural Law*, 8(1), p. 92.

⁹¹⁸ KELLEY 2003, p. 41.

⁹¹⁹ 7 U.S. Code § 191 - “Packer” defined.

⁹²⁰ 7 U.S. Code § 182(4) - Definitions.

⁹²¹ 7 U.S. Code § 182(10) - Definitions.

operating a stockyard”,^{922,923} market agency „means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services”,⁹²⁴ while dealer „means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.”⁹²⁵

The Act regulates several and various protective pillars regarding the business conduct of packers *vis-à-vis* livestock sellers. First and foremost, the Secretary of Agriculture may require reasonable bonds from every packer in connection with its livestock purchasing operations to secure the performance of their obligations. Under this provision, only those packers are exempted whose average annual purchases do not exceed \$500,000. If the Secretary finds that the packer is insolvent, he may issue an order of suspension or a cease-and-desist order to prevent the packer from purchasing livestock during insolvency.⁹²⁶ In addition, the Act establishes a statutory trust for livestock⁹²⁷ which benefits unpaid cash sellers. Given that the assets of the trust are not part of the bankruptcy estate in case of a packer’s bankruptcy, „unpaid cash sellers of livestock do not have to compete with the bankrupt debtor’s [*that is, the packer’s*] secured creditors for the assets contained in the trust.”⁹²⁸ Moreover, a requirement of prompt payment can also be found on packers,⁹²⁹ which obligation is regulated in extreme detail, including rules on the methods of payment, the possibility for a waiver by written agreement and disclosure requirements. It is declared that the violation of this obligation is an unfair practice.⁹³⁰

Last but not least, an enumeration of unlawful practices appears in the Act.⁹³¹ Of these practices, the first two are so lax that many interpretation problems may arise. The violation ‘engaging in or using any unfair, unjustly discriminatory, or deceptive practice or device’⁹³² has

⁹²² 7 U.S. Code § 201(a) - “Stockyard owner”; “stockyard services”; “market agency”; “dealer”; defined.

⁹²³ See 7 U.S. Code § 202(a) - “Stockyard” defined; determination by Secretary as to particular yard: When used in this subchapter the term “stockyard” means any place, establishment, or facility commonly known as stockyards, conducted, operated, or managed for profit or nonprofit as a public market for livestock producers, feeders, market agencies, and buyers, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce.

⁹²⁴ 7 U.S. Code § 201(c) - “Stockyard owner”; “stockyard services”; “market agency”; “dealer”; defined.

⁹²⁵ 7 U.S. Code § 201(d) - “Stockyard owner”; “stockyard services”; “market agency”; “dealer”; defined.

⁹²⁶ 7 U.S. Code § 204 - Bond and suspension of registrants.

⁹²⁷ 7 U.S. Code § 196 - Statutory trust established; livestock.

⁹²⁸ Roger A. McEOWEN (2019) *Packers and Stockyards Act Provisions For Unpaid Cash Sellers of Livestock* [Online]. Available at: <https://lawprofessors.typepad.com/agriculturallaw/2019/03/packers-and-stockyards-act-provisions-for-unpaid-cash-sellers-of-livestock.html> (Accessed: 29 December 2021).

⁹²⁹ KELLEY 2003, p. 44.

⁹³⁰ 7 U.S. Code § 228b - Prompt payment for purchase of livestock.

⁹³¹ 7 U.S. Code § 192 - Unlawful practices enumerated.

⁹³² 7 U.S. Code § 192(a).

covered, among others, discriminatory pricing, predatory pricing, deceptive advertising, as well as false weighing.⁹³³ The second provision prohibits „mak[ing] or giv[ing] any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.”⁹³⁴ Recently, the Agricultural Marketing Service of the Department of Agriculture has issued a regulation on those criteria which shall be considered when determining whether an undue or unreasonable preference or advantage has occurred. These are as follows: the authority aims to explore whether the preference or advantage cannot be justified (a) based on cost savings considerations, (b) based on meeting a competitor’s prices, (c) based on meeting other terms offered by a competitor, (d) as a reasonable business decision. It is also noted that „[d]isparate contract terms are not undue or unreasonable just because the terms are not identical. Some disparities in contract terms can be attributed to reasonable business negotiations between contracting parties.”⁹³⁵ The interpretation of these first two practices creates fertile ground to the questions mentioned above: is the Packers and Stockyards Act an antitrust statute and does it require evidence of adverse impact on competition to find a violation, or does the Act go beyond antitrust laws in the level of protection through not requiring any negative effect on competition? By looking at the Act’s legislative intent, textual and systematic interpretation and earlier case law, opposing views clashed in a case before the Fifth Circuit, which ended with the victory of those who argue for the antitrust nature of the Packers and Stockyards Act and, thereby, the requirement of proving negative effects on competition:

*„Once more a federal court is called to say that the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act. That is this holding.”*⁹³⁶

Although it must not be forgotten that the case was then settled which meant that the Supreme Court had no opportunity „to rule on whether the majority or dissenting opinion is correct.”⁹³⁷

⁹³³ KELLEY 2003, p. 44.

⁹³⁴ 7 U.S. Code § 192(b).

⁹³⁵ Department of Agriculture – Agricultural Marketing Service (2020) Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act, *Federal Register*, 85(239), p. 79780.

⁹³⁶ United States Court of Appeals, Fifth Circuit, *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355 (5th Cir. 2009).

⁹³⁷ SHIVELY–ROBERTS 2010, p. 427.

The further enumerated practices do not raise these questions thanks to their wording. The Act can also be violated by apportioning the supply and manipulating or controlling prices, as well as conspiring, combining, agreeing or agreeing to do so, and even aiding or abetting the doing of any of that.⁹³⁸

Furthermore, there are specific requirements determined for swine packer marketing contracts, mostly referring to obligations of giving contract-related information to the Secretary.⁹³⁹

The second group of subjects under the Act consists of swine contractors. The previously mentioned unlawful practices also apply to them, but they do not fall under the personal scope of provisions on statutory trust, the bond requirement and the prompt payment requirement.⁹⁴⁰

The third group, live poultry dealers are subject to the provisions on unlawful practices, however, the enforcement authority has limited powers against them in comparison with packers and swine contractors. The Secretary's main power is seeking injunctive relief. The requirements for statutory trust and prompt payment also apply to live poultry dealers.⁹⁴¹

The fourth umbrella group includes stockyard owners, market agencies and dealers. While, in case of meeting the statutory definition of the term 'stockyard', the respective stockyard is posted as such, market agencies and dealers shall obtain a bond prior to registration. The prompt payment obligation mentioned above also refers to market agencies and dealers.⁹⁴² However, there are some differences from the prohibited practices applying to the first three

⁹³⁸ See: 7 U.S. Code § 192(c)-(g). It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

[...]

(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e).

⁹³⁹ See: 7 U.S. Code §§ 198-198b.

⁹⁴⁰ KELLEY 2003, p. 47.

⁹⁴¹ KELLEY 2003, pp. 53–54.

⁹⁴² KELLEY 2003, pp. 49 and 51.

groups. On the one hand, there is a general duty as to stockyard services. Stockyard owners and market agencies shall provide those services reasonably and nondiscriminatorily, as well as services shall not be refused on any basis that is unreasonable or unjustly discriminatory.⁹⁴³ On the other hand, it is unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.⁹⁴⁴

Perishable Agricultural Commodities Act of 1930

It is unambiguous that the most vulnerable farmers are those who produce perishable agricultural commodities. In general, the Act was adopted to prevent unfair practices of buyers (commission merchants, dealers and brokers) against their suppliers. The late rejection of the take-over of supplied goods by buyers may cause extreme difficulties for suppliers to sell their products to another buyer because of the limited market alternatives.⁹⁴⁵

The term 'perishable agricultural commodity' means fresh fruits and fresh vegetables of every kind and character, whether or not it is frozen or packed in ice, as well as cherries in brine.^{946,947} The unfair conducts are listed in seven heads in technical terms. The condemned practices⁹⁴⁸ are greatly summarised by *Heron and Hayes*:

⁹⁴³ 7 U.S. Code § 205 - General duty as to services; revocation of registration.

⁹⁴⁴ 7 U.S. Code § 213(a) - Prevention of unfair, discriminatory, or deceptive practices.

⁹⁴⁵ TOULMIN 1949, p. 207.

⁹⁴⁶ 7 U.S. Code § 499a(4) - Short title and definitions.

⁹⁴⁷ Pursuant to the regulations of the Department of Agriculture, these definitions are determined in more detail:

(u) Fresh fruits and fresh vegetables include all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, but does not include those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character. The effects of the following operations shall not be considered as changing a commodity into a food of a different kind or character: Water, steam, or oil blanching, battering, coating, chopping, color adding, curing, cutting, dicing, drying for the removal of surface moisture; fumigating, gassing, heating for insect control, ripening and coloring; removal of seed, pits, stems, calyx, husk, pods rind, skin, peel, et cetera; polishing, precooling, refrigerating, shredding, slicing, trimming, washing with or without chemicals; waxing, adding of sugar or other sweetening agents; adding ascorbic acid or other agents to retard oxidation; mixing of several kinds of sliced, chopped, or diced fruit or vegetables for packaging in any type of containers; or comparable methods of preparation.

(v) Frozen fruits and vegetables include all produce defined in paragraph (u) of this section when such produce is in frozen form.

(w) Cherries in brine means cherries packed in an aqueous solution containing sulphur dioxide or other bleaching agent of sufficient strength to preserve the product, with or without the addition of hardening agents.

See: 7 CFR 46.2(u) – 7 CFR 46.2(w).

⁹⁴⁸ See: 7 U.S. Code § 499b - Unfair conduct.

„The[y] range from unfair, unreasonable, discriminatory or deceptive practices in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity, to the making of a change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity. In between those two poles other unfair conduct is defined. It includes full rejection of the goods, dumping the goods without just cause, making fraudulent or misleading statements in connection with any transaction, making misrepresentations by any means as to the quality, quantity, size, pack, weight, condition, and degree of maturity, etc., of the goods, and fraudulently tampering with any mark on the container or car containing the goods.”⁹⁴⁹

A comprehensive list on unlawful practices is also presented by Looney:

„failure to pay fully; rejecting produce without reasonable cause; failure to pay promptly; failure to make good delivery without reasonable cause; failure to account truly and correctly; discarding, dumping, or destroying produce on consignment without reasonable cause; shipping misbranded or misrepresented produce as to grade, quality, weight, or state of origin; and altering inspection certificates or making false or misleading statements.”⁹⁵⁰

The protection of produce sellers has been broadened in 1984 by creating a statutory trust,^{951,952} which is similar to that of the Packers and Stockyards Act. Both of these trusts „protect unpaid sellers from delinquent purchasers by elevating the claims of trust beneficiaries above secured lenders and creditors.”⁹⁵³ However, not all agree with this special treatment of produce sellers in connection with their claims against their buyers, by emphasising that „the noble ideal” behind the Act’s passage no longer applies.⁹⁵⁴ Conversely, the standpoint of the Congress was that „due to the need to sell perishable commodities quickly, sellers of perishable commodities

⁹⁴⁹ Julian B. HERON JR.–John C. HAYES JR. (1997) Reparations Proceedings under the Perishable Agricultural Commodities Act – Valuable Tool in Need of Change, *South Dakota Law Review*, 22(3), p. 520.

⁹⁵⁰ J. W. LOONEY (1990) Protection for Sellers of Perishable Agricultural Commodities: Reparation Proceedings and the Statutory Trust under the Perishable Agricultural Commodities Act, *U.C. Davis Law Review*, 23(3), pp. 675–676.

⁹⁵¹ Bartholomew M. BOTTA (1997) Personal Liability for Corporate Debts: The Reach of the Perishable Agricultural Commodities Act Continues to Expand, *Drake Journal of Agricultural Law*, 2(2), p. 339.

⁹⁵² See: 7 U.S. Code § 499e(c) - Liability to persons injured.

⁹⁵³ John J. KORBOL (1992) Current Issues Involving Statutory Trusts under the Perishable Agricultural Commodities Act, *San Joaquin Agricultural Law Review*, Vol. 2, p. 2.

⁹⁵⁴ See, for example: Thomas J. CUNNINGHAM (1999) Amended Perishable Agricultural Commodities Act: Further Concealment of a Lien Already Nearly Invisible, *Banking Law Journal*, 116(3), pp. 253–260.

are often placed in the position of being unsecured creditors of companies whose creditworthiness the seller is unable to verify.”⁹⁵⁵

Regarding the enforcement of its provisions, the Perishable Agricultural Commodities Act „establishes a reparation forum for claims that involve Act violations,” in those cases which are related to (a) perishable agricultural commodities, (b) interstate commerce, and (c) licenses subjected to the Act, and (d) when the respective petition has been filed within nine months of committing the violation.⁹⁵⁶ I do not aim to analyse the procedural rules in more detail, but it must be noted that the violation of the Act may result in a reparation order issued by the enforcement authority. In the decision, the Department of Agriculture determines the amount of damage and makes an order directing the offender to pay that amount, as well orders the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with the hearing.⁹⁵⁷

Unfair Trade Practices Affecting Producers of Agricultural Products Act of 1968

As can be found in the policy declaration regarding the Act, the main reason behind its adoption has lain in creating the possibility for farmers and ranchers „to join together voluntarily in cooperative organizations as authorized by law.” The public interest requires that no interference with this right could take place.⁹⁵⁸ The prohibited practices of handlers, reproduced here in full, are the following. It is forbidden for handlers knowingly to engage or permit any employee or agent to engage in the following practices: „(a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association; or (b) To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers; or (c) To coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler; or (d) To pay or loan money, give any thing of value, or offer any other inducement or reward to a producer for refusing to or ceasing to belong to an association of

⁹⁵⁵ Sandra M. FERRERA (1999) Perishable Agricultural Commodities Act Affecting Lender’s Secured Priority Interest, *University of Miami Business Law Review*, 7(2), p. 355.

⁹⁵⁶ LOONEY 1990, pp. 684–685.

⁹⁵⁷ 7 U.S. Code § 499g(a) - Reparation order.

⁹⁵⁸ 7 U.S. Code § 2301 - Congressional findings and declaration of policy.

producers; or (e) To make false reports about the finances, management, or activities of associations of producers or handlers; or (f) To conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by this chapter.”⁹⁵⁹

It can be seen that the prohibitions aim to ensure that agricultural cooperatives (associations of producers) could function without external restraints and exercise their rights.

Both the persons aggrieved and the competent Attorney-General may bring civil action against offenders for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. Furthermore, the persons injured may sue and recover damages and reasonable attorneys’ fees.⁹⁶⁰

4. Concluding remarks of Part Two

The normative analysis in Part Two makes it clear that—despite the fact that there are both some antitrust and trade regulation provisions exclusively applying to agri-food markets—the root cause of competition-related problems in agri-food markets is not addressed at all and/or in time. Preventing the creation of market situations in which the abuse of buyer power, be it bargaining or monopsony power, cannot come to the fore would be crucial to the attainment of agricultural policy objectives. Through some corrections to the regulation in force, progress could be achieved regarding the issue of wealth transfers from agricultural producers to their buyers seen as unjustified by agricultural policymakers.

The current protection system is built upon two core pillars. First, the limited exemption for agricultural producers under the prohibition of anti-competitive agreements within the area of antitrust, and second, the different types of prohibitions of unfair trading practices within the area of trade regulation. The other two antitrust instruments—abuse of dominance/monopolisation and merger control—remain silent regarding agriculture-specific anomalies. Furthermore, neither the exemption is relevant in this sense because it applies only in the cases when agricultural producers would be the antitrust offenders. It is a necessary but not sufficient legal instrument to countervail buyer power in all cases. The one and only substantial protection could be the prohibition of unfair trading practices, but the predicament with this one is that it only provides a system of *ex post* control. It does not attack the root of the problem. It is not preventive but remedial in nature. The prohibition of unfair trading practices means correcting the situation already wrong.

⁹⁵⁹ 7 U.S. Code § 2303 - Prohibited practices.

⁹⁶⁰ 7 U.S. Code § 2305 - Enforcement provisions.

On one hand, a possible direction for development could be the introduction of an *ex ante* control mechanism in the form of sector-specific merger control—as already proposed by the American Antitrust Institute more than a decade ago⁹⁶¹—within the framework of which a more intensive and emphasised assessment could be conducted on the economic dependence of suppliers on buyers. This could hold up further concentration of the agri-food markets downstream and thus the increase in buyer power of certain market participants.

On the other hand, since there are already quite concentrated procurement markets from the perspective of the suppliers of agri-food products, a further *ex post* control mechanism could be established within antitrust in the form of extending the rules on abuse of dominance. The proposed rules are aimed—similarly to the merger control recommendations—at taking into consideration the economic dependence of suppliers on buyers to a greater extent. The detailed proposals are introduced in Chapter 4 of Part Four.

These ameliorations could be used in all analysed jurisdictions, given that there are similar problems and similar regulations in all of them. Of course, details differ from one another, but buyer power issues are prevalent on both sides of the Atlantic.

Moreover, I formulate some concluding remarks one by one. Let us start with the two EU Member States, then move on to the EU itself and, in the end, the United States.

Concerning Germany, I agree with *Hartmann-Rüppel* who analysed the legal regulation of grocery retailers, including their relationship with agri-food suppliers, as well as the adjacent areas with the problem of buyer power at its centre. No legislative changes are needed.⁹⁶² The German antitrust provisions—the exemptions provided for agricultural market participants—are coherent; Section 28 of *GWB* and Section 6 of *AgrarOLkG* have a clear relationship as well as they are formulated in accordance with EU requirements. In the time since *Hartmann-Rüppel* made his conclusion, agricultural producers are protected even to a greater extent through the implementation of the UTP Directive into German law. The German implementation used the possibility emerging from the minimum harmonisation approach to adopt stricter rules than those in the Directive, and three grey-list practices of the UTP Directive have rather been listed in the German black list. Germany even has a specific norm related to relative market power, which forbids for undertakings with superior market power to offer food below cost price. It is deemed an unfair impediment.

⁹⁶¹ AMERICAN ANTITRUST INSTITUTE 2008, p. 283.

⁹⁶² Marco HARTMANN-RÜPPEL (2015) Germany. In: Pierre KOBEL–Pranvera KËLLEZI–Bruce KILPATRICK (eds.) *Antitrust in the Groceries Sector & Liability Issues in Relation to Corporate Social Responsibility*. Berlin: Springer Verlag, p. 220.

As to the Hungarian regulation, some corrections would be needed. The agricultural antitrust exemption codified in Section 93/A of the Competition Act is not fully formulated in clear terms. Although the enforcement of the provisions is minimal, the following should be made clear. Who are put in a privileged position as a consequence of the rules? It is not clear from the rules that agricultural producers are the beneficiaries. It speaks of market participants affected by the respective agreement. Both criteria to be met constitute shadowy requirements: (a) the distortion, restriction or prevention of economic competition resulting from the agreement shall not exceed what is necessary to obtain an economically justified and fair income and (b) the market participant affected by the agreement shall not be prevented from obtaining such income. From an antitrust perspective, the provision also raises questions as to why the Minister Responsible for Agricultural Policy has the sole power to decide whether these conditions are met, and as to why the Hungarian Competition Authority has no power to overrule the Minister's decision. The justification for such a decision could be strengthened by the mere fact that the Hungarian Competition Authority has a say in the decision, or at least the decision should be made in agreement with the Hungarian Competition Authority. It would make possible that both the general knowledge on competition and the sectoral knowledge on agricultural markets be considered to provide a higher level of justification for the decisions. Given that the provision only applies when the trade between Member States is not affected, it is not against EU law, however, to a greater extent could it be brought into line with EU law with a dual enforcement mechanism. Taken into account that EU law declares in principle that competition rules also apply to agricultural markets unless otherwise provided, but the Hungarian regulation excludes the Hungarian Competition Authority from the decision-making process, it seems that this EU principle is not fulfilled regarding these provisions. The decision is made by a public law actor—in theory—exclusively representing agricultural policy but competition policy objectives not at all. It is another question that this approach is in line with a food sovereignty approach towards competition in agri-food markets, however, the interests of competing public policies are not balanced.

Here I do not wish to repeat my findings on the inappropriate implementation of the UTP Directive into Hungarian law.⁹⁶³

The Hungarian regulation on unilateral conducts is also far from perfect. There are two presumptions formulated which do not make sense. Both presumptions are codified in Act CLXIV of 2005 on Trade. One is related to the legal instrument 'abuse of dominance' and the

⁹⁶³ See Subchapter 3.1.2. of Part Two.

other to ‘abuse of significant market power’. An undertaking is presumed to be dominant on the market for the retail sale of daily consumer goods, if its previous year’s (consolidated) net turnover from retail sales of foodstuffs exceeds HUF 100 billion. It results that most retailers in Hungary (Tesco, Auchan, Spar, Lidl, Aldi) are in a dominant position *ex lege*. Of course, it does not mean that they would have abused that dominance, but the Hungarian Competition Authority could establish the existence of their dominant position on this statutory provision without engaging in a market investigation. In conventional antitrust terms—obviously—they would not be dominant. This provision should be repealed for two reasons. First, it lacks reason; second, the Hungarian Competition Authority, fortunately, has never used it. The other presumption declares that significant market power is presumed to exist against the supplier, if its previous year’s (consolidated) net turnover from retail sales of daily consumer goods exceeds HUF 100 billion. This provision is also outdated due to the low amount of turnover required. Here when calculating the turnover, not only the retail sales of food but also that of other daily consumer goods, such as perfumes, drugstore products, household cleaning products, chemicals and sanitary paper products, shall be taken into account. Once again, it means that most retailers in Hungary (Tesco, Auchan, Spar, Lidl, Aldi) are presumed to have significant market power against their suppliers *ex lege* without any further market investigation. These presumptions push down the intervention threshold so much that if the Hungarian Competition Authority would want, could investigate—almost in an unrestrained way—the practices of retailers without the need to get engaged in any actual assessment on market conditions. The turnover threshold as to the legal instrument ‘abuse of significant market power’ does not seem a bad choice, but it should definitely be increased in order to not constitute a possibility for abusive over-enforcement lacking legitimate objectives. Moreover, as mentioned earlier, even the name choice for ‘abuse of significant market power’ is contradictory, having in mind that dominance also presupposes significant market power. Emphasising the legal instrument’s relatedness to economic dependence or relative market power in its name would be advisable to establish clear-cut terminology.

Concerning the United States, law enforcement should find its way back to interpret the Packers and Stockyard Act in its original sense: as a trade regulation and not as an antitrust statute. The change would indicate that claimants should not prove adverse effects on competition. This return would mean a good first step towards the better protection for the market participants of livestock and poultry sectors selling their animals. Several questions arise in connection with the interpretation of the agricultural antitrust exemption provided by the Capper-Volstead Act, however, due to the low amount of cases many of these questions have

remained relatively unanswered since the statute's adoption. These are the following as put by *Barnes and Levine*: (a) inadvertent inclusion of a non-farmer; (b) a „good faith” belief in the exempt status; (c) whether supply management is protected; (d) whether vertical integration nullifies the exemption; (e) who a farmer is.⁹⁶⁴

As to the European Union, the legal text of the agricultural antitrust exemption in the Agri-Food Competition Regulation and its case law are not fully in line with one another. The legal text seems to mention two cases when an agreement can be exempted as well as an example—which is typical—when the exemption seems to be realised. These two cases and one example are understood by case law as three distinct modalities for the exemption in spite of the fact that the wording suggests otherwise. The formulation of the rules is dubious in other aspects, too. The prohibition for charging identical prices is misleading because it suggests that within a PO or APO the members cannot agree on the sales price of their produce when they step up on the market as one entity. On the contrary, the requirement only refers to the fact that a PO or APO shall not prohibit its members to sell their produce at a price lower than the price determined for the sales of the PO or APO.

Furthermore, the two definitions codified in Article 207 (relevant market) and Article 208 (dominant position) have no function at all. They should be repealed because they do not provide any sectoral derogation for agri-food markets in relation to the general interpretation of these notions. If the EU legislation would like to codify these definitions in a legally binding form, why do it in a sectoral regulation and why do it in a way which provides no sectoral additions to the interpretation of these notions?

The case law in *Endives* is not clear in one aspect. It sees the requirements for the exemption as fulfilled, if the agreement takes place in a legally recognised PO or APO. However, if two legally recognised POs are not legally recognised as an APO, but they agree on certain practices otherwise unlawful, the exemption criteria are deemed as not met and the POs are deemed as antitrust offenders. The difference is created by the mere fact that the two legally recognised POs are also legally recognised as an APO. In this case, they would not be held liable for the antitrust offence. Moreover, as put by *Blockx*, some incoherence may arise from the fact that the legal recognition of POs and APOs depends on national authorities.⁹⁶⁵ I

⁹⁶⁴ BARNES–LEVINE 2021.

⁹⁶⁵ Jan BLOCKX (2017) The ECJ Preliminary Ruling in French *Endives*: Two (Too?) Simple Rules to Attune Article 101 TFEU to the Common Agricultural Policy, *Kluwer Competition Law Blog* [Online]. Available at: <http://competitionlawblog.kluwercompetitionlaw.com/2017/11/15/ecj-preliminary-ruling-french-endives-two-simple-rules-attune-article-101-tfeu-common-agricultural-policy/> (Accessed: 21 March 2022).

am of the opinion that the EU provisions on legal recognition provide—although broad but—clear enough directions for Member States, to which they have to stick.

The provision which declares that the agreement forming an integral part of a national market organisation can be exempted has also lost sense. On one hand, this criterium has been merged into the requirement of the fulfilment of CAP objectives based on the assumption that the objectives of the CAP and that of national market organisations are identical, and, on the other hand, national market organisations have almost ceased to exist, since there is no place for a national market organisation, if the product being the subject for that national market organisation is regulated by EU law. Given that agri-food markets are regulated and organised in the CMO Regulation at EU level, there is no room for national market organisations.

It would also be advisable to define the relationship between producer organisations and farmers' associations. It is not clear what a farmers' association or an association of farmers' associations is. Are they called like these if they are not legally recognised, and if they are recognised, do they become producer organisations and associations of producer organisations?

It is also worth mentioning that the exemption criteria for interbranch organisations are still uncertain. So far, there has been no case law to give actual meaning for these provisions.

In a broad context, it is redundant for EU legislation to keep both the Agri-Food Competition Regulation and the competition rules laid down in the CMO Regulation. Article 1 of the Agri-Food Competition Regulation declares that its scope does not cover those products listed in Annex I TFEU which are covered by the CMO Regulation. Nonetheless, Article 1 of the CMO Regulation declares that it establishes a common organisation of the markets for agricultural products, which means *all the products listed in Annex I TFEU*.

Taking into consideration all of the above, the provisions should be codified in one legal act with the following content:

Article 101(1) of the Treaty shall not apply to those agreements, decisions and practices of farmers, farmers' associations, associations of such associations, producer organisations and associations of such organisations (together hereinafter referred to as 'organisations'), which fulfil the following conditions:

- (a) they are necessary for the attainment of and do not jeopardise the objectives set out in Article 39 of the Treaty;*
- (b) they concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products;*
- (c) they do not exclude competition;*

(d) they do not exclude the possibility for any party to the agreement to charge a lower price to her/his own buyers than the one charged by the organisation itself to the buyers of the organisation.

Concerning the UTP Directive, I also have some remarks (hypothetical questions), nevertheless, having in mind that these issues may become outdated over time, if one can gain insights from the functioning of implemented provisions in national law. First, I see it dubious whether it was a good choice that the Directive is based on minimum harmonisation. Perhaps—instead of a directive—a regulation could have better served the intended aims by creating a fully consistent EU landscape on the issue. Moreover, *Pichler* says that it is already clear that the intended protection of agriculture will hardly be achieved through the means of the UTP Directive.⁹⁶⁶ Of course, competition policy is not the best tool to increase the standard of living of agricultural producers, however—in my opinion—the competitive pressure put on them may be alleviated by competition-related provisions regulating their business relationships.

Furthermore, the way the personal scope of the Directive—turnover thresholds—is determined seems also controversial. First, the Directive also becomes applicable, if a supplier with a turnover of EUR 499.999 bargains with a buyer with a turnover of EUR 500.001, but it is unlikely that in this case the buyer would be in a superior bargaining position over the supplier. Second, turnover thresholds are a good proxy but should not be used as an exclusive factor to determine one's bargaining power. It requires a more detailed assessment of all relevant components of a given market situation.

⁹⁶⁶ PICHLER 2021, p. 537.

Part Three: Agri-Food Competition Law in Light of Food Sovereignty

Part Three is complex in nature since it aims to scrutinise agri-food competition law in light of food sovereignty.

After the introduction of the conflicting paradigms of food sovereignty and food security, a summarising chapter is provided on the possible objectives of antitrust law. Besides antitrust law objectives, I also present the different schools of thought behind these goals. Where possible, I identify the analysed objects with these objectives and schools of thought. The European Union and Germany have been greatly influenced by ordoliberalism, while the United States of America—since the appearance of Robert Bork—has, to a significant extent, followed the path of the Chicago School. In Hungary, as a consequence of the almost fifty-year period of centrally planned economy in the Socialist era, such clear and fruitful school of thought and discourse on antitrust policy and law has not emerged which would be suitable to get identified undoubtedly. Nevertheless, both US antitrust and German competition law have influenced the Hungarian regulation after the regime change in 1989.⁹⁶⁷

The analysis on food sovereignty has the goal to get closer to the approach which food sovereignty takes when speaking about competition. If I am aware of its standpoint towards competition, I can identify that competition school of thought which can be brought into line with the considerations of food sovereignty. That is to say, I aim to discover as to which competition policy framework is the closest to the perceptions of food sovereignty on competition and its regulation.

Of the competition schools of thought, I find that, at a theoretical level, ordoliberal competition policy is fit to display those elements in competition-related regulation which food sovereignty considers indispensable in order to attain its objectives. The traits of ordoliberal competition policy are analysed in detail in Subchapter 2.2.1 on the objectives of German competition law. The reason for providing an in-depth analysis on ordoliberalism there is that ordoliberal competition policy is a unique German notion and was already present in Germany before the beginning of the European integration process.

It results that in the forthcoming analysis I work on with ordoliberal competition policy and the EU which has significantly been influenced by ordoliberal competition policy. That is why, furthermore, in Part Three, I aim to trace the standpoint of ordoliberalism on agriculture,

⁹⁶⁷ TÓTH 2020, p. 72.

harmonise two apparently conflicting notions (ordoliberalism and food sovereignty) and examine food sovereignty from the viewpoint of EU institutions. With the harmonisation, I aim to provide an understanding of sovereignty in the notion of food sovereignty since the critique has come forth that it is undertheorised.⁹⁶⁸ The attempt to bring into conformity ordoliberalism and food sovereignty is theoretical. Ordoliberalism is chosen as an orientating point for food sovereignty because of the competition policy represented by it: ordoliberalism, through its economic model of social market economy, leaves room for a multidimensional assessment of competition-related conducts which may be better suited to optimise competition regulation in agri-food markets.

1 The conflicting paradigms of food security and food sovereignty and their approaches to competition

In this chapter, I aim to explore those elements of food sovereignty which may provide us with starting points for the way competition is perceived within its framework. In some aspects, I use the paradigm of food security as a conflicting basis for comparison.

The literature is not consistent on the relationship between the paradigms of food security and food sovereignty. As the title of the chapter suggests, I draw a sharp dividing line between the two and treat them as opposing alternatives. Similarly to this thesis, the paradigm of food security and food sovereignty is construed as a global conflict, for example, by *William D. Schanbacher*,⁹⁶⁹ *María Elena Martínez-Torres* and *Peter M. Rosset*⁹⁷⁰ as well as *Philip McMichael*⁹⁷¹ and *Joe J. Wills*.⁹⁷² However, it will be seen later that the European Union and its institutions do not necessarily take this position. The approach of the EU institutions presented later is neither revolutionary nor new, as the early literature on food sovereignty also took the view that food sovereignty is a precondition for food security.⁹⁷³ Some overlaps do

⁹⁶⁸ Sam GREY–Raj PATEL (2015) Food sovereignty as decolonization: some contributions from Indigenous movements to food system and development politics, *Agriculture and Human Values*, 32(3), p. 432.

⁹⁶⁹ WILLIAM D. SCHANBACHER (2010) *The Politics of Food – The Global Conflict Between Food Security and Food Sovereignty*. Santa Barbara: Praeger Security International.

⁹⁷⁰ MARÍA ELENA MARTÍNEZ-TORRES–PETER M. ROSSET (2014) Diálogo de saberes in *La Vía Campesina: food sovereignty and agroecology*, *The Journal of Peasant Studies*, 41(6), pp. 979–997.

⁹⁷¹ PHILIP MCMICHAEL (2014) Historicizing food sovereignty, *The Journal of Peasant Studies*, 41(6), pp. 933–957.

⁹⁷² See Chapter 3 titled ‘Food Security vs. Food Sovereignty: The Right to Food and Global Hunger’ of Joe J. WILLS (2017) *Contesting World Order? Socioeconomic Rights and Global Justice Movements*. Cambridge: Cambridge University Press.

⁹⁷³ MARC EDELMAN–TONY WEIS–AMITA BAVISKAR–SATURNINO M. BORRAS JR–ERIC HOLT–GIMÉNEZ–DENIZ KANDIYOTI–WENDY WOLFORD (2014) Introduction: critical perspectives on food sovereignty, *The Journal of Peasant Studies*, 41(6), p. 914.

exist between these paradigms (for example, culturally appropriate food).⁹⁷⁴ Nevertheless, it does not mean that they would not have an irresolvable conflict.

Important findings on food sovereignty's approach towards competition and trade can be collected from the 2002 food sovereignty definition which declares that it does negate trade but aims to promote trade policies and practices serving the rights of peoples to food, hand in hand with safe, healthy and ecologically sustainable production.⁹⁷⁵ In the multi-level food supply chain worrisome concerns not only arise from anti-competitive cartels, abuse of dominance and mergers,⁹⁷⁶ but also from unfair trading practices against suppliers of agri-food products falling outside the scope of conventional antitrust law instruments. In many cases, the latter remain hidden from the eyes of antitrust authorities, on one hand because of the lack of normative and prohibitive regulation, and, on the other hand, if there is some kind of regulation, because of the fear factor which discourages suppliers from making a formal complaint against offenders out of fear of commercial retaliation.⁹⁷⁷ Both these market behaviours which can be assessed with antitrust law instruments and the unfair trading practices emerging in contractual relations are unacceptable if one uses the food sovereignty definition as a benchmark tool.

Although the paradigm of food sovereignty has emerged most significantly at the international level and aims to formulate suggestions with regard to international trade in agricultural and food products, it is apparent from its self-determination that it argues against completely free markets lacking the guardian role of state regulation.⁹⁷⁸ In general, it defines the state as the protector of farmers,⁹⁷⁹ and this need for protection is also to be interpreted regarding the agricultural markets and the role farmers should play therein. It not only refers to international markets but also to regional and national ones. Food security advocates argue for the liberalisation of markets as the one and only means to achieve their objectives. However, at the international level the proponents of food sovereignty represent the view that the World Trade Organization should get out of agriculture because free trade policies and their foundation in the form of neoclassical economics are not suitable to meet the needs of agriculture and the food sector.⁹⁸⁰ Neoclassical economics is also the basis for those antitrust law regimes which consider the goal of economic efficiency as the exclusive aim of antitrust, as in the US in the

⁹⁷⁴ EDELMAN–WEIS–BAVISKAR–BORRAS JR–HOLT–GIMÉNEZ–KANDIYOTI–WOLFORD 2014, p. 914.

⁹⁷⁵ WINDFUHR–JONSÉN 2005, p. 1.

⁹⁷⁶ See: ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 2013.

⁹⁷⁷ GÖCKLER 2017.

⁹⁷⁸ WINDFUHR AND JONSÉN 2005, p. 29.

⁹⁷⁹ MANN 2014, p. 54.

⁹⁸⁰ See: Peter M. ROSSET (2006) *Food is Different: Why We Must Get the WTO Out of Agriculture*. London: Zed Books.

last four decades with the dominance of the Chicago School. The core principle of neoclassical economics is to maximise allocative efficiency,⁹⁸¹ which – in antitrust terms – is understood as consumer welfare.⁹⁸² Consumer welfare is no other than the guiding principle of the Chicago School of antitrust dominating the US antitrust regime from the appearance of Robert Bork's *The Antitrust Paradox*.⁹⁸³

Neoclassical economics and its political philosophy background in the form of neoliberalism are condemned by food sovereignty which cannot accept, and argues against, the trait of neoliberalism based on which separate economic, social and political spheres are evaluated according to a single economic logic.⁹⁸⁴ With regard to antitrust law, this single-mindedness lies in the approach that considers consumer welfare as the one and only legitimate objective of antitrust law. From the perspective of food sovereignty, with regard to agricultural and food products, this can be best described as the commodification of food products. From a neoliberal and a food security standpoint, regarding the notions of competition and of food, the only considerations to be taken into account are economic ones, which are against the immanent features of food sovereignty. By challenging the dominance of agribusiness and the unjust trade system⁹⁸⁵ and by not negating trade,⁹⁸⁶ food sovereignty – on the contrary – puts significant emphasis on social considerations and aims to contribute to a humane market economy which intends to surpass the neoliberal market economy strictly operating with economic terms.

In summary, the paradigm of food sovereignty builds upon a mode of competition and a way of market functioning which require the guardian role of the state in the form of legal regulation aiming to protect the interests of agricultural producers and farmers as well as those of small and medium-sized enterprises. It craves extensive and strong competition law legislation and enforcement dominated not only by efficiency-based considerations but also non-efficiency-based ones. On the contrary, food security proponents see the solution of ameliorating the situation of agricultural producers (farmers) in having completely free markets of which the state backed out. Pursuant to the understanding of the paradigm of food security, completely free markets make it possible for each and every agricultural producer to enter global markets and, thus, to generate higher profits. Food sovereignty aims to take into account

⁹⁸¹ Robert D. ATKINSON–David B. AUDRETSCH (2011) Economic Doctrines and Approaches to Antitrust, *Indiana University-Bloomington: School of Public & Environmental Affairs Research Paper Series* [Online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1750259# (Accessed: 6 October 2021).

⁹⁸² Dina I. WAKED (2020) Antitrust as Public Interest Law: Redistribution, Equity, and Social Justice, *The Antitrust Bulletin*, 65(1), p. 88.

⁹⁸³ BORK 1978.

⁹⁸⁴ WILLIAM DAVIES (2014) *The Limits of Neoliberalism*. London: SAGE Publications, pp. 31–32.

⁹⁸⁵ See: MANN 2014.

⁹⁸⁶ WINDFUHR–JONSÉN 2005.

those non-economic aspects that are overlooked by neoliberal food policy and its food security paradigm.

2 Antitrust law objectives

Concerning the objectives, first, I have to look at agri-food competition law generally from two different standpoints.

From the perspective of competition law, the box of rules comprising the area of agri-food competition law is a sub-area of a broadly understood competition law (as a branch of law) where social objectives in the form of distributional goals hand in hand with the protection of certain market participants sneak into the policy-making process, and this establishes the possibility for lawmakers to adopt specific and exemption norms in favour of the market players of agriculture and the food supply chain who possess weak bargaining position and no market power. Including wealth transfers as a concern is no other than a value decision which competition policymakers may or may not make⁹⁸⁷ in favour of certain sectors such as agriculture. It varies level by level and country by country. Nevertheless, a general trend can be observed that – to a certain extent – each country and level examined in detail provides for specific and exemption norms to handle the agricultural sector and the food supply chain specially.

From the perspective of agri-food law, agri-food competition law is one part of agri-food law where general agricultural and food policy objectives influence and „hijack” the broadly understood competition laws, and these laws serve as an instrument to achieve agricultural and food policy objectives.

The reason for briefly reviewing the objectives of antitrust law is that they have a crucial impact on the application and interpretation of antitrust laws,⁹⁸⁸ thus are also of paramount importance when speaking of sector-specific regulation. Debates on antitrust law goals are continuous, so much so that one must admit the arbitrary nature of the question of what antitrust law objectives should be. It would be more exact to pose the question as what we want from markets and antitrust, considering that the answer to the former question „is typically given in terms of what the respondent—invariably an inside player who has already formed a normative

⁹⁸⁷ PINAR AKMAN (2012) *The Concept of Abuse in EU Competition Law – Law and Economic Approaches*. Oxford: Hart Publishing, p. 40.

⁹⁸⁸ Deborah HEALEY (2020) *The ambit of competition law: comments on its goals*. In: Deborah HEALEY–Michael JACOBS–Rhonda L. SMITH (eds.) *Research Handbook on Methods and Models of Competition Law*. Cheltenham: Edward Elgar Publishing, p. 12.

view—believes the operational guiding principle should be.”⁹⁸⁹ This means that most of the positions on the goals of antitrust law are prejudicial because they are preliminarily determined by the respective respondent’s own perceptions of what we aim to strengthen with the help of functioning markets.

Although antitrust law objectives are rather dynamic and not static in nature,⁹⁹⁰ in general and based on *Akman*’s approach, two main groups of objectives can be identified: one group is connected to the notion of welfare, while the other to notions unrelated to efficiency.^{991,992} While the former is dominated by economic considerations (in particular, by the considerations of welfare economics), the latter focuses also on considerations other than different types of welfare. For an even clearer clustering and simple terminology, one may group antitrust law objectives to efficiency-based and non-efficiency-based goals. However, non-efficiency-based goals do not necessarily mean that efficiency is not taken into account throughout the enforcement of antitrust laws. For example, the antitrust goal of the protection of the competitive process or, in other words, the protection of competition as such does not imply that consumer welfare, understood as allocative efficiency,⁹⁹³ is not and cannot be enhanced, given that „[p]rotecting the competitive process is economically efficient.”⁹⁹⁴ Nonetheless, a complex assessment requires that not only the process but also the outcome be taken into account.⁹⁹⁵

In the last four decades, debates on the goals of antitrust law have taken a direction where voices echoing the triumph of enhancing efficiency prevail over non-efficiency-based concerns, such as fairness, the protection of competitive process and the protection of individual economic freedom. The common question which – according to Nihoul – always arises as to the notion of efficiency is how to measure it: „[s]hould we aim at maximising consumer welfare? Producer welfare? Total welfare?”⁹⁹⁶ The adoption of any of these economic welfare standards by enforcement authorities is of particular importance regarding the outcome of

⁹⁸⁹ Eleanor M. FOX (2013) Against Goals, *Fordham Law Review*, 81(5), p. 2159.

⁹⁹⁰ „The goals of competition law evolve over time.” See Roger VAN DEN BERGH (2017) *The goals of competition law*. In: Roger VAN DEN BERGH–Peter CAMESASCA–Andrea GIANNACCARI (2017) *Comparative Competition Law and Economics*. Cheltenham: Edward Elgar Publishing, p. 88.

⁹⁹¹ AKMAN 2012, p. 25.

⁹⁹² The dichotomy of competition law goals is divided into the „Freedom to Compete Approach” and the „More Economic Approach” by Meier. See: Martin MEIER (2019) *Pleading for a “Multiple Goal Approach” in European Competition Law – Outline of a Conciliatory Path Between the “Freedom to Compete Approach” and the “More Economic Approach”*. In: Klaus MATHIS–Avishalom TOR (eds.) *New Developments in Competition Law and Economics*. Cham: Springer Nature Switzerland AG, pp. 51–52.

⁹⁹³ Consumer welfare is understood as allocative efficiency by, for example, WAKED 2020, p. 88.

⁹⁹⁴ ANCHUSTEGUI 2017, p. 89.

⁹⁹⁵ AKMAN 2012, p. 47.

⁹⁹⁶ Paul NIHOUL (2012) Choice vs Efficiency? *Journal of European Competition Law & Practice*, 3(4), p. 315.

decisions.^{997,998} Nevertheless, not all scholars share the view that these standards are of paramount relevance to enforcement. The picture is nuanced by, for example, Motta: „consumer and total welfare standards would not often imply very different decisions by antitrust agencies and courts.”⁹⁹⁹

We must not forget, however, that „no welfare test can eliminate the exercise of policy judgment in competition policy.”¹⁰⁰⁰ Therefore, both *Akman* and *Hovenkamp* acknowledge the importance and influential role of policy choices within antitrust law, be it about whether wealth transfers and social considerations are, or should be, taken into account, or whether consumer or total welfare standard is, or should be, employed by enforcement authorities. The choice on welfare standard expresses a certain value decision, for by committing ourselves to the total welfare standard one also leaves scope for considering the interests of groups other than consumers. The views of *Akman* and *Hovenkamp* are also consistent with *Eleanor Fox*’s discussion of antitrust law objectives. *Fox* explicitly put that the goals of antitrust law depend on what one wants from markets and antitrust, thus it is a question of value decision and policy choice. It is convincing when three of the greatest and most renowned antitrust scholars of our time all recognise and acknowledge that antitrust law is—to a significant extent—guided by policy choices and value decisions which inevitably and indirectly have effect on enforcement priorities.

2.1 The objectives of EU antitrust law

EU antitrust law objectives vary widely.¹⁰⁰¹ A recent empirical study by *Stylianou and Iacovides* has found that EU competition law follows a multitude of goals and all seven objectives examined have existed from the 1960s until now. The authors call it a risky but not unsubstantiated finding that the competition law goals connected to the ordoliberal school of thought are continuously present; they also conclude that the protection of competition as such, that is, the protection of the competitive process, takes precedence over outcome considerations. Although with fluctuating intensity but the following objectives have been present since the

⁹⁹⁷ Pieter KALBFLEISCH (2011) Aiming for Alliance: Competition Law and Consumer Welfare, *Journal of European Competition Law & Practice*, 2(2), p. 111.

⁹⁹⁸ For a detailed analysis on the choice between the standard of consumer welfare and total welfare, see: KAPLOW 2012. In his study, KAPLOW (2012, p. 26) finds that „it is more efficient to confine competition law to the maximization of total welfare.”

⁹⁹⁹ Massimo MOTTA (2004) *Competition Policy: Theory and Practice*. Cambridge: Cambridge University Press, p. 19.

¹⁰⁰⁰ HOVENKAMP 2019, p. 104.

¹⁰⁰¹ CRAIG-DE BÚRCA 2015, p. 1001.

1960s: efficiency, welfare, the freedom of competition, maintaining market structure, fairness, the European integration, and the competitive process.¹⁰⁰²

The ordoliberal impact on EU antitrust law is a heavily debated area, however the majority of authors argues for having such influence.¹⁰⁰³ One of the most renowned scholars who argues against the ordoliberal effects on EU antitrust law is *Pinar Akman*.¹⁰⁰⁴ Ordoliberal competition policy is analysed in detail in connection with Germany (Subchapter 2.2.1), given that it originates from there.

Though the antitrust law of the European Union has gone its own way, the consumer welfare paradigm of the Chicago School has had quite a significant impact on EU antitrust law and policy.¹⁰⁰⁵ Commencing with the statements of the European Commission in the late 1990s and appearing in a legally binding form in the 2004 Merger Regulation,¹⁰⁰⁶ it has strongly infiltrated in the discourse on the goals of EU antitrust law as the more economic approach to European antitrust law.¹⁰⁰⁷

The polythematic nature of EU antitrust law is best summarised in the *GlaxoSmithKline* case:

„[...] *there is nothing in that provision [Article 81 EC, then Article 101 TFEU] to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests*

¹⁰⁰² STYLIANOU–IACOVIDES 2019.

¹⁰⁰³ See, for example: David J. GERBER (1994) Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe, *The American Journal of Comparative Law*, 42(1), p. 69; GERBER 1998, p. 264; ANCHUSTEGUI 2015, p. 139; Peter BEHRENS (2015) *The ordoliberal concept of "abuse" of a dominant position and its impact on Article 102 TFEU* [Online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658045 (Accessed: 23 July 2021), p. 29; Conor TALBOT (2016) Ordoliberalism and Balancing Competition Goals in the Development of the European Union, *The Antitrust Bulletin*, 61(2), pp. 264–289; Peter NEDERGAARD (2019) The ordoliberalisation of the European Union? *Journal of European Integration*, 42(2), p. 229; Peter VAN WIJCK (2020) Loyalty rebates and the more economic approach to EU competition law, *European Competition Journal* [Online]. Available at: <https://doi.org/10.1080/17441056.2020.1834973>.

¹⁰⁰⁴ See: AKMAN 2012.

¹⁰⁰⁵ Anne C. WITT (2019) The European Court of Justice and the More Economic Approach to EU Competition Law — Is the Tide Turning? *The Antitrust Bulletin*, 64(2), pp. 172–213.

¹⁰⁰⁶ Christian KIRCHNER (2007) *Goals of Antitrust and Competition Law Revisited*. In: Dieter SCHMIDTCHEN–Max ALBERT–Stefan VOIGT (eds.) *The More Economic Approach to European Competition Law*. Tübingen: Mohr Siebeck, p. 7.

¹⁰⁰⁷ See: SCHMIDTCHEN–ALBERT–VOIGT (eds.) 2007; Roger VAN DEN BERGH (2016) The More Economic Approach in European Competition Law: Is More Too Much or Not Enough? In: Mitja KOVAČ–Ann-Sophie VANDENBERGHE (eds.) *Economic Evidence in EU Competition Law*. Cambridge–Antwerp–Chicago: Intersentia, pp. 13–42; Anne C. WITT (2016) *The More Economic Approach to EU Antitrust Law*. Oxford: Hart Publishing; Marta ZALEWSKA–GŁOGOWSKA (2017) *The More Economic Approach under Article 102 TFEU*. Baden-Baden: Nomos Verlag.

*of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.”*¹⁰⁰⁸

It is, therefore, clear that the market structure and the competitive process are also concerns in the European Union, when it comes to antitrust objectives.

One significant difference must be noted why the consumer welfare paradigm could not become dominant in the EU but could in the USA. The reform of antitrust law was initiated within the judiciary, in particular the Supreme Court in the United States, while in Europe the institution which first adopted and attempted to introduce the more economic approach (the European equivalent of the consumer welfare paradigm) was the European Commission.¹⁰⁰⁹ Given that EU courts stand above the Commission from an enforcement perspective and the Court of Justice of the European Union makes the final judgments, EU courts are in a stronger position to determine their own approach and standpoint towards reform attempts. Moreover, only the Commission is bound by its notices. It does not mean that a trend did not start to the direction of more efficiency- and welfare-based enforcement, however „the freedom- and fairness-based definitions and concepts coined in the 1970s” have remained.¹⁰¹⁰

All in all, still an inherent feature of EU antitrust law is that it pursues a multitude of goals and does not limit itself to efficiency-based considerations, thus by leaving room to other priorities.

2.2 The objectives of national antitrust law regimes

This subchapter aims to shortly discuss the objectives of antitrust law at national level: first, the two EU Member States, Germany and Hungary are analysed, and second, I turn my attention to the US antitrust regime.

2.2.1 The objectives of German competition law

¹⁰⁰⁸ Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P – Judgment of the Court (Third Chamber) of 6 October 2009: GlaxoSmithKline Services Unlimited v Commission of the European Communities (C-501/06 P) and Commission of the European Communities v GlaxoSmithKline Services Unlimited (C-513/06 P) and European Association of Euro Pharmaceutical Companies (EAEPC) v Commission of the European Communities (C-515/06 P) and Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission of the European Communities (C-519/06 P), [63].

¹⁰⁰⁹ WITT 2019, p. 173.

¹⁰¹⁰ WITT 2019, p. 212.

As mentioned above, since World War II the dominant school of thought in Germany has been ordoliberal competition policy which finds its roots in Freiburg. It has also been pointed out that competition law scholars tend to identify ordoliberal competition policy strictly with the first generation of the Freiburg School,¹⁰¹¹ but it should rather be perceived as a continuously changing notion which is settled in its constituting elements. Ordoliberalism has undeniably German roots¹⁰¹² and „has proved singularly influential in shaping the social market economy of post-war Germany.”¹⁰¹³ Before the World War II, there was no chance for ordoliberalism to influence economic policy;¹⁰¹⁴ however—thanks to his strong connections with the Freiburg School—Ludwig Erhard’s appointment to the position of the *Deutscher Wirtschaftsrat*’s¹⁰¹⁵ chairperson in January 1948 opened the door to ordoliberal views and ideas to be realised in economic and legal policy-making processes.¹⁰¹⁶ Actually, the intellectual framework of Germany’s competition act still in force, that is, of *GWB* was built up by ordoliberal thinkers,¹⁰¹⁷ therefore it is reasonable to examine whether the *GWB* includes any explicit principle and/or starting point with regard to the objective(s) of German competition law. Unfortunately, the answer is no. Nonetheless, besides this, one thing is certain in the *GWB*: it does not refer to „the” or „the more” economic approach, which results in that the *GWB* is therefore to be interpreted on the basis of the general methods developed for the interpretation of laws.¹⁰¹⁸

It means that the ordoliberal tradition does not appear *expressis verbis* in the *GWB*, however it has always been of crucial importance and has made an impact on the content of the act’s legal instruments. Germany’s antitrust authority, the BKA clearly and directly builds up its priorities and organises its enforcement activities to *protect competition as such*.¹⁰¹⁹ It is its

¹⁰¹¹ BEHRENS 2015.

¹⁰¹² NEDERGAARD 2019, p. 215.

¹⁰¹³ Malte DOLD–Tim KRIEGER (2021) The ideological use and abuse of Freiburg’s ordoliberalism, *Public Choice* [Online]. Available at: <https://link.springer.com/article/10.1007/s11127-021-00875-0> (Accessed: 4 November 2021).

¹⁰¹⁴ Anthony NICHOLLS (1984) *The other Germany – The 'Neo-liberals'*. In: Roger J. BULLEN–Hartmut Pogge von STRANDMANN–Antony B. POLONSKY (eds.) *Ideas Into Politics – Aspects of European History 1880-1950*. London–Sydney: Croom Helm, p. 171.

¹⁰¹⁵ In English: German Economic Council.

¹⁰¹⁶ QUACK–DJELIC 2005, p. 5.

¹⁰¹⁷ Ben VAN ROMPUY (2012) *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn: Kluwer Law International, § 3.03.

¹⁰¹⁸ Torsten KÖRBER–Heike SCHWEITZER–Daniel ZIMMER (2020) *Einleitung*, Rn. 35. In: Torsten Körber–Heike Schweitzer–Daniel Zimmer (eds.) *Wettbewerbsrecht – Band 2: GWB. Kommentar zum Deutschen Kartellrecht*, 6th edn. Munich: C.H. Beck.

¹⁰¹⁹ See the website of BKA: „Das Bundeskartellamt ist eine unabhängige Wettbewerbsbehörde, deren Aufgabe der Schutz des Wettbewerbs in Deutschland ist.” Available at: https://www.bundeskartellamt.de/DE/UeberUns/Bundeskartellamt/bundeskartellamt_node.html (Accessed: 7 November 2021).

definite and straightforward mission, which faithfully reflects the ordoliberal nature of German antitrust law. The spirit of ordoliberalism is echoed strongly in the BKA:

„Competition means that several companies compete with one another for the favour of customers. In a competitive environment customers or suppliers can switch to another company. Consequently, companies endeavour to offer their goods or services at the lowest possible price and to improve their quality. Competition therefore encourages companies to be innovative. Effective competition also prevents the creation or strengthening of power positions which are too influential in society and politics. Consumers, in particular, benefit from a competitively organized market because they can choose from a wide range of offer of those goods and services which best match their expectations (e.g. good quality, appropriate price-performance ratio, good service, etc.).”¹⁰²⁰

Although the requirement of low prices is also mentioned, however it is the necessary consequence of the competitive process. The fundamental objective is the protection of competition which is not only an aim in itself but also an essential tool to achieve other socially useful outcomes, such as low prices, innovation, and the avoidance of creating or strengthening of power positions.

The *Federal Ministry for Economic Affairs and Energy*¹⁰²¹ also emphasises that the *GWB*’s main aim is to protect competition *per se*.¹⁰²² This is also confirmed by the literature. Concerning Section 1 of *GWB*, it is stated that the provision concentrates on the protection of the competitive process and the individuals’ competitive freedom of action and does not leave room, for example, for other welfare objectives and environmental protection.¹⁰²³

All of the above take us to the same place: German antitrust law, faithfully to its roots, is deeply embedded in the ordoliberal tradition and has been guided by ordoliberal ideas since the *GWB*’s passage.

¹⁰²⁰ See: https://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt_node.html (Accessed: 7 November 2021).

¹⁰²¹ In German: *Bundesministerium für Wirtschaft und Energie*.

¹⁰²² Bundesministerium für Wirtschaft und Energie (n.d.) *Wettbewerbspolitik* [Online]. Available at: <https://www.bmwi.de/Redaktion/DE/Dossier/wettbewerbspolitik.html> (Accessed: 7 November 2021). See also the background document of the ministry: Bundesministerium für Wirtschaft und Energie (n.d.) *Informationen zum nationalen Kartell- und Wettbewerbsrecht*, p. 1. [Online]: „Der Wettbewerb ist gemeinsames Schutzgut des Kartellrechts (GWB) [...]” Available at: https://www.bmwi.de/Redaktion/DE/Downloads/I/informationen-zum-nationalen-kartell-und-wettbewerbsrecht.pdf?__blob=publicationFile&v=4 (Accessed: 7 November 2021).

¹⁰²³ Carsten GRAVE–Jenny NYBERG (2020) *Vorbemerkung §§ 1 bis 3*, Rn. 24–26. In: Ulrich LOEWENHEIM–Karl M. MEESSEN–Alexander RIESENKAMPFF–Christian KERSTING–Hans Jürgen MEYER-LINDEMANN (eds.) *Kartellrecht – Kommentar zum Deutschen und Europäischen Recht*, 4th edn. Munich: C.H. Beck.

As a consequence of this, it is worth introducing ordoliberalism in more detail, however one must also take into account that the literature is utterly rich in this respect and therefore I do not and could not aim to fully present this school of thought in general and its competition policy in particular. The Freiburg School, as the original collective of ordoliberals, defined itself in relation to liberalism by stating that „a free-market order is not simply what one would find if and where government is absent, [it is] a political-cultural product, based on a constitutional order that requires careful ‘cultivation’ for its maintenance and proper functioning.”¹⁰²⁴ It means that markets cannot determine a system of legal and ethical standards for themselves in order to fulfil their economic policy tasks.¹⁰²⁵ In an obituary on *Walter Eucken*, *Leonhard Miksch*, another representative of the Freiburg School,¹⁰²⁶ consistently distanced ordoliberalism from neoliberalism by stating that the economic theory for *Eucken* was only a means to design an order that would liberate humanist values from the threatening grip of chaotic, anarchist, collectivist and nihilist forces.¹⁰²⁷ According to *Gerber*, *Miksch*’s mention of nihilist forces referred to neoliberalism in its pure Hayekian sense.¹⁰²⁸ The most authentic ordoliberal concept which accurately includes ordoliberal thoughts and ideas is the concept of social market economy with human beings in its centre.¹⁰²⁹ However, the model of social market economy is not construed only in one way by different ordoliberal thinkers. For example, not only the concept of *Eucken*¹⁰³⁰ in several of its aspects differs from that of *Müller-Armack*,¹⁰³¹ but also beyond these versions there are also different shades of the model.¹⁰³² This lack of consistency openly shows us that the concept is not an accurately elaborated economic model even at theoretical level but rather „a cipher for a “mélange” of socio-political ideas for a free and socially just society and some general rules of economic policy.”¹⁰³³ The legal framework of social market economy is set up by an economic constitution laying down the principles

¹⁰²⁴ Viktor J. VANBERG (2013) Ordnungspolitik, the Freiburg School and the Reason of Rules, *Annals of the University of Bucharest / Political science series*, 15(1), p. 26.

¹⁰²⁵ Christian HECKER (2011) Soziale Marktwirtschaft und Soziale Gerechtigkeit: Mythos, Anspruch und Wirklichkeit, *Zeitschrift für Wirtschafts- und Unternehmensethik*, 12(2), p. 272.

¹⁰²⁶ Walter Otto ÖTSCH–Stephan PÜHRINGER–Katrin HIRTE (2018) *Netzwerke des Marktes – Ordoliberalismus als Politische Ökonomie*. Wiesbaden, Springer Fachmedien, p. 1.

¹⁰²⁷ Leonhard MIKSCHE (1950) *Walter Eucken*, *Kyklos*, 4(4), p. 279.

¹⁰²⁸ GERBER 1998, p. 240.

¹⁰²⁹ Martin DAHL (2018) Ordoliberal Roots of Ecological Market Economy, *Review of Economic & Business Studies*, 11(2), p. 116.

¹⁰³⁰ See *Eucken*’s most famous article which gives us the best insights on his thoughts on competition: *Walter EUCKEN* (1949) Die Wettbewerbsordnung und ihre Verwirklichung: Erster Teil über die Wirtschaftspolitik der Vergangenheit, *ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, Vol. 2, pp. 1–99.

¹⁰³¹ The spiritual father of the model/concept of social market economy is *Alfred Müller-Armack*.

¹⁰³² See also: Christian WATRIN (1979) The Principles of the Social Market Economy – its Origins and Early History, *Zeitschrift für die gesamte Staatswissenschaft*, 135(3), p. 405.

¹⁰³³ Nils GOLDSCHMIDT (2012) Alfred Müller-Armack and Ludwig Erhard: Social Market Liberalism, *Freiburger Diskussionspapiere zur Ordnungsökonomik*, No. 04/12, p. 1.

necessary for markets to function efficiently based on socially protected values.¹⁰³⁴ The content of economic constitution is best illustrated by its principles described by *Eucken*, which can be divided into two groups, taking into account that the elements of these two groups complement each other. Although these elements make only sense when applied parallelly at the same time, I only stress the competition-related ones relevant for the thesis. One group consists of the so-called constituting/structural¹⁰³⁵ principles,¹⁰³⁶ while the other one the regulating principles.^{1037,1038} „Constitutive principles ensure the establishment of the competitive order [*Wettbewerbsordnung*], regulative principles its continuous functioning.”¹⁰³⁹ Of the constituting principles the most important one is freedom of contract which, however, can be limited for the sake of well-functioning competition; while from the regulating principles one must emphasise the containment of market power.¹⁰⁴⁰ The principle of freedom of contract is of high relevance when speaking about unfair trading practices in the agricultural sector and the food supply chain, while the containment of market power is relevant because—in most cases—a certain degree of (relative or absolute) market power is necessary to perform unfair trading practices against suppliers. At least a certain extent of relative market power is needed to commit an unfair trading practice, which—from the supplier’s (the abused party’s) perspective—in many cases results in the restriction of the principle of freedom of contract, more exactly in the restriction of the freedom to determine the content of the contract. That is, the respective supplier has no choice in determining the terms of the contract, of which he is one of the contracting parties. This comes from the fact that the buyer has relative market power *vis-à-vis* and is in a superior bargaining position over its supplier.

The goals of ordoliberal competition policy are, on the one hand, to protect individual economic freedom to compete, and, on the other hand, to protect competition as such.¹⁰⁴¹ *Akman* states in a not very positive tone that „for ordoliberals, efficiency is only a possible outcome of competition and not an aim. More importantly, the objective of protecting economic freedom may not always result in welfare-enhancing outcomes [...]”, that is, „pursuing economic

¹⁰³⁴ Sylvain BROYER (1996) *The Social Market Economy: Birth of an Economic Style*, *Wissenschaftszentrum Berlin für Sozialforschung – Discussion Paper*, August 1996, p. 9.

¹⁰³⁵ The name ‘structural principles’ is used by Siegfried G. KARSTEN (1990) *The Social Market Economy and the Moral Problem in Modern Capitalism*, *International Journal of Social Economics*, 17(3), pp. 27–35.

¹⁰³⁶ In German: *konstituierende Prinzipien*.

¹⁰³⁷ In German: *regulierende Prinzipien*.

¹⁰³⁸ Dirk SAUERLAND (n.d.) *Freiburger Schule* [Online], *Gabler Wirtschaftslexikon*. Available at: <https://wirtschaftslexikon.gabler.de/definition/freiburger-schule-33210> (Accessed: 9 November 2021).

¹⁰³⁹ Christian AHLBORN–Carsten GRAVE (2006) *Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective*, *Competition Policy International*, 2(2), p. 203.

¹⁰⁴⁰ *Ibidem*.

¹⁰⁴¹ ANCHUSTEGUI 2017, p. 87.

freedom does not always coincide with consumer welfare, a competition policy that protects economic freedom may in certain circumstances lead to consumer harm.”¹⁰⁴² That is, the goal of consumer welfare later presented among the objectives of US antitrust law and prevailing since the 1980’s may not be—in many cases—reconciled with the ordoliberal goals. By adopting an ordoliberal approach towards antitrust law objectives, in certain cases efficiency-based concerns can become secondary. Although ordoliberals are likely to achieve economic efficiency by realising and following the path of the goals of protecting economic freedom and competition as such, nevertheless the latter ones also include the possibility to take into account non-efficiency-based considerations insofar as they contribute to the protection of economic freedom and of competition as such. It does not mean sacrificing economic efficiency on the altar of non-efficiency-based considerations but bearing in mind that in the middle and long term, exclusively following the path of economic efficiency may result in outcomes detrimental to competition. In the middle and long term maintaining an economic system based on competition can only be realised by the direct protection of the competitive process and structure and by making competing possible for each and every market player. It has been criticised that it means the protection of (inefficient) competitors and not that of competition, but one must acknowledge that the competitive process and structure are easier to be protected when there are many competitors. If competition takes place among a lot of market players, it is more likely that economic power will not be concentrated in the hands of a few.

By aiming to achieve an increase in or at least the maintenance of the current level of economic efficiency one may succeed in the short term, nevertheless fail in the middle and long term, if one does not take into account the competitive structure. Only a well-functioning competitive structure is able to produce efficiencies, and ignoring its significance for a long time for the sake of realising economic efficiency at all costs in the short term may result in such a structure which is not competitive any more. One of the most prominent ordoliberal scholars of our time, *Wernhard Möschel* also declares that economic efficiency is an indirect and derived goal of ordoliberal competition policy, contrary to „the protection of individual economic freedom of action”, or viewed from the other side, contrary to „the restraint of undue economic power”, which are direct goals and values.¹⁰⁴³

¹⁰⁴² AKMAN 2012, pp. 49 and 62.

¹⁰⁴³ Wernhard MÖSCHEL (1989) Competition Policy from an Ordo Point of View. In: Alan PEACOCK–Hans WILLGERODT (eds.) *German Neo-Liberals and the Social Market Economy*. Hampshire: Palgrave Macmillan, p. 146.

One of the most important notions of ordoliberalism, the competitive order (*Wettbewerbsordnung*) protected by the economic constitution is „the key to a prosperous and humane society”,¹⁰⁴⁴ and its essence is that the rules of the game are defined by the state. It means that „[b]usinesses are free to choose what they produce, what technology they use, what raw materials they purchase and what markets they wish to sell on”,¹⁰⁴⁵ however they are bound by the framework set up by the state. It does not open up the possibility for the state to intervene to economic processes directly but it has the chance to establish the framework within which the competitive order can function. The competitive order is dominantly characterised by the form of competition which ordoliberals call ‘complete competition’. In short, complete competition means that „no corporate entity possess[es] the authority to coerce the action of others.”¹⁰⁴⁶ Of course, complete competition is not compatible with monopolies and oligopolies. While monopolies are unambiguously opposed by ordoliberals, the issue of oligopolies is a divisive question. The more relevant issue as to the agricultural and food sector is the latter one. As put by *Eucken*, there are two opposing ordoliberal views towards oligopolistic markets. The approach of stronger state intervention and of direct regulation on oligopolies was taken by *Leonhard Miksch*, while another group of thinkers were of the opinion that taking action only against monopolies was enough to prevent that oligopolies could evolve to monopolies, given that it was not worth it for a market participant of an oligopolistic market to aim to get to a monopolistic position, because then it would fall within the scope of antitrust law.¹⁰⁴⁷ In my opinion, the latter approach is slightly naive considering the profit-oriented nature of market players, thus I rather follow and accept *Miksch*’s standpoint. Although it does not exclusively refer to oligopolistic markets becoming monopolistic markets, but the *OECD* declared in general that „[i]n recent years, there has been growing concern that a trend has emerged in which markets around the world are becoming more concentrated and less competitive.”¹⁰⁴⁸ It is hard to believe that already concentrated oligopolistic markets do not become more concentrated, as this general finding suggests, just because market players aim to distance themselves from getting to a monopolistic position because of the fear from antitrust

¹⁰⁴⁴ AHLBORN–GRAVE 2006, p. 199.

¹⁰⁴⁵ See the English translation of Eucken’s seminal article: Walter EUCKEN (2006) The Competitive Order and Its Implementation (English Translation), *Competition Policy International*, 2(2), p. 227.

¹⁰⁴⁶ Isabel Oakes, Anselm Küsters (2021) Lessons from the Past? How Ordoliberal Competition Theory Can Address Market Power in the Digital Age [Online]. Available at: <https://promarket.org/2021/11/14/ordoliberal-lessons-competition-tech-platforms-antitrust-germany/> (Accessed: 16 November 2021). See also AKMAN 2012, p. 58.

¹⁰⁴⁷ EUCKEN 2006, pp. 244–245.

¹⁰⁴⁸ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2018) *Market Concentration*, Issues paper by the Secretariat, 6-8 June 2018, DAF/COMP/WD(2018)46, p. 3.

law enforcement. The tendency towards concentration and consolidation is evident especially in the agricultural and food sector, both in Europe¹⁰⁴⁹ and in the United States^{1050, 1051}. As a consequence of these, it is more reasonable to follow *Miksch's* approach which aims to supervise and deal with markets, already in their 'oligopoly' phase. According to *Miksch*, complete competition is achieved, and in his view this is the most important feature, when there are a large number of players in a given market.¹⁰⁵² Oligopolistic markets do not fulfil this requirement, therefore they fall under the notion of 'tied competition'¹⁰⁵³ which calls for special regulation under state supervision,¹⁰⁵⁴ or as put by *Goldschmidt*, for special competition laws.¹⁰⁵⁵

In conclusion and in general, the ordoliberal competition policy followed by German antitrust law is not deterred to regulate markets with legal means in order that the competitive structure and competition as such as well as the economic freedom of individuals could be maintained, ensured and preserved. It does not mean direct intervention to economic processes but establishing game rules according to which market players shall organise their economic activity. This approach is greatly aware of not only economic but also social anomalies deriving from markets abandoned by law and lacking legal regulation. By following ordoliberal competition policy, social aspects may be better and easier implemented when applying the law, given that economic efficiency (the outcome) is not the only relevant factor for law enforcement to concentrate on, but also the process itself is given appropriate consideration. „[E]fficiency is an expected result of competition.”¹⁰⁵⁶ However, the greatest strength of

¹⁰⁴⁹ Philippe CHAUVÉ–An RENCKENS (2015) The European Food Sector: Are Large Retailers a Competition Problem? *Journal of European Competition Law & Practice*, 6(7), p. 513.

¹⁰⁵⁰ See, for example: <https://www.foodprocessing.com/articles/2021/market-concentration/> (Accessed: 17 November 2021). „Mary Hendrickson, a professor of rural sociology at the University of Missouri, agrees that antitrust enforcement policy shapes the pace of concentration in the food industry. She points out that vertical integration in the broiler industry – arrangements where processors supply chicks and feed to growers, who are contractually obligated to use them – was common by the 1960s, but it took until the 1980s for claims of unfairness and abuse to be heard. The difference, Hendrickson says, is that *the top four firms had only about 12% of the market in the 1970s; today, it's more than 50%*. With that situation, Hendrickson says, “antitrust interpretations and enforcement changed greatly in the 1980s.” [Emphasis put by the author.]

¹⁰⁵¹ See also: AMY TRAUGER (2014) Toward a political geography of food sovereignty: transforming territory, exchange and power in the liberal sovereign state, *The Journal of Peasant Studies*, 41(6), p. 1133: „The commodification of food, in the second food regime (Friedmann and McMichael 1989), has resulted in the vertical integration and the concentration of power in a few very large firms [...]”; Furthermore: ANDREE–AYRES–BOSIA–MASSICOTTE 2014, p. 34.

¹⁰⁵² Leonhard MIKSCH (1937) *Wettbewerb als Aufgabe: die Grundsätze einer Wettbewerbsordnung*. Stuttgart: Kohlhammer Verlag, p. 24.

¹⁰⁵³ In German: *gebundene Konkurrenz*.

¹⁰⁵⁴ EUCKEN 2006, p. 244.

¹⁰⁵⁵ Nils GOLDSCHMIDT (2017) *Leonhard Miksch*. In: *Soziale Marktwirtschaft – Vordenker und Klassiker* [Online], p. 81. Available at: <https://bit.ly/3Dnd0aq> (Accessed: 17 November 2021).

¹⁰⁵⁶ AKMAN 2012, p. 60.

ordoliberal competition policy is its willingness to regulate markets in case of market distortions which endanger the competitive structure: it is a suitable policy choice to bring forward the level of protection. This willingness to regulate stems from the holistic viewpoint of ordoliberalism: it acknowledges that markets cannot be dismantled to separate economic, social and political spheres and markets cannot be limited to economic transactions. Markets as a complex whole inherently unify economic, social and political aspects, and they only make sense when examining them comprehensively in an integrated model, such as the notion of social market economy.

2.2.2 *The objectives of Hungarian competition law*

Identifying Hungarian antitrust law objectives is not an easy task. Although before World War II, quite fruitful discussions had taken place on antitrust law, but it was completely eroded by the era between 1949 and 1989. The model of centrally planned economy and its advocates did not acknowledge the *raison d'être* of antitrust law, given that it was totally irreconcilable with their thoughts on how markets should work and what role states should play in the functioning of markets.¹⁰⁵⁷ That is, for four decades competition law discourse had not existed in Hungary, and only after the regime change could this change. Nevertheless, on the objectives of Hungarian antitrust law no intensive discussions have developed since then.¹⁰⁵⁸ One thing is certain: both US and German antitrust law have had an impact on Hungarian laws.¹⁰⁵⁹

With regard to Hungary—because of the limited number of Hungary-specific scholarly discourse on antitrust law goals¹⁰⁶⁰—it is reasonable to start the analysis with the preamble of the Hungarian Competition Act. Let me present here its word-for-word translation:

„The public interest in maintaining market competition for economic efficiency and social advancement, and the interest of businesses and consumers in respecting the requirements of

¹⁰⁵⁷ See, for example: VÖRÖS 1981; VÖRÖS Imre (1982) Versenyjogot vagy piaci magatartási jogot? *Létünk*, 12(6), pp. 1033–1044. See a contemporary summary on the 1968 economic reform: VEREBICS János (2018) A verseny mint gazdasági és jogi probléma az 1968-as mechanizmus-reform első éveinek összefüggésében, *Állam- és jogtudomány*, 59(3), pp. 98–120.

¹⁰⁵⁸ In Hungarian literature, one can rather see the general presentation of possible competition law objectives than a discussion on *Hungary's competition law objectives*. See a general description: TÓTH Tihamér (2020b) *Uniós és magyar versenyjog [EU and Hungarian competition law]*. Budapest: Wolters Kluwer, pp. 52–53.

¹⁰⁵⁹ TÓTH 2020b, p. 72.

¹⁰⁶⁰ TÓTH Tihamér (2010) Az ordoliberalis iskola palackpostája – a piacgazdaság eszméje egykor és ma. In: BALOGH Elemér–HOMOKI-NAGY Mária (eds.) *Emlékkönyv Dr. Ruzsoly József egyetemi tanár 70. születésnapjára*. Szeged: Szegedi Tudományegyetem Állam- és Jogtudományi Kar, pp. 878–889; NAGY 2021, pp. 18–22.

business fairness, requires that the State should ensure the fairness and freedom of economic competition through legislation. This requires the adoption of competition law provisions that prohibit market conduct that infringes the requirements of fair competition or restricts economic competition, and prevent mergers between undertakings that are detrimental to competition, while also providing for the necessary organisational and procedural conditions.”

As can be seen from the preamble, at the end of the 1990s Hungarian competition law set itself the objective to follow a polycentric notion of competition. Not only economic efficiency but also social advancement seems to be given appropriate consideration. The preamble reflects ordoliberal thoughts, as if the Hungarian competition law were part of a social market economy: it refers to efficiency, social advancement, fairness, and freedom of competition. The preamble gives the impression that in Hungary the attainment of a humane economy is the complex goal and competition law plays crucial role in the functioning of that economy.

The more economic approach of EU antitrust law has had an impact on Hungary since the 2000s. It has resulted in the decrease of national antitrust cases dealing with abuse of dominance and the increase of national cartel enforcement. The strong cartel enforcement has been dominant since then to varying degrees.¹⁰⁶¹

The mission of Hungarian Competition Authority formulated on the authority's website may provide further assistance to determine the objectives of Hungarian antitrust law. The Authority refers to the protection of competition and its supportive tasks towards the competitive process several times. The Authority's role in connection with the freedom and fairness of competition lies in the enforcement of competition rules for the sake of public interest in such way that long-term consumer welfare and competitiveness could increase.¹⁰⁶² The Hungarian Competition Authority's medium-term institutional strategy for the years between 2019 and 2022 also determines several goals to be followed. However, this strategy seems closer to the American antitrust tradition, for it declares that the Authority guards the fairness and freedom of competition to increase consumer welfare. Moreover, it takes action against unfair and competition-restricting conducts, as well as supervises the maintenance of market structures serving the competitive process.¹⁰⁶³

¹⁰⁶¹ TÓTH 2020b, p. 133.

¹⁰⁶² HUNGARIAN COMPETITION AUTHORITY (n.d.) *The Authority's task* [Online]. Available at: https://www.gvh.hu/gvh/2349_hu_a_hivatal_feladata.

¹⁰⁶³ HUNGARIAN COMPETITION AUTHORITY (2020) *Medium-Term Institutional Strategy for the Years Between 2019 and 2022*, Done at Budapest on 26 October 2020, p. 3.

Therefore, Hungarian antitrust law objectives are a mix of German and US approaches toward the goals of antitrust laws. Hungary emphasises the aim to increase consumer welfare, nevertheless it also acknowledges the importance of paying attention to the competitive structure and fairness. The expression ‘long-term consumer welfare’ mentioned in the description on the tasks of the Authority is not an easy-to-measure notion.¹⁰⁶⁴ During antitrust law enforcement, the goal of consumer welfare is simpler to be interpreted in short term. That is, the concerned authority examines whether an economic conduct increases or decreases consumer welfare in short term; engaging in analyses on the impacts of a certain conduct on long-term consumer welfare may only be strongly hypothetical and thus unreliable.

All in all, by not limiting itself to efficiency-based considerations, such as the increase in consumer welfare, Hungarian antitrust legislation and enforcement are suitable to adopt an approach which concerns a broader spectrum of factors: market structure as well as fairness and freedom of competition and even paying attention to social advancement.

2.2.3 The objectives of US antitrust law

The academic debate on the aims of antitrust law has a decades-long tradition in the United States. The antitrust law paradigms appearing in the United States have been to a certain extent adopted almost everywhere, with some delays. The literature on US antitrust goals is so immense that my analysis can only be arbitrary concerning the chosen scholarly works. However, I strive for diversity.

As regards US antitrust eras, a good starting point is provided by *Barak Orbach* who distinguishes five periods which „began and ended gradually” and not in „sharp turns”.¹⁰⁶⁵ These eras mark quite informative aspects on antitrust goals, and more generally, on the then prevailing antitrust policy. The formative era between 1890 and 1911 was the period of developing general standards, the most important of which was that Sherman Act „prohibits only unreasonable restraints of trade, not all restraints.”¹⁰⁶⁶ In the second era from 1911 to 1935 the scope of antitrust was narrowed by developing reasonableness standards, and more than half of the Supreme Court Justices as representatives of laissez-faire constitutionalism considered

¹⁰⁶⁴ I mean that if there is a long interval between the intervention of a competition authority triggered by an anti-competitive conduct and the measurement of the increase in consumer welfare, that is to say, if one wants to measure the long-term consumer welfare implications of an intervention of an authority, there are many factors that can contribute to the changes in long-term consumer welfare, and it is more difficult to connect the intervention with the changes.

¹⁰⁶⁵ Barak ORBACH (2018) The Present New Antitrust Era, *William & Mary Law Review*, 60(4), p. 1444.

¹⁰⁶⁶ ORBACH 2018, pp. 1445–1446.

antitrust „a threat to economic liberties”. Moreover, in the spirit of distinguishing „between constructive and destructive collaborations among competitors” the rule of reason standard was developed.¹⁰⁶⁷ The third period, the fairness era lasted for four decades from 1935 to 1975. The then prevailing economic theories linked market structure with competition. „[H]ostile toward defendants and enforced aggressively”, antitrust law was guided by the premises

„that large businesses and vertical arrangements tend to exclude competition, that horizontal market arrangements tend to be collusive, that intellectual property rights convey monopoly power, and that the corporate form defines the boundaries of economic units.”¹⁰⁶⁸

The fourth era, which is still dominant today, came to the fore in 1975. It is to a significant extent connected with the appearance of the Chicago School in antitrust. *Orbach* marvellously summarises the changes taking place in this period:

„Since the mid-1970s, the Supreme Court has persistently narrowed the substantive scope of antitrust law, adopting procedural barriers, and dismantling doctrines associated with the fairness vision. Among other things, the Court moved from glorification to skepticism of the effectiveness of antitrust enforcement, emphasizing concerns regarding the costs of false positives; replaced per se rules with the rule of reason; abandoned exaggerated concerns about exclusionary practices in favor of skepticism of the viability of exclusionary conduct; reversed judicial premises regarding the competitive effects of unilateral conduct and vertical restraints; overruled the intraenterprise conspiracy doctrine; withdrew from the premise that intellectual property rights convey market power; reinterpreted the implied immunity doctrine to trim the reach of antitrust law; and piled up procedural standards that are favorable to antitrust defendants.”¹⁰⁶⁹

As can be seen from *Orbach*’s analysis, the intensity of antitrust enforcement shows cyclical changes: while the first and third era were characterised by strong law enforcement, the second and fourth ones (the two rule of reason eras) by reluctance to vivid and severe enforcement of laws.

¹⁰⁶⁷ ORBACH 2018, p. 1449.

¹⁰⁶⁸ ORBACH 2018, p. 1452.

¹⁰⁶⁹ ORBACH 2018, p. 1456.

Since the 1978 publication of Robert Bork's *The Antitrust Paradox*, consumer welfare in the US has become „the only articulated goal of antitrust law” and „the governing standard”.¹⁰⁷⁰ Though the years have passed, the clear-cut breakthrough has fallen short of consumer welfare and the more economic approach expected in the aspect of legal certainty and clarity, and this has been voiced in both Europe¹⁰⁷¹ and the US.¹⁰⁷² Recently, four decades after its introduction, critics of consumer welfare have become increasingly vocal, and in the words of *Mark Glick*, the „winds of change are blowing”,¹⁰⁷³ meaning that „the relative stability of the antitrust consensus has yielded to a sharp rupture.”¹⁰⁷⁴ As *Crane* put it: „[i]n the last two years, the self-styled neo-Brandeis movement has emerged out of virtually nowhere to claim a position at the bargaining table over antitrust reform and the future of the antitrust enterprise.”¹⁰⁷⁵ The premonition is best exemplified in the United States by the appointment of *Lina Khan* as the chairperson of the Federal Trade Commission.¹⁰⁷⁶ Of course, the appearance of the Neo-Brandeisians – the emerging school of thought which intensively criticises the consumer welfare paradigm – has not been without reaction, and these new „hipster antitrust”¹⁰⁷⁷ proponents are criticised because of their provocative proposals for changes to the antitrust regime directed by the sole objective of consumer welfare, arguing that the proposals lack little to no empirical evidence.¹⁰⁷⁸ At the same time, neither have consumer welfare advocates escaped strong criticism. Some have even called competition law based on consumer welfare profound nonsense by arguing that it is built upon „false history, false concepts and false economics”.¹⁰⁷⁹

¹⁰⁷⁰ ORBACH 2010, p. 133.

¹⁰⁷¹ See, for example, DASKALOVA 2015. She calls it „shocking” that the meaning of consumer welfare is still unclear more than ten years after its adoption in the EU.

¹⁰⁷² See, for example, ORBACH 2010: „This article chronicles how academic confusion and thoughtless judicial borrowing led to the rise of a label that 30 years later *has no clear meaning*.”

¹⁰⁷³ Mark GLICK (2019) *American Gothic: How Chicago Economics Distorts “Consumer Welfare” in Antitrust* [Online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3423081 [Accessed: 16 August 2021].

¹⁰⁷⁴ Lina KHAN (2020) The End of Antitrust History Revisited, *Harvard Law Review*, Vol. 133, p. 1656.

¹⁰⁷⁵ Daniel A. CRANE (2019) How Much Brandeis Do the Neo-Brandeisians Want? *The Antitrust Bulletin*, 64(4), p. 531.

¹⁰⁷⁶ Lina Khan is one of the most known advocates of the Neo-Brandeis or New Brandeis School. See, for example, Lina KHAN (2018) The New Brandeis Movement: America's Antimonopoly Debate, *Journal of European Competition Law & Practice*, 9(3), pp. 131–132. See also the book of another prominent advocate: WU 2018.

¹⁰⁷⁷ The labels ‘Hipster Antitrust’, ‘New Brandeisians’ or ‘Neo-Brandeisians’ could be interpreted as judgmental. See: Seth B. SACHER–John M. YUN (2020) Some reactions to „reactionary antitrust”, *Concurrences*, 2020/4.

¹⁰⁷⁸ Joshua D. WRIGHT–Elyse DORSEY–Jonathan KLINK–Jan M. RYBNICEK (2019) Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust, *Arizona State Law Journal*, 51(1), p. 314. For more criticism, see: Christopher S. YOO (2018) *Hipster Antitrust: New Bottles, Same Old W(h)ine?* [Online]. Available at: https://scholarship.law.upenn.edu/faculty_scholarship/2168/ (Accessed: 16 August 2021).

¹⁰⁷⁹ Sandeep VAHEESAN (2019) The Profound Nonsense of Consumer Welfare Antitrust, *The Antitrust Bulletin*, 64(4), p. 494.

It would, however, be wrong to identify the last four decades of US antitrust with the exclusive and general acceptance of early Chicago School premises. Even those who try to embed US antitrust enforcement in economic analysis criticise many aspects of „Chicago economics”. The economic literature has presented compelling evidence against the self-correcting nature of markets. The economic analysis in antitrust cannot be equated with the ideology of antitrust laws’ underenforcement, as many Chicagoans tend to do. This has resulted in rising inequality. Economics cannot be used arbitrarily, only when anti-enforcement is tried to be justified. In many cases it also delivers an answer in favour of strong enforcement because of anti-competitive conducts. This has been often ignored by the Chicago School in the spirit of „opportunistic economics”.¹⁰⁸⁰ In the agricultural and food supply chain, the rising inequality between small and medium-sized agricultural enterprises and agri-business is a central element of food sovereignty’s criticism.

One thing is certain in the United States: currently there is an overlapping period¹⁰⁸¹ between the second rule of reason era characterised by highly moderate antitrust enforcement and an era in which fairness considerations are given more significance.

2.3 Proposals for a more inclusive antitrust law

Although the contemporary and mainstream antitrust is based on the methods of neoclassical economics and dominated by efficiency-based considerations typically in the form of consumer welfare, the quest for a more inclusive antitrust framework is permanent both in literature and practice. One can also see that—with the exception of US antitrust—both the EU and its two analysed Member States deem certain non-efficiency-based considerations important. The EU, German and Hungarian regimes are concerned with economic efficiency but also leave room for different objectives to be pursued outside the area of economics. To varying degrees, one can read about the following objectives: the protection of competition as such (the protection of the competitive process), the protection of individual economic freedom, fairness, the maintenance of market structure, and integration.

In parallel, more and more proposals are being put forward to call for an even more inclusive antitrust and competition law and policy. The scale is wide. Although the issue of wealth equality sits uncomfortable in the context of antitrust law,¹⁰⁸² antitrust undeniably

¹⁰⁸⁰ Herbert HOVENKAMP–Fiona Scott MORTON (2020) Framing the Chicago School of Antitrust Analysis, *University of Pennsylvania Law Review*, 168(7), p. 1852.

¹⁰⁸¹ ORBACH 2018, p. 1463.

¹⁰⁸² Daniel A. CRANE (2016) Antitrust and Wealth Inequality, *Cornell Law Review*, 101(5), p. 1228.

influences wealth distribution,¹⁰⁸³ therefore academic debate continuously brings the matter to the fore. It does this despite the fact that moving away from efficiency is and would be a „daunting” assignment for antitrust,¹⁰⁸⁴ as well as antitrust is ill suited to directly engage in the attainment of goals related to income equality.¹⁰⁸⁵ *Waked*, however, is of the opinion, with which I agree, that antitrust is „malleable to achieve goals far beyond the narrow efficiency-based goals.”¹⁰⁸⁶

Among others, the protection of small businesses—connected to the opportunity to compete—as a goal is revealed in connection with all relevant US antitrust acts (Sherman, Federal Trade Commission and Clayton Acts).¹⁰⁸⁷ The narrow efficiency-based antitrust framework is also contested in the context of developing countries.¹⁰⁸⁸ It has become common to connect antitrust and competition policy with social issues, such as inequality, for the sake of enhancing antitrust’s role in redistributive tasks,¹⁰⁸⁹ at least as a complementing and supporting policy beside tax, labour and trade policies.¹⁰⁹⁰ It may be more reasonable and realistic, however, to address the issue in a way that redistribution should not be an explicit objective of antitrust, but antitrust—through its failure to retain competitive markets—contributes to an unequal form of income distribution.¹⁰⁹¹

A more inclusive antitrust framework is related to the approach that antitrust should be polycentric, because the monocentric viewpoint—which only concentrates on economic efficiency—ignores that „[a] ‘complex economy’ is characterised by the existence of overlapping and interpenetrating domains of economic networks, political networks, and social/kinship networks”.¹⁰⁹² *Lianos* proposed a fairness-driven antitrust with complex equality at its centre, which is suitable to step out of the current paradigm exclusively focusing on market

¹⁰⁸³ Herbert J. HOVENKAMP (2017) Antitrust Policy and Inequality of Wealth, *Faculty Scholarship at Penn Law* [Online]. Available at: <https://bit.ly/3t6leB4> (Accessed: 12 March 2022).

¹⁰⁸⁴ Shi-Ling HSU (2018) Antitrust and Inequality: The Problem of Super-Firms, *The Antitrust Bulletin*, 63(1), p. 112.

¹⁰⁸⁵ Carl SHAPIRO (2018) Antitrust in a time of populism, *International Journal of Industrial Organization*, Vol. 61, pp. 714–748.

¹⁰⁸⁶ WAKED 2020, p. 87.

¹⁰⁸⁷ Robert H. LANDE (1999) Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, *Hastings Law Journal*, 50(4), pp. 907–910, 925–926, 945.

¹⁰⁸⁸ Eleanor M. FOX (2007) Economic Development, Poverty and Antitrust: The Other Path, *Southwestern Journal of Law and Trade in the Americas*, 13(2), pp. 211–236.

¹⁰⁸⁹ Anthony B. ATKINSON (2015) *Inequality: What Can Be Done?* Cambridge, MA: Harvard University Press, pp. 126–127.

¹⁰⁹⁰ Jonathan B. BAKER–Steven C. SALOP (2015–2016) Antitrust, Competition Policy, and Inequality, *Georgetown Law Journal Online*, Vol. 104, p. 27.

¹⁰⁹¹ KHAN–VAHEESAN 2017, p. 294.

¹⁰⁹² Ioannis LIANOS (2019) Polycentric Competition Law, *Current Legal Problems*, 71(1), p. 206.

power as well as also fit to concentrate on all sources of power through certain legal instruments, such as the prohibition of the abuse of relative market power.¹⁰⁹³

In the context of the European Union, *Kornezov* calls for a more socially sensitive antitrust enforcement based on the assumption that the EU Treaties—Articles 2 and 3 TEU as well as Article 9 TFEU—put a great emphasis on social considerations, which approach should also govern the competition policy.¹⁰⁹⁴ In the United States, *Miazad* brings to the fore the notion of prosocial antitrust which challenges the current framework preventing undertakings from collaborating to meet, among others, social demands.¹⁰⁹⁵

I am of the opinion that the resistance of antitrust law legislation and enforcement to broader objectives was only credible until the increasing emphasis on sustainability objectives within the framework of antitrust proved that antitrust can focus on and thematise what it wants. For example, environmental sustainability has become a catchword so emphasised in the academic and political discourse on antitrust that more and more amendments to antitrust laws and guidelines are adopted to open the door for taking into consideration sustainability objectives in antitrust law and enforcement.¹⁰⁹⁶ The EU Commission is, too, committed to a more sustainable competition law practice.¹⁰⁹⁷ The rules of the CMO Regulation analysed in Part Two have also been complemented recently with Article 210a which exempts both vertical and horizontal agreements from the prohibition of anti-competitive agreements in case they aim to apply a sustainability standard higher than mandated by Union or national law.¹⁰⁹⁸

To sum up, it has become apparent once again that antitrust and competition policy and law—if the political and legislative will is there—can contribute to the attainment of objectives other than economic efficiency. If it wants to, it can step out of the narrow paradigm based on

¹⁰⁹³ Ioannis LIANOS (2020) Competition Law as a Form of Social Regulation, *The Antitrust Bulletin*, 65(1), p. 83.

¹⁰⁹⁴ Alexander KORNEZOV (2020) For a Socially Sensitive Competition Law Enforcement, *Journal of European Competition Law & Practice*, 11(8), pp. 399–403.

¹⁰⁹⁵ Amelia MIAZAD (2021) *Prosocial Antitrust* [Online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802194 (Accessed: 14 July 2021).

¹⁰⁹⁶ See, for example, the exemption of Austrian antitrust law: Viktoria H S E ROBERTSON (2022) Sustainability: A World-First Green Exemption in Austrian Competition Law, *Journal of European Competition Law & Practice* [Online]. Available at: <https://doi.org/10.1093/jeclap/lpab092>. Nevertheless, it is not true that Austria was the first to adopt a green exemption in antitrust law. In the Hungarian competition act still in force and adopted in 1996, from the outset there is an exemption possibility under the prohibition of anti-competitive agreements, if the respective agreement contributes to the amelioration of the environmental situation. See the guidelines adopted by the Dutch competition authority for sustainability agreements [<https://bit.ly/369d2XL> (Accessed: 13 March 2022)] and the legal memo titled What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context? [<https://bit.ly/3q08LwV> (Accessed: 13 March 2022)]. See also: Hungarian Competition Authority (2021) Sustainable Development and Competition Law [Online]. Available at: <https://bit.ly/3t99Nc1>.

¹⁰⁹⁷ MALINAUSKAITE 2022.

¹⁰⁹⁸ See: CMO Regulation, Article 210a(1).

consumer welfare. The complete ignorance of efficiency-based considerations is not required, however, a more sensitive balancing between competing interests and objectives is.

2.4 Conclusions on antitrust law objectives

Antitrust law objectives are important determining factors with regard to the functioning of markets. The right question posed should be what we want from markets and antitrust law. One must acknowledge and recognise the subjective nature of antitrust law objectives, that is to say, that they depend to a significant extent on those public law actors who determine them. Goals are undeniably policy questions and value decisions. It is difficult, if not impossible, to take a neutral standpoint. The dividing line between the EU and US approach toward competition and competition policy may have deeper philosophical roots. As put by *Scruton*, the Europeans do not reject market solutions but „pay more attention than their American counterparts to the things that make markets possible: to law, tradition and the moral life.”¹⁰⁹⁹

By examining the different viewpoints towards antitrust law objectives, I conclude that the consumer welfare paradigm as the exclusive aim of antitrust, as followed in the United States, is not suitable to take into account the special characteristics of the agricultural sector. If antitrust enforcement exclusively concentrates on consumer harm and only aims to increase consumer surplus, vulnerable market players of the food supply chain, in particular agricultural producers, do not compete in such market circumstances within the framework of which they could be able to compete appropriately and efficiently. It does not mean the protection of weak competitors and market players but that of the market structure, competition as such, and the individual economic freedom to compete.

Therefore, ordoliberal competition policy can provide such theoretical framework that follows antitrust law objectives appropriate to—indirectly—give protection to agricultural producers. That is, agricultural producers and primary agricultural production are not protected directly from competition but indirectly through the means of adopting ordoliberal antitrust law objectives. Antitrust legislation in the spirit of ordoliberal competition policy makes it possible to adopt the rules of the game in such a manner that certain economic sectors are given specific consideration in light of their specific needs. It means that, on the one hand, legislation takes the standpoint that retaining the competitive structure of certain economic sectors requires special laws, and, on the other hand, even the enforcement of general provisions takes place in a way that authorities do not limit themselves to a single-factor perspective. They not only

¹⁰⁹⁹ Roger SCRUTON (2011) *Green Philosophy: How to think seriously about the planet*. London: Atlantic Books [e-book], p. 15.

consider the change in consumer welfare but take a holistic strategy by handling market structure, the competitive process, and the individual economic freedom to compete as objectives worth pursuing for the sake of maintaining competition.

The single-factor economic efficiency approach towards antitrust law in the form of formulating consumer welfare as the exclusive goal takes into account only short-term results resulting in consumer surplus which, simply put, means lower prices to consumers. At the same time, constructing a competition law regime with a broader variety of goals, such as the ordoliberal notions of the protection of the competitive process and of individual economic freedom, goes hand in hand with a more far-reaching standpoint which also respects middle and long-term results. The dominant US antitrust approach over the past forty years belongs to the former, while the EU's broader, multi-purpose approach belongs to the latter, at least at a theoretical level. This is why I aim to conceptualise and theorise food sovereignty within the EU competition law discourse.

In view of these considerations and taking into account that I have already outlined the food sovereignty's approach towards competition in Chapter 1, subsequently, I aim to present the ordoliberal standpoint towards agriculture, then to examine whether ordoliberalism can be brought into line with the emerging paradigm of food sovereignty. Ultimately, I present those EU documents which have included and mentioned the notion of food sovereignty in order that I could come closer to the approach of the European Union towards food sovereignty. These three subchapters make it possible to harmonise three different concepts: ordoliberal competition policy, food sovereignty, and agriculture. The starting point for this is the viewpoint taken by the European Union, given that ordoliberalism—both in terms of legislation and enforcement—has had a significant impact on the competition policy of the EU.

3 Agriculture from an ordoliberal viewpoint

Although it is a common mistake that ordoliberalism is strictly associated with the first generation of ordoliberal thinkers who are from the Freiburg School,¹¹⁰⁰ it may nevertheless be an appropriate starting point when one aims to analyse an issue from an ordoliberal viewpoint. Obviously, ordoliberalism is constantly changing and evolving, that is, one cannot ignore looking at it using a dynamic approach, but core concepts represented by first-generation ordoliberals are useful benchmark tools. The mainstream and most famous ordoliberal thinkers

¹¹⁰⁰ For example, see the critique formulated by BEHRENS 2015. His critique is aimed at *Pinar Akman* and *David J. Gerber*. *Akman* rejects the ordoliberal impact on EU competition law, while *Gerber* limits the ordoliberal school of thought to the Freiburg School.

did not pay particular attention to agricultural issues, but there was one economist whose writings include far-sighted considerations for agriculture. This is *Wilhelm Röpke* who was called „something of an agrarian” by *Milton Friedman*.¹¹⁰¹ Röpke was not only an economist but also a prominent philosophical thinker who wanted to adopt a systemic approach. I do not claim that the thoughts of Röpke on agriculture can be wholly equated with those of mainstream ordoliberalism or, in general, with the basic and insurmountable findings and assumptions of ordoliberalism, but these may be considered when trying to provide an image of such a peripheral issue as agriculture from an ordoliberal standpoint.

Wilhelm Röpke, in his book titled *International Economic Disintegration*, acknowledges the special features of agriculture. The ‘singular character’ of agriculture comes from its strong interrelations with nature. The processes of agricultural production are embedded in a system where natural factors are decisive. *Röpke* lists several distinctive characteristics of agriculture which contribute to its peculiar nature in contrast with industrial production. He emphasises and lists why agriculture is a special sector of economic life:

*„the limits set to mechanization, division of labour and use of machinery; the constant need of soil preservation by a complex combination of measures; the everpresent tendency toward diminishing returns; the irregularity and precariousness of its output; the unchangeable rhythm of seasonal or longer production periods; the difficulties of storage; the usefulness of combining different lines of agricultural production horizontally or vertically; and the tendency toward a lower optimum size of the unit of production than exists generally in industry.”*¹¹⁰²

Besides *Wilhelm Röpke*, one can also emphasise an internationally less known ordoliberal thinker who is quite a polymath: *Constantin von Dietze*. He was an agronomist, lawyer, economist, and theologian, thus he represented a rich and holistic viewpoint. The translated title of one of his most relevant works is *Agriculture and Competition Order*.¹¹⁰³

After presenting the differences between agriculture and industry, *von Dietze* submits that farmers are also overwhelmingly driven by profit maximisation.¹¹⁰⁴ Nevertheless,

¹¹⁰¹ Amity SHLAES (1996) *The Foreigners Buchanan Calls His Own*, *Wall Street Journal*, 29 February 1996 cited by Samuel GREGG (2010) *Wilhelm Röpke’s Political Economy*. Cheltenham: Edward Elgar Publishing, p. 2.

¹¹⁰² Wilhelm RÖPKE (1942) *International Economic Disintegration*. London–Edinburgh–Glasgow: William Hodge and Company, Limited, pp. 111–112.

¹¹⁰³ Constantin VON DIETZE (1942) ‘Landwirtschaft und Wettbewerbsordnung’, *Schmollers Jahrbuch*, Vol. 66, pp. 129–157.

¹¹⁰⁴ VON DIETZE 1942, p. 132.

antedating the EU's approach which provides exemption from the general cartel prohibition for the agricultural sector and harmonising his thoughts with those of *Röpke*, he finds with regard to horizontal agreements that the completeness of the competition cannot be ruled out even by agreements between dozens or hundreds of agricultural suppliers because of the great number of competing farmers. He also considers the entire agricultural sector as a prime example of the realisation of the conditions of complete competition.¹¹⁰⁵ In *von Dietze's* opinion, and I must add that these are timeless anomalies related to agricultural production and that is why I mention them, after the prosperous decades from 1820s to 1870s, several problems arose which carried negative effects on the agricultural sector: the rural *exodus* causing fewer and fewer agricultural workers, urbanisation, price fluctuations, as well as monopolisation. The agricultural sector felt that the monopolisation that was taking place in other sectors of the economy through powerful mergers was disadvantageous for its profession, which remained in complete competition. Thus, towards the end of the 19th century, plans were made and efforts exerted almost all over the world to oppose the traders or industrial monopolies with equally strong associations, i.e. to monopolise the supply of important agricultural products as well.¹¹⁰⁶ What *von Dietze* established 80 years ago is still true today: market actors downstream in the supply chain, such as the market operators of the processing industry and the retail chains, have a negative impact on the pricing of raw materials to the disadvantage of primary agricultural producers.¹¹⁰⁷ Or, conversely, suppliers of agricultural products face serious challenges because of the significant imbalances in bargaining power, and, as a result, unfair trading practices against them are a common occurrence.. *Von Dietze* saw the future of family farming (and, in general, that of agriculture), as well as the preservation of its rural character, in adopting an economic policy according to the constituting and regulating principles of the ordoliberal notion of competitive order (*Wettbewerbsordnung*).¹¹⁰⁸ The realisation of a competitive order goes not only against the monopolistic and oligopolistic trends taking place downstream in the food supply chain at the level of processing and retailing but also stands up for freedom of contract which should not be used in the competitive order to create dependencies between market players because these dependencies may result in unfair trading practices against agricultural producers.

¹¹⁰⁵ VON DIETZE 1942, p. 133.

¹¹⁰⁶ VON DIETZE 1942, p. 140. See, for example, the previously mentioned Granger movement and the *Kornhausbewegung*. See more: Wilhelm CASTENDYCK (1903) *Die Entwicklung der Kornhausbewegung, mit Besonderer Berücksichtigung der Preussischen und der Bayerischen Verhältnisse*.

¹¹⁰⁷ VON DIETZE 1942, p. 147.

¹¹⁰⁸ VON DIETZE 1942, p. 156.

4 Conceptualising food sovereignty with ordoliberalism

This chapter aims to provide a possible interpretation of ‘sovereignty’ in ‘food sovereignty’. While doing so, in parallel I bring to the fore the tenets of ordoliberalism and ordoliberal competition policy which may serve as potential interfaces between them and food sovereignty.

One of the main goals of ordoliberalism, i.e. ensuring autonomy for citizens against private and public monopoly powers through a constitutional economic framework, can be raised to the level of collective autonomy within the framework of the agriculture and food supply chain if one accepts *Raf Geenens*’ interpretation of sovereignty. He uses the term ‘sovereignty’ as „the name for the perspective a community adopts when it sees itself as collectively autonomous.”¹¹⁰⁹ Within the domain of agriculture and food supply chain, food sovereignty can be perceived as the perspective of a collectively autonomous community making a stand for defining their agricultural and food policy. To mention one example, most agricultural producers share the vision that trade in agri-food products and the food chain in general should be fairer, more balanced and transparent. This demand is one of the most emphasised and important topics in agricultural policy-making processes. Agricultural producers appear as collectively autonomous in fighting for their common goal: by making a stand for certain demands, they aim to define their own agricultural and food policy.¹¹¹⁰

With this conceptualisation, one has to give up neither the ordoliberal approach of competition, i.e. the claim for setting up the rules of the game through state regulation, nor the concept of food sovereignty. Furthermore, one can seize food sovereignty as a kind of collective autonomy, which can be traced back to the notion of individual autonomy as a value to be protected by ordoliberalism. If one accepts the ordoliberal viewpoint and thus the necessity of regulating competition through general rules, and if one also accepts *Röpke*’s ordoliberal thoughts on agriculture which hold that „in this sector [...] a particularly high degree of far-sighted, protective, directive, regulating and balancing intervention is not only defensible, but even mandatory,”¹¹¹¹ the concept of food sovereignty can be easily reconciled with the ordoliberal approach protecting individual autonomy against public and private constraints of competition. It is one step from the individual to the collective level, from the individual autonomy protected by ordoliberalism to the concept of food sovereignty perceived as a collective autonomy of a community with the emphasised aim of challenging the restrictions of

¹¹⁰⁹ Raf GEENENS (2017) Sovereignty as Autonomy, *Law and Philosophy*, 36(5), p. 524.

¹¹¹⁰ See, for example, the agricultural lobby groups in the EU: https://copa-cogeca.eu/food_chain#b435.

¹¹¹¹ Wilhelm RÖPKE (1950) *The Social Crisis of Our Time*. Chicago: The University of Chicago Press, p. 205.

competition exercised by agribusiness, i.e. giant food enterprises, be it a processor, wholesaler or retail chain.

Raf Geenens pronouncedly builds his theory of sovereignty as autonomy upon the works of *Jürgen Habermas*. He emphasises that *Habermas* provides „the most elaborate account of sovereignty as autonomy.”¹¹¹² If one scrutinises the works of *Habermas*, one may find a thought that can be drawn as an exact parallel to the viewpoint of ordoliberalism. In one of his books, he says that „basic rights must now do more than just protect private citizens from encroachment by the state apparatus, [p]rivate autonomy is endangered today at least as much by positions of economic and social power.”¹¹¹³ Ordoliberalism has the same approach: it cannot imagine a mode of economy other than the market economy but wants to set up the rules of the game within the framework of which market actors will perform their economic activities. It is coherent with the view of *Habermas*: „it has become impossible to break out of the universe of capitalism; the only remaining option is to civilise and tame the capitalist dynamic from within.”¹¹¹⁴ The instrument for civilising and taming the capitalist dynamic is none other than creating competition rules within an economic constitutional framework which highlights economic liberties and individual autonomy. Ironically, the aim of competition law is to save capitalism from itself.¹¹¹⁵

Although it seems paradoxical to support individual autonomy and collective autonomy at the same time, these two types of autonomy are understood as categories in two different spheres. Individual autonomy (individual economic freedom) as protected by ordoliberalism refers to the capacity to live one’s life according to reasons and motives that are taken as one’s own and not according to manipulative and/or distorting external forces, that is to say, it refers to being economically independent. In its ordoliberal sense, it is economic capacity and one of the most important principles of the economic constitutional framework. At the same time, food sovereignty perceived as a type of collective autonomy is a political term.¹¹¹⁶ Individuals can have individual autonomy, that is, they can be independent from an economic point of view, but when stepping up to the political arena, these individuals can determine themselves as collectively autonomous who all fight for their individual autonomy and for remaining independent. They become collectively autonomous through trying to achieve the same goal:

¹¹¹² GEENENS 2017, p. 506.

¹¹¹³ Jürgen HABERMAS (1996) *Between Facts and Norms – Contributions to a Discourse Theory of Law and Democracy*. Cambridge: The MIT Press, p. 263.

¹¹¹⁴ Jürgen HABERMAS (2012) *The Crisis of the European Union: A Response*. Cambridge: Polity Press, p. 106.

¹¹¹⁵ Richard WHISH (2020) Do Competition Lawyers Harm Welfare? [Online], *Concurrentialiste – Journal of Antitrust Law*. Available at: <https://leconcurrentialiste.com/richard-whish-welfare/>.

¹¹¹⁶ WINDFUHR–JONSÉN 2005, p. 15.

maintaining their independence in and by determining their own agricultural and food policy. These notions, thus, have the same legal implications and can be connected to each other with a mutual legal objective: protecting agricultural producers, farmers, small and medium-scale enterprises by creating effective competition and trade law rules and enforcing them in the same manner.

Ordoliberalism and food sovereignty have another common feature: they both intend to re-introduce and re-emphasise social issues in pursuance of their goals. In general, ordoliberalism (or, as others name it, German neoliberalism)¹¹¹⁷ aims to combine economic efficiency with a just and stable social order.¹¹¹⁸ The fact that ordoliberalism is also known as German neoliberalism should not mislead anyone: „[a]s a matter of legal and political form, ordoliberalism and neoliberalism are often in tension with each other, as ordoliberalism’s rule-based commitments come up against neoliberal discretionary politics.”¹¹¹⁹ The feature that distinguishes ordoliberalism from neoliberalism is that the latter views the world as a market and tries to govern it as if it were a market, and it refuses the separation of economic, social and political spheres, by „evaluating all three according to a single economic logic”.¹¹²⁰ In contrast, even the name of one of the most significant notions of ordoliberalism carries its socially focused nature: social market economy¹¹²¹.¹¹²² The concept of social market economy brought to the fore by *Müller-Armack* has at least three core concepts: (a) the preservation of the market economy as a dynamic order; (b) social equilibrium, which is subject to the observance of the first sentence; and (c) securing stability and growth through monetary and competition policy.¹¹²³ The social market economy is a normative system based on values such as dignity,

¹¹¹⁷ The reason behind this that ordoliberalism and neoliberalism „happened to be very much on the same page with regard to the exact matters that now set them apart from each other—after all, both are widely and correctly considered to be subcurrents or variations of the same neoliberal tradition.” See THOMAS BIEBRICHER (2021) *Freiburg and Chicago: How the Two Worlds of Neoliberalism Drifted Apart Over Market Power and Monopolies* [Online], 27 June 2021. Available at: <https://promarket.org/2021/06/27/freiburg-and-chicago-how-the-two-worlds-of-neoliberalism-drifted-apart-over-market-power-and-monopolies/> (Accessed: 12 July 2021).

¹¹¹⁸ BRIGITTE YOUNG (2017) *Ordoliberalism as an ‘irritating German idea’*. In: THORSTEN BECK–HANS-HELMUT KOTZ (eds.) *Ordoliberalism: A German oddity?* London: CEPR Press, p. 35.

¹¹¹⁹ Michael A. WILKINSON (2019) *Authoritarian Liberalism in Europe: A Common Critique of Neoliberalism and Ordoliberalism*, *Critical Sociology*, 45(7–8), p. 1024.

¹¹²⁰ DAVIES 2014, pp. 31–32.

¹¹²¹ In German: *soziale Marktwirtschaft*.

¹¹²² The relationship between ordoliberalism and social market economy can be perceived in a way that „the ordoliberalism of the Freiburg school constituted a major part of the theoretical foundations on which the creation of the social market economy in post-WWII Germany was based.” Of course, there are differences in how ordoliberals in general and Müller-Armack perceived the social market economy. Ordoliberalism in general looked at the competitive order as an ethical order in itself, while Müller-Armack submitted that this order has no inherent ethical qualities but shall be made to have these. See VIKTOR J. VANBERG (2004) *The Freiburg School: Walter Eucken and Ordoliberalism*, *Freiburger Diskussionspapiere zur Ordnungsökonomik*, No. 04/11, p. 2.

¹¹²³ RALF PTAK (2004) *Vom Ordoliberalismus zur Sozialen Marktwirtschaft – Stationen des Neoliberalismus in Deutschland*. Wiesbaden: Springer Fachmedien, p. 227.

well-being, self-determination, encouragement, freedom and responsibility of all individuals; it is fully committed to a humane society in which „economic growth and social sustainability are compatible notions.”¹¹²⁴

Contrary to ordoliberalism, neoliberalism lacks the desire to achieve social equilibrium and takes into account no concerns other than economic ones. That is the ground for me to reconcile food sovereignty with ordoliberalism. At the same time, this is the reason which establishes the impossibility for neoliberalism to be in line with food sovereignty. In all its aspects, food sovereignty – as it has emerged as a social movement – pursues the aim of having social considerations taken into account during policy-making processes. The trait of ordoliberalism that it does not just consider economic efficiency as the exclusive objective of competition law means that other (non-economic) considerations may be taken into account when adopting and enforcing competition laws in a broad sense. Therefore, in an ordoliberal concept of competition law, which – as mentioned – does not limit itself to achieving one and only one objective, i.e. consumer welfare through economic efficiency, non-economic aspects may also appear when deciding whether or not a conduct is harmful to competition. This means that food sovereignty with its social aims is not contrary to ordoliberalism. As the definition provides, food sovereignty does not negate trade but aims to create trade practices which are able to break the dominance of agribusiness. Doing so is motivated by social considerations which also appear in the ordoliberal line of thinking. The ordoliberal approach of adopting the rules of the game through legislation which direct the behaviour of market participants is in accordance with food sovereignty, since the latter also wants a level playing field. “Food sovereignty promotes the role of the state as protector of farmers’ interests”¹¹²⁵ which can only be realised through legislation. This does not mean that inefficient undertakings and market actors will be prioritised, but all operators on the respective market will have equal opportunities as a result of the aim to reach social equilibrium. In the broadest context, the ultimate goal is that all market participants be part of a humane economy.¹¹²⁶ Criticism may be made that this links competition law with redistributive objectives, and redistribution is not an aspect with which competition law should deal. Still, it is worth reconceptualising and perceiving redistribution from another approach. Adopting the thoughts of *Eleanor Fox*, if we

¹¹²⁴ Doris HILDEBRAND (2017) The equality and social fairness objectives in EU competition law: The European school of thought, *Concurrences*, 2017/1.

¹¹²⁵ MANN 2014, p. 54.

¹¹²⁶ See the seminal book: WILHELM RÖPKE (2014) *A Humane Economy: The Social Framework of the Free Market*. Wilmington, Delaware: Intercollegiate Studies Institute.

refuse to accept that competition law can and should contribute to redistribution¹¹²⁷ and if we view competition law as something that should only deal with economic efficiency, we may also acknowledge that redistribution is taken over from the state by and positioned in the hands of giant undertakings.¹¹²⁸ Food sovereignty also emphasises the problem of decreasing state regulatory power.¹¹²⁹

The strength of food sovereignty is that it may provide us with answers at different levels,¹¹³⁰ as well as that it has the feature of multi-interpretability.¹¹³¹ This allows to identify two trends from different directions but leading to the same result. Ordoliberalism emphasises the role of the state in setting the rules of competition in the market (at national and/or EU level), while food sovereignty seeks to restore the leading role of the state as protector of the agricultural community (at the international level). The result and the conclusion are the same in both cases: the state must take an active role in shaping competition and trade rules. This does not mean direct intervention into the relationship of market participants but signifies establishing those competition and trade rules according to which these market participants operate on the market.

By adopting the approach of ordoliberalism which goes beyond a single-purpose viewpoint towards antitrust law and by choosing the political category of food sovereignty as a possible conceptual framework in policy-making processes, one steps on the path of prosocial antitrust/competition law.¹¹³² By prosocial antitrust law I mean a mode of antitrust law legislation and enforcement in a broad sense which is sensitive to social issues and does not limit itself to achieving economic efficiency. By looking at the primary law of the European Union, Article 9 TFEU includes the horizontal social clause¹¹³³ which requires that „social

¹¹²⁷ It is manifest that the goal of redistribution should be primarily the concern of tax policy and tax regulation, nevertheless there are situations when taxation cannot be seen as an appropriate tool to solve problems. How can tax regulation remedy a situation when as a consequence of exploitative abuses, be it under the notion of abuse of dominance or of other abuse-type conducts, the abused party is squeezed out of the market? As put by *Lianos*: „Other instruments than competition law have traditionally been employed in order to deal with situations of economic, and in particular income and/or wealth, inequality. Welfare and tax systems constitute an obvious example.” The traditional tools of taxation and the welfare state intervene *ex post*, „thus leaving the root cause of the problem unresolved.” See: LIANOS 2020, p. 9.

¹¹²⁸ The keynote speech given by *Eleanor Fox* at the conference titled 'Should Wealth and Income Inequality Be a Competition Law Concern?' held on 20 May 2021. The title of her speech was *Antitrust and Inequality: The History of (In)equality in Competition Law and Its Guide to the Future*.

¹¹²⁹ WINDFUHR–JONSÉN 2005, p. 29.

¹¹³⁰ JOSÉ BOVÉ–FRANÇOIS DUFOUR (2001) *The World Is Not for Sale – Farmers Against Junk Food*. London, Verso, p. 168.

¹¹³¹ MAARTEN A. HAJER (1995) *The Politics of Environmental Discourse: Ecological Modernisation and the Policy Process*. New York: Oxford University Press, p. 61.

¹¹³² Although she does not use the term in the exact same sense, the notion of prosocial antitrust is taken over from MIAZAD 2021.

¹¹³³ See in detail: Maria Eugenia BARTOLONI (2018) *The horizontal social clause in a legal dimension*. In: Francesca IPPOLITO–Maria Eugenia BARTOLONI–Massimo CONDINANZI (eds.) *The EU and the Proliferation of*

values have to be respected in all policy fields of the EU.”¹¹³⁴ Of the few *expressis verbis* provisions on resolving the conflicts between competition and another policy, the subject of my study—agriculture—is one which establishes the specific social objectives to be considered when adopting and enforcing competition laws in the form of the provision formulated in Article 42 TFEU.¹¹³⁵ As described earlier, Article 42 TFEU paves the way for the precedence of Common Agricultural Policy objectives over general competition rules.

The ordoliberal antitrust law objectives such as the protection of the competitive process and of individual freedom¹¹³⁶ are *in themselves* appropriate to consider non-economic factors when deciding whether a conduct is harmful to competition. This does not mean that the notion of prosocial antitrust law would argue against the economic efficiency to be achieved by competition laws.

As a consequence of adopting a food sovereignty approach, one rejects that food be purely commodified,¹¹³⁷ and as a consequence of a socially responsive ordoliberal competition policy positioned in the framework of social market economy, I can take into account those dimensions of competition and trade in agricultural products and food which would remain invisible from a more economic approach limited to the objective of enhancing consumer welfare. As posited by Trauger, „[t]he commodification of food [...] has resulted in the vertical integration and the concentration of power in a few very large firms with national governments increasingly tailoring food regulation to the demands of agribusiness.”¹¹³⁸

The food sovereignty movement’s demand to break the control and growing power of corporations over the food system¹¹³⁹ is fully in accordance with the thoughts of ordoliberalism’s mainstream economist, *Walter Eucken*. As explained in one of his major works, the state’s policy should be directed toward dissolving economic power groups or

Integration Principles under the Lisbon Treaty. Abingdon: Routledge, pp. 83–104.

¹¹³⁴ Andreas HEINEMANN (2019) *Social Considerations in EU Competition Law – The Protection of Competition as a Cornerstone of the Social Market Economy*. In: Delia FERRI–Fulvio CORTESE (eds.) *The EU Social Market Economy and the Law – Theoretical Perspectives and Practical Challenges for the EU*. Abingdon: Routledge, pp. 123–146. See also: Dagmar SCHIEK–Liz OLIVER–Christopher FORDE–Gabriella ALBERTI (2015) *EU Social and Labour Rights and EU Internal Market Law*. Brussels: European Union, pp. 14–15.

¹¹³⁵ HEINEMANN 2019.

¹¹³⁶ IGNACIO HERRERA ANCHUSTEGUI (2015) Competition Law through an Ordoliberal Lens, *Oslo Law Review*, 2(2), p. 139.

¹¹³⁷ As Oliver and Robison put it: „Commodification is a widely used and inconsistently defined concept.” By commodification they mean „a process in which a good from a humanity sphere is relocated in the commodity sphere where instead of being valued for its connections to persons that enable it to satisfy important socio-emotional needs, it is valued for its physical properties that satisfy mostly physical needs.” See: JEFFREY R. OLIVER–LINDON J. ROBISON (2017) Rationalizing Inconsistent Definitions of Commodification: A Social Exchange Perspective, *Modern Economy*, Vol. 8, pp. 1314–1327.

¹¹³⁸ TRAUGER 2014, p. 1133.

¹¹³⁹ WILLIAM D. SCHANBACHER (2019) *Food as a Human Right – Combatting Global Hunger and Forging a Path to Food Sovereignty*. Santa Barbara: Praeger Security International, p. 91.

limiting their function.¹¹⁴⁰ It is not the only parallel which can be drawn between the key ordoliberal economist Eucken and food sovereignty: an overlap may also be found with regard to the requirement of contractual freedom. In *Eucken's* view, freedom of contract should not be used in the competitive order to create dependencies between market players, that is, freedom of contract may not be granted for the purpose of concluding contracts that restrict or eliminate freedom of contract.¹¹⁴¹ This tenet of *Eucken* may be a basis for regulating unfair trading practices in the food supply chain from an ordoliberal point of view, given that the UTPs, in most cases, constitute certain types of exploitative abuse which restrict the freedom of contract of that contracting party which is *vis-à-vis* the party having superior bargaining power. To be more exact, the weaker contracting party's freedom to determine the terms of the contract is restricted due to economic dependence, and so this party is put in a position which – from a food sovereignty approach – is unacceptable because of the economic exploitation.¹¹⁴² The ordoliberal concept of efficiency also includes „the continuing possibility of choice for the individual,“¹¹⁴³ of which the above-mentioned behaviours deprive the agricultural producers, who are vulnerable in cases of bargaining with buyers being in a superior bargaining position.

The characteristic of food sovereignty that it can be interpreted at all levels means that the movement's demand for ceasing unequal trading rules at the international level can be projected at the national and EU levels.¹¹⁴⁴ Ordoliberal competition policy and the social market economy constitute an appropriate framework to set up those competition and trade rules which take into account non-economic (social) factors to provide protection for the weakest actors of the food supply chain, the farmers as well as small and medium-size enterprises. The food sovereignty movement promoting social justice¹¹⁴⁵ may find a useful partner in ordoliberal competition policy to establish the set of rules necessary to provide protection for the most vulnerable of the food supply chain. On the one hand, this 'partner-in-crime' role of ordoliberalism comes from the view of ordoliberal thinkers who dealt with agriculture, and on the other hand, even from the general constituting principles drawn up by Eucken.

¹¹⁴⁰ WALTER EUCKEN (1952) *Grundsätze der Wirtschaftspolitik*. Tübingen: J.C.B. Mohr (Paul Siebeck), p. 334.

¹¹⁴¹ EUCKEN 1952, p. 278.

¹¹⁴² WINDFUHR-JONSÉN 2005, p. 46.

¹¹⁴³ AKMAN 2012, pp. 56–57.

¹¹⁴⁴ BERNSTEIN (2014, p. 1055) also mentions the regulation of international and *domestic* trade in food commodities as well as the protection of small-scale farming among the demands of food sovereignty. According to our view, the protection may also take place through effective competition law regulation which guarantees that smaller market players could compete within a market where their interests are taken into account.

¹¹⁴⁵ DAVID M. KAPLAN (ed.) (2019) *Encyclopedia of Food and Agricultural Ethics*, 2nd edn. Springer, p. 99.

5 Food sovereignty from the standpoint of the European Union

Although *Patel* declares that the European Union „is not a place characterised by food sovereignty,” however still better off than the United States of America despite the much criticism of food sovereignty advocates rained down on the Common Agricultural Policy,¹¹⁴⁶ this brief *intermezzo* aims to shed light on the approach of the institutions of the European Union towards food sovereignty. First, it is worth mentioning that the task of doing this is not easy, since there is not a single EU document dealing with the issue of food sovereignty in detail and one cannot find a unified approach of the EU institutions. The research was carried out primarily within the EUR-Lex database in which I tried to look up those documents which includes the word ‘food sovereignty’. The database found around 120 search results, of which about half can provide some information to map the attitude of a given EU institution towards food sovereignty. Many of the results are of little help to us.

As mentioned, there is no food sovereignty strategy at EU level and the institutions approach the phenomenon differently, therefore I present their standpoint one by one.

It must also be noted that the concept of agriculture within the European Union follows a multifunctional approach. Simply put, the multifunctional approach towards agriculture means that one does not limit the task of agriculture to grow food and fibre but one perceives it as which is able to promote and achieve much more goals than that.¹¹⁴⁷ „Multifunctionality refers to the fact that an economic activity may have multiple outputs and, by virtue of this, may contribute to several societal objectives at once.”¹¹⁴⁸ In other words, it refers to „th[e] nexus between commodity and non-commodity output production in agriculture.”^{1149,1150} The European model of agriculture manifestly pursues a multifunctional way of thinking towards agriculture and adopts an approach which is coherent with multifunctionality.¹¹⁵¹

¹¹⁴⁶ PATEL 2009, pp. 668–669.

¹¹⁴⁷ FIONA SMITH (2009) *Agriculture and the WTO – Towards a New Theory of International Agricultural Trade Regulation*. Cheltenham: Edward Elgar Publishing, pp. 21–24.

¹¹⁴⁸ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2001) *Multifunctionality – Towards an Analytical Framework*. Paris: OECD Publishing, p. 11.

¹¹⁴⁹ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2008) *Multifunctionality in Agriculture – Evaluating the Degree of Jointness, Policy Implications*. Paris: OECD Publishing, p. 7.

¹¹⁵⁰ It is the positive approach of multifunctionality. Besides this, there is a normative one which „focuses on the multifunctional role of agriculture as a societal objective”, and a third interpretation has also emerged which „attempts to understand the concept of multifunctionality in a wider perspective, as the result of a transformation process in the linkage among agriculture, rural areas and society at large.” See in detail: ANDREA SABA (2017) *Results-Based Agri-Environmental Schemes for Delivering Ecosystem Services in the EU: Established Issues and Emerging Trends*. In: MARIAGRAZIA ALABRESE–MARGHERITA BRUNORI–SILVIA ROLANDI–ANDREA SABA (eds.) *Agricultural Law – Current Issues from a Global Perspective*. Springer International Publishing, pp. 87–88.

¹¹⁵¹ See in detail: MICHAEL CARDWELL (2004) *The European Model of Agriculture*. Oxford: Oxford University Press.

The European model of agriculture in the form of multifunctionality which does acknowledge the role of agriculture in contributing to achieving broader societal objectives is of paramount importance to me when I aim to draw up the approach of the EU towards food sovereignty. A multifunctional approach of agriculture is a direct sign of that the European Union's agricultural policy is not dismissive to social objectives to be realised by agriculture, as well as an indirect sign that the notion of food sovereignty could be in accordance with the approach of the EU, even if the EU institutions are reluctant to use the term *expressis verbis* and to deal with it in detail. The reluctance may be caused by the not so good choice of terminology by the movement's advocates. „Sovereignty conflicts”, mostly in the form of struggles on competences between Member States and the EU itself, are continuous in the context of the European Union.¹¹⁵² Nevertheless, the conceptualisation of food sovereignty presented earlier may serve a great starting point for overriding this reluctance, if the EU institutions are willing to ignore the traditional meaning of sovereignty, and within the notion of food sovereignty, they perceive sovereignty as the name for the perspective a community adopts when it sees itself as collectively autonomous. This community is – in this case – the community of farmers which contribute with their work to the notion of European multifunctional agriculture.

Let us turn our attention to the notion of food sovereignty as it appears in the documents adopted and issued by EU institutions. Perhaps not surprisingly, the term has been used most often by the European Economic and Social Committee, which is, nevertheless, only an advisory body representing certain interest groups. As early as 2009, the Committee recognised food sovereignty as a legitimate right of a people. However, it captured food sovereignty as a precondition for a people to achieve their own food security, and somewhat counterintuitively, it also notes the economically costly nature of food self-sufficiency and its contrary character in relation to global governance.¹¹⁵³ Two years later, in 2011, the Committee explicitly stated that the European agricultural model must be established on the principles of food sovereignty, and the objectives to be followed by the Common Agricultural Policy should be, *inter alia*, to reach a stabilised market, to limit price volatility, to support the incomes of European farmers, to adopt trade rules which not only preserve the European agri-food model but also avoid

¹¹⁵² See, for example: Christopher J. BICKERTON–Dermot HODSON–Uwe PUETTER (2015) *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*. Oxford: Oxford University Press; Nathalie BRACK–Ramona COMAN–Amandine CRESPI (2019) Sovereignty conflicts in the European Union, *CEVIPO Working Papers*, 2019/4, pp. 3–30; Bertrand MATHIEU (2021) Redefining the Relationship Between National Law and European Law, *Central European Journal of Comparative Law*, 2(1), pp. 139–145.

¹¹⁵³ See EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (2009) *Opinion on 'Trade and Food Security'* (exploratory opinion) (2010/C 255/01).

competition distortions, and „to allow farmers to win back market power from retailers, especially large-scale commercial chains”.¹¹⁵⁴ With this opinion, the Committee seems to have committed itself to a kind of European food sovereignty, aiming to allow European farmers to define their own agricultural and food policy which constitutes the basis for the European agricultural model. In 2012, the Committee identified food sovereignty as extremely important to EU policies and as one of the social competitive advantages of a cooperative market.¹¹⁵⁵ In 2016 and 2017, with regard to the post-2020 Common Agricultural Policy, the European agricultural model which must be based on the principle of food sovereignty was emphasised again by the Committee,¹¹⁵⁶ which in 2018 also formulated that all of the EU trade agreements must respect food sovereignty.¹¹⁵⁷ The link between multifunctional agriculture and food sovereignty is most prominently featured in a 2019 opinion on the role of agroecology in food supply chains. Based on the opinion, the agroecology’s third dimension is perceived as „a social movement in the quest for food sovereignty and new multifunctional roles for agriculture,”¹¹⁵⁸ which are strongly intertwined notions. The latest mentions of food sovereignty by the Committee were made with regard to the COVID-19 crisis: the pandemic „has shone a light on the need for food sovereignty”¹¹⁵⁹ and proved „the critical importance” of food sovereignty, besides the critical importance of food security and one health concept.¹¹⁶⁰ In summary, the European Social and Economic Committee does not consider the notion of food sovereignty and food security incompatible with each other, but rather sees food sovereignty as a prerequisite of achieving food security. The Committee extends the concept of food sovereignty to the European arena and takes the view that the Common Agricultural Policy must be established on this very concept. By elevating the concept to a pan-European level, it steps

¹¹⁵⁴ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (2011) *Opinion on the ‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: The CAP towards 2020 — Meeting the food, natural resources and territorial challenges of the future’* (2011/C 132/11).

¹¹⁵⁵ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (2012) *Opinion on ‘Cooperatives and agri-food development’* (own-initiative opinion) (2012/C 299/09).

¹¹⁵⁶ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (2016) *Opinion on ‘The main underlying factors that influence the Common Agricultural Policy post-2020’* (own-initiative opinion) (2017/C 075/04); EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (2017) *Opinion on ‘A possible reshaping of the Common Agricultural Policy’* (exploratory opinion) (2017/C 288/02).

¹¹⁵⁷ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (2018) *Opinion on the ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The Future of Food and Farming’* (2018/C 283/10).

¹¹⁵⁸ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (2019) *Opinion on the ‘Promoting short and alternative food supply chains in the EU: the role of agroecology’* (own-initiative opinion) (2019/C 353/11).

¹¹⁵⁹ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (2020a) *Opinion on the ‘Introduction of safeguard measures for agricultural products in trade agreements’* (own-initiative opinion) (2020/C 364/07).

¹¹⁶⁰ EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (2020b) *Opinion on the ‘Compatibility of EU trade policy with the European Green Deal’* (own-initiative opinion) (2020/C 429/10).

outside the conventional definition which determines it as the right of a people. This can be the result of that the agricultural policy is common in the European Union, therefore defining agricultural and food policies at EU level may also be the right of a theoretically unified European people. Obviously, one must recognise the dubious nature of this simplified approach. Food sovereignty at EU level can be better perceived as the aggregate of different European peoples defining their own agricultural and food policies.

The other advisory body, the Committee of the Regions has dealt with food sovereignty much less. In one of its opinions, the Committee considered short distribution channels as a basic level of food sovereignty. Besides providing this basic level, these „channels lead to greater interaction and mutual knowledge and understanding between consumers and producers. Through personal knowledge of producers they create relationships based on trust and make products easily traceable by consumers.”¹¹⁶¹ Also in 2011, the Committee of the Regions declared that Community preference as an important principle of the Common Agricultural Policy significantly contributes to *Europe’s food sovereignty*.¹¹⁶² If one remembers to that part of the definition of food sovereignty which emphasises it as *the right of a people* to define their own agricultural and food policies, it can be seen from the documents issued by these EU advisory bodies that both interpret food sovereignty as the right of a unified European people, which – as mentioned above – is not free of contradictions, given that each Member State and even different regions in the same Member State may have totally different needs to achieve food sovereignty and may stand at different levels of food sovereignty.

The European Commission’s statements on the issue of food sovereignty are close to zero, with only a few written answers to requests for information. Nevertheless, it must be noted that the written answers to these questions do not reflect the official standpoint of the Commission; they are formulated only on behalf of the Commission. The only one which I aim to bring to the fore is the following. The then-Commissioner for Development, Mr Andris Piebalgs stated in a written answer that „the EU *supports countries in defining their own policies*, to prioritise local small-scale farming, and considers that an *appropriate balance between support to national production and trade can lead to greater food security*. Furthermore, it must also be mentioned that „EU support focuses on small-scale farmers, recognising that the vast majority of the poor and hungry still live in rural areas where agriculture forms the main economic activity and where small-scale farming is very dominant.

¹¹⁶¹ COMMITTEE OF THE REGIONS (2011) *Opinion on ‘Local food systems’* (outlook opinion) (2011/C 104/01).

¹¹⁶² COMMITTEE OF THE REGIONS (2011) *Opinion on ‘The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future’* (2011/C 192/05).

This does not exclude support to medium-sized and family farms.”¹¹⁶³ It is visible from this answer that the European Commission also recognises food sovereignty through the indirect reference of *supporting countries in defining their own policies*. Similarly to the European Economic and Social Committee, this answer also reflects that the notions of food security and food sovereignty are not sharply contrasted as in the statements of food sovereignty advocates. The European Commission, besides the indirect acknowledgement of food sovereignty, also expresses that a greater extent of food security may be achieved by finding the appropriate balance between national production and trade. This standpoint is in part contrary to the approach of key institutions propagating food security which take the view that trade between countries cannot be in any case restricted because any obstacle to free trade reduces the extent of food security.

The appearance of food sovereignty and food security paralelly is most manifest in the documents of the European Parliament. The EP is of the opinion that „countries must have the right to food sovereignty and food security.”¹¹⁶⁴ In 2009, besides calling on the EU to recognise the right of food sovereignty of developing countries,¹¹⁶⁵ the EP stated that the basis for fighting against hunger must be the right of food sovereignty which is „the capacity of a country or a region to democratically implement its own agricultural and food policies, priorities and strategies.”¹¹⁶⁶ In 2016, in a resolution on global goals and EU commitments with regard to nutrition and *food security*, the European Parliament called „for EU trade and development policy to respect the political and economic policy space of developing countries in order for them to establish the necessary policies to promote sustainable development and dignity for their people, including *food sovereignty*.”¹¹⁶⁷ One year later, the EP declared that certain forms of tenure (e.g. small and medium-sized farms, distributed ownership or properly regulated tenancy, and access to common land) which encourage people to remain in rural areas have positive impact on both *food security* and *food sovereignty*.¹¹⁶⁸ Furthermore, it was put that „the

¹¹⁶³ Answer given on 9 August 2013 by Mr Piebalgs on behalf of the Commission to the following question: What measures can it adopt to support agricultural production systems based on food sovereignty that prioritise local production and consumption?

¹¹⁶⁴ EUROPEAN PARLIAMENT (2008) *Resolution of 22 May 2008 on rising food prices in the EU and the developing countries* (2009/C 279 E/14).

¹¹⁶⁵ EUROPEAN PARLIAMENT (2009a) *Resolution of 13 January 2009 on the Common Agricultural Policy and Global Food Security* (2010/C 46 E/02).

¹¹⁶⁶ EUROPEAN PARLIAMENT (2009b) *Resolution of 26 November 2009 on the FAO Summit and food security* (2010/C 285 E/11).

¹¹⁶⁷ EUROPEAN PARLIAMENT (2016) *Resolution of 5 October 2016 on the next steps towards attaining global goals and EU commitments on nutrition and food security in the world* (2018/C 215/02).

¹¹⁶⁸ EUROPEAN PARLIAMENT (2017) *Resolution of 27 April 2017 on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers* (2018/C 298/15), point V.

aim of Europe's agricultural policy is to preserve the European model of farming, based on a multifunctional agriculture," and this model „safeguards traditional products and *food sovereignty*, and fosters innovation while protecting the environment and future generations.”¹¹⁶⁹

In summary, one can see that the most active concerning the statements on food sovereignty is the European Economic and Social Committee. Obviously, it comes from the role of this advisory body which has the task to represent certain interest groups, including, for example, farmers. All in all, the European Union institutions' statements with regard to food sovereignty show us some characteristics as regards the viewpoint of the European Union. The notion of food sovereignty is many times connected to that of food security, and the previous one is perceived as one important pillar of achieving the latter one. In general, it is contrary to the approach of food sovereignty advocates, since they draw up a strict dividing line between these two paradigms. Nevertheless, this EU approach towards food sovereignty is in line with the standpoint of institutions emphasising the greater importance of food security. However, the documents adopted and issued clearly illustrate that the EU does not reject the thought of having *the* European food sovereignty as a collective notion. Besides, as the institutions examined put it, the Common Agricultural Policy as the clear example of a multifunctional agriculture model must also be established on food sovereignty. Although I have limited written sources with regard to the compatibility of food sovereignty and the European model of agriculture, it can be clearly seen that these notions may be simply reconciled, given that both accept and submit that the task of agriculture is not only to produce but also to achieve non-economic, in particular social objectives. Here I would just like to say up front that this approach is also in line with what the ordoliberal authors have written about agriculture, as well as with the social equilibrium thesis of the social market economy.

Finally, it is worth mentioning that the Common Agricultural Policy and its objectives formulated in Article 39 TFEU, at least at a theoretical level, contribute to the question of the centrality of farm incomes which is of paramount importance to food sovereignty.¹¹⁷⁰ The second goal of the CAP is no other than „to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in

¹¹⁶⁹ EUROPEAN PARLIAMENT 2017, point W.

¹¹⁷⁰ See, for example, Jan Douwe VAN DER PLOEG (2013) *Peasants and the Art of Farming – A Chayanovian Manifesto*. Halifax–Winnipeg: Fernwood Publishing.

agriculture,”¹¹⁷¹ therefore this CAP objective provides an appropriate tool to achieve the food sovereignty’s aim of of increasing farm incomes.

¹¹⁷¹ TFEU, Article 39, 1(b).

Part Four: Summarising Thoughts, Conclusions, and Proposals

Part Four includes summarising thoughts, the most important findings of the thesis, and my proposals. First, I provide a brief summary of the discussion, then, second, I make some general conclusions as regards the regulation of competition in agri-food markets. Just as antitrust law and policy are closely intertwined, so are agri-food competition law and its policy. On the one hand, agricultural and food policy, on the other hand, competition policy interact with each other to establish the rules taming competition in agri-food markets. So far, agricultural policy is the winner of this interaction. The victory of agri-food policy is realised through the adoption of rules that provide the agricultural sector with antitrust law privileges and stronger protection for agricultural producers in form of trade regulation rules. Therefore, as declared in both EU primary and secondary law as well as case law, agricultural policy takes precedence over competition-related rules. And yet there are a number of unresolved problems in the competitive structure of agri-food markets. Third, I compare the US and EU regulation of competition in agri-food markets. Fourth, I evaluate the legal regulation in force on competition in agri-food markets from the perspective of food sovereignty and propose changes and amendments in light of the two alternatives presented before. Fifth, I outline and offer two food sovereignty-based competition policy alternatives to the possible ways for controlling competition in agri-food markets. One is built on the extension of the scope of antitrust, primarily by taking the view that antitrust objectives could and should be broadened to establish enlarged room for antitrust enforcement, while the other is constructed on the harmonious relationship and functioning between antitrust and (trade) regulation.

1 Summarising thoughts

Agri-food markets are governed differently from other sectors. Competition policy providing direction for agri-food markets is not limited to antitrust law but also leaves room for trade regulation. In other words, agri-food markets are influenced and controlled by both antitrust and trade regulation rules. This is manifest in the European Union and two of its Member States, Germany and Hungary, as well in the United States. The dual nature of regulating competition in agri-food markets is primarily based on the policy choice and value decision that agricultural producers deserve additional protection in order that a fair standard of living could be ensured for them and their individual earnings could be increased. From the viewpoint of the primary means of competition policy, that is from the viewpoint of antitrust rules, this policy choice is deemed inefficient in several cases. Trade regulation rules, such as the prohibition of

unfair trading practices, cannot be justified with the grounds and reasons underpinning antitrust regulation. They have their own function which sometimes contradict conventional antitrust considerations, sometimes coincide with them. From an antitrust standpoint, the previous is more frequent, even more so when the objective of consumer welfare is considered the one and only legitimate goal of antitrust.

The main purpose of antitrust, to increase efficiency, runs counter to those objectives of agricultural policy that are redistributive in nature, such as ensuring a higher living standard for agricultural producers. The clash of objectives, however, has been settled by declaring that agricultural policy takes precedence over competition rules. It is explicitly proclaimed in EU primary law. Although no similar declaration is found in the two Member States analysed and in the United States, the same commitment emerges implicitly in these countries by adopting trade regulation rules that do not require the proving of negative effects on competition. These provisions are in many cases contradictory to efficiency-based considerations emphasised by mainstream antitrust, however, they do not prevent antitrust enforcement from coming to the fore.

Their relationship can be drawn as that the violation of trade regulation rules are not necessarily covered by antitrust, but the violation of antitrust rules are presumably covered also by trade regulation. For example, an unfair trading practice against a supplier does not trigger antitrust enforcement, but a unilateral and anti-competitive trading practice with adverse effects on competition by a dominant undertaking also falls under the category of unfair trading and could trigger enforcement based on provisions aimed at preventing unfair trading practices. That is, trade regulation extends its protective scope to practices that are not prohibited by antitrust. This is present in all analysed countries and in the European Union.

Given that the EU is an open proponent of the multifunctional model of agriculture, the policy choice is undeniable. Multifunctional agriculture embodies an approach that goes beyond the view of looking at agriculture as only a sector producing commodities. It craves for the protection of rural lifestyle and landscapes and of agricultural producers living in rural areas. Agriculture also serves social, cultural, and traditional functions. This approach is reflected in competition-related rules when agricultural producers are provided with antitrust law exemptions and additional market protection based on quite weak economic but satisfactorily strong social arguments. This is also more or less present at national level.

In general, agri-food markets become more and more concentrated horizontally and more and more integrated vertically, there are less and less family farms and smallholders, but

food prices are still increasing. Small and medium-sized family farms and agricultural producers sell their produce at lower price than it would be worth for them, but lower prices paid to producers do not appear as lower prices paid by consumers. Somewhere in the food supply chain, at the level of intermediaries (food processors, wholesale dealers, retailers) these amounts get stuck. Intermediaries between producers and consumers pay less but charge more. It should not be even acceptable from a narrow antitrust standpoint. Consumer welfare does not increase by rising vertical integration and horizontal concentration of the food supply chain. No surplus is realised by consumers. They pay more for foodstuffs, but producers have to charge less to stay in the business.

The system's beneficiaries are intermediaries: food processors, wholesalers, retailers. The system is shaped like a hourglass. There is one end point with millions of producers, and there is the other end point with billions of consumers. The two end points are connected to each other through a significantly lower amount of intermediaries who are in a winning situation both upstream and downstream. Most foodstuffs are price inelastic. We all eat. Changes in the prices of basic food staples do not change the demand significantly, therefore intermediaries, in particular retail chains, do not have to expect significant decrease in the demand, if they increase the price of basic foodstuffs. Nevertheless, the most diverse types of dependence suffered by producers as suppliers on buyers forces producers to accept terms and conditions dictated by buyers in order that they could remain in the business.

2 General conclusions

These findings lead us to two conflicting viewpoints as to how the privileged position of the agricultural sector in relation to competition-related rules can be explained. The first point of view is that the favoured status of the sector is based on strong social and economic considerations and arguments. On the contrary, the second group takes the view that providing exemption from antitrust rules and stronger protection for agricultural producers are no other than the repercussions of strong, well-organised and methodical agricultural lobby both at EU and national level. It may be more reasonable to unearth the middle ground: on the one hand, owing to the structural characteristics of agriculture and the factors beyond human control (for example, weather and climatic conditions), and, on the other hand, because of that the products of primary agricultural production and food are essential to sustain human life, agricultural lobbyists are in a position to have a great impact on legislation, because their arguments – in many cases – seem quite valid (for example, regarding the weak bargaining position of producers, the struggle to ensure predictable income for themselves, changing weather and climatic

conditions, etc.). This gives justification for their ambition to fight for exemptions from antitrust and sector-specific rules for the agricultural sector not only at EU but also national level. Although from the standpoint of conventional antitrust law which aims to achieve the highest possible economic efficiency, these arguments are often not satisfactory on the grounds of economics. The more one moves away from the single-factor economic approach towards antitrust law and the more non-efficiency-based considerations one opens the door for, the more acceptable the arguments of agricultural lobbyists are. The extent to which we commit ourselves to non-efficiency-based considerations in antitrust law determine whether there will be, and if yes, how many exemptions and how much protection agricultural producers will enjoy. It can be imagined as a sliding scale whose one end point stands for economic efficiency exclusively and the other end point for non-efficiency-based considerations as an umbrella term. The extent is policy choice, therefore it is determined by relevant and current policymakers. Viewed from another angle, other policies can and will undermine antitrust policy.¹¹⁷²

The relative autonomy of agri-food competition law from general antitrust law trends can be illustrated quite well by the fact that the prevalent antitrust doctrines in the last four decades in the United States (the paradigm of consumer welfare) and in the last twenty-five years in the EU (the more economic approach) have left untouched the competition-related exception and specific norms provided for agriculture. It is another reason as to why one should perceive agri-food competition law as an integral part of agri-food law rather than as part of competition law. The way of how competition in agri-food markets is governed is determined – to a significant extent – by agricultural policy objectives, and – to a much less extent – by mainstream antitrust considerations. This is why antitrust lawyers often claim that the efficiency of agri-food markets has been sacrificed on the altar of considerations that have nothing to do with competition, such as ensuring a higher living standard for agricultural producers.

From the perspective of antitrust policy, trade regulation rules in agri-food markets are – in many cases – point in the opposite direction than antitrust rules. However, from the perspective of agricultural policy, antitrust and trade regulation rules rather complement each other; while antitrust attacks those conducts that are contrary to economic efficiency, trade regulation those which cannot be reached by antitrust enforcement.

In the thesis, as a doctrinal framing, I created an umbrella term for antitrust and trade regulation rules related to competition in agri-food markets. By agri-food competition law I

¹¹⁷² TÓTH 2020b, p. 48.

mean all provisions that directly or indirectly control and influence competition between undertaking in agri-food markets. The following definition is formulated:

Agri-food competition law is the aggregate of legal instruments aiming to realise agricultural and food policy objectives, created and maintained to regulate the behaviour of undertakings in and the competitive process of the agricultural and food market.

Therefore, these provisions serve to realise agricultural and food policy objectives, that is to say, they are an instrument in the hands of agricultural and food policymakers. Their primary aim is to create a competitive environment that reduces the vulnerability of weak market actors in the food supply chain and, thus, raises the income of agricultural producers generated from the sales of their produce. This cannot be justified with the assessment methods of antitrust law without framing antitrust in a context different from the current standpoint. Antitrust exclusively serving the increase of consumer welfare and exclusively triggered by conducts harming economic efficiency is not eligible to take into account the unique competition-related problems in the agricultural and food supply chain. Criticism may be raised that curing sector-specific anomalies is not the task of antitrust, but even if it were true, certain problems to be solved remain on the surface. It is also possible that these do not seem to be a problem at all from the single economic logic of antitrust, but the feature of the goods being the object of these trade relations, that is to say, their necessity for life puts the problem in a different perspective.

In general, by looking at the full picture from a practical standpoint, it is hard, if not impossible, to find any increase in economic efficiency as the consequence of the current and mainstream paradigm of competition regulation. I am aware that there are many more factors in the background which overall contribute to the increase of food prices, such as biofuel production, energy prices, weather, speculation, economic growth and changing diets,¹¹⁷³ but a competition policy exclusively concentrating on economic efficiency in the form of consumer welfare does not seem to mitigate the problems. However, from an agricultural policy standpoint, it does impair important pillars of the rural landscape and lifestyle by not taking into account non-efficiency-based considerations. The dominance of agribusiness is seriously against the inherent values of traditional and centuries-old agricultural production. This should not be understood as a return to ancestral methods, but as support for viable farmers and family farms that are fit for the 21st century. These market actors significantly contribute to the preservation

¹¹⁷³ Patrick WESTHOFF (2010) *The Economics of Food – How Feeding and Fueling the Planet Affects Food Prices*. Upper Saddle River, NJ: Pearson Education, p. 4.

of rural landscape and lifestyle, traditions and values foreign to the urban environment, beyond producing food. It does not seem like that their exploitation by giant food companies and retail chains would bring about any tangible benefit for consumers, for example, in the form of lower prices. As a consequence of these general considerations, I propose two possible ways for the better functioning of competition in agri-food markets, which – to a certain extent – may cure the current two-component competition regimes. By two components I mean antitrust and trade regulation, and the amelioration of agri-food competition is built on these two constituting elements and their interrelationship.

A competition policy, if not limited to increase economic efficiency, can contribute to the multifunctional model of agriculture, thus by creating balance between competition and agricultural policy. A holistic and integrated view to competition-related issues of agri-food markets does not impede the realisation of the essence of multifunctional agriculture, such as „the management of renewable natural resources, landscape, conservation of biodiversity and contribution to the socio-economic viability of rural areas”¹¹⁷⁴, but facilitate its realisation. Small farms, though endangered by giant food companies and retail chains, play a crucial role in rural sustainability, as well as support biodiversity and ecological resilience.¹¹⁷⁵ One of the purposes of food sovereignty is precisely to express the fact that agriculture does not only consist of agricultural production as economic activity. It is much more. Food sovereignty protects the interest of next generations, empowers family farms, is committed to the three shades of sustainability (environmental, social, and economic), aims to guarantee just incomes for producers, fights for biodiversity and social relations free of oppression and inequality.¹¹⁷⁶ Food sovereignty fully subscribes to the multifunctional model of agriculture and is even more than that. The multifunctional model of agriculture does not say anything about the role states should play in governing markets; the paradigm of food sovereignty, on the contrary, does. A food sovereignty-based competition policy, on the one hand, acknowledges that agriculture cannot only be interpreted as a necessary production activity to create the ‘subject matter’ of agricultural and food trade, and, on the other hand, espouses the multifunctional model of agriculture. Moreover, it respects the way food sovereignty addresses competition in agri-food markets: the strong guardian role of the state over the competitive process with an extensive

¹¹⁷⁴ Henk RENTING–Walter A.H. ROSSING–Jeroen C.J. GROOT–Jan Douwe VAN DER PLOEG–Catherine LAURENT–Daniel PERRAUD–Derk Jan STOBELAAR–Martin K. VAN ITTERSUM (2009) Exploring multifunctional agriculture. A review of conceptual approaches and prospects for an integrative transitional framework, *Journal of Environmental Management*, Vol. 90, Supplement 2, p. 112.

¹¹⁷⁵ GUOMAR ET AL. 2018, p. 785.

¹¹⁷⁶ SCHANBACHER 2019, pp. 49–50.

competition regulation and enforcement also leaving room for non-efficiency-based considerations. This approach is manifested in the form of legal regulation which takes into account the unique features of the agricultural sector, either through creating exemption under general antitrust rules (exception norms), or through adopting sector-specific trade regulation rules (specific norms).

3 Comparison between the US and EU regulation, as well as the German and Hungarian regulation

The aim of this chapter is twofold. On the one hand, it compares the approach of the United States with that of the EU towards competition and its regulation in force in agri-food markets, while, on the other hand, it compares the regulation of the two EU Member States analysed, Germany and Hungary. The comparison between the EU and the US makes it possible to outline the key similarities and differences on both sides of the Atlantic.

Concentrating on the first topic, one thing is certain. Both the European Union and the United States have established a legal regime that provides for derogations for the agricultural sector under general antitrust rules. It is also similar that the exemption is not unlimited; agricultural cooperatives shall respect antitrust rules, however, with some alleviations. The US exemption can be found in Section 6 of the Clayton Act and in the Capper-Volstead Act, while the EU exemption is codified in two EU regulations. The limitedness of the exemptions is ensured in part in different ways. What is similar is that both jurisdictions *expressis verbis* declare as to which type of activities the agreement shall be related to in order that it could be exempted. In the United States, they are the following: collective processing, preparing for market, handling, and marketing, as well as common marketing agencies. At the same time, in the EU the agreement shall concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products. What is immediately visible is that the EU exemption also covers agreements related to the production, while it is not referred to in the United States. It is relevant in the case of limiting production which the EU deems permissible within a PO, but the United States does not.

The exemption provided for any association of producers (be it legally recognised, such as a producer organisation, or legally non-recognised, such as a farmers' association, or be it an agricultural cooperative within the US) is based, in part, on the doctrine of single economic entity. The association is like a parent company that has its own subsidiaries, i.e. its agricultural producer members. The members are not independent undertakings from one another from an antitrust law perspective but constitute a single economic entity. Although neither the EU nor

the US exemption mentions explicitly but as a consequence of the single economic entity doctrine even price fixing is permissible to a certain extent based on case law. Indirectly, within the framework of the term ‘marketing’, which is a legitimate objective to be carried by an agricultural cooperative, the US case law also means price fixing. Although the EU regulation declares the prohibition of charging identical prices, recent case law in *Endives* shows that this provision only refers to that if a producer organisation prohibits its members from selling their own produce at a price under the minimum fixed price determined within the producer organisation. It is actually in accordance with the requirement that the agreement shall concern the sale of agricultural products.

As to the personal scope of exemptions, there are similarities and differences. The EU and the US regulation are similar in that they do not connect the applicability of the exemption to a certain form of legal entity. It is irrelevant in both jurisdictions whether the undertaking is profit-making or non-profit making, or it is a cooperative or a company. Both the EU and the United States employ criteria, negative or positive, to be fulfilled by the undertaking to be exempted, but the structure of these criteria and their formulation are different. The EU has derogations which can only apply to legally recognised producer organisations (see Article 152(1a) of the CMO Regulation), while there are others which apply in general to farmers and farmers’ associations, without giving them a correct definition (see Article 209 of the CMO Regulation and Article 2 of the Agri-Food Competition Regulation). The recognition of producer organisations are regulated in detail, on the one hand, in secondary EU law (in the CMO Regulation itself), and, on the other hand, in national law. These general rules on the recognition of producer organisations constitute a separate area of provisions in the EU, while the US antitrust formulates its negative criteria on associations, which can apply the exemption, directly among the provisions on the exemption. The US negative conditions ‘no more than one vote per member’, ‘dividends not exceeding 8 per cent’, and ‘no dealing to an amount greater in value to nonmembers than to members’ do not have EU equivalents, however, the general rule ‘one member, one vote’ also applies in the EU to producer organisations that are cooperatives. But again, this procedural provision derives from general rules and is not declared among the rules on the agricultural antitrust exemption. Negative requirements are formulated with regard to the undertaking itself in the United States, while the European Union is rather concerned with the economic conduct when formulating negative conditions. The latter declares that the agreement shall not exclude competition, require charging identical prices and jeopardise the objectives of the Common Agricultural Policy. While limiting the exemption in the United Sta-

tes takes place primarily from the standpoint of the undertaking and secondarily from the conduct itself with the prohibition of undue price enhancement, the EU rather aims to limit the exemption by regulating and reaching that certain unwanted effects be avoided (competition exclusion, identical prices, jeopardised agricultural policy objectives).

Another important distinction can be drawn which sheds light on the diverging focus of the two jurisdictions. The European Union withdraws the protection (exemption) provided for the agreement, if it jeopardises common agricultural policy objectives. It means that the conduct is not only assessed in antitrust terms but also within the framework of agricultural law. Hijacking the assessment method from antitrust law in a direction where other policy objectives are taken into consideration is clearly missing regarding the US agricultural antitrust exemption. This EU approach may seem like a folly. It is an antitrust provision, the agreement is related to agricultural products, no competition concerns arise, but it endangers agricultural policy objectives, so it does not deserve the privileged treatment of antitrust law.

The organisational criteria for the application of the exemptions are also similar both in the EU and the United States. The EU only accepts certain derogations if the PO or the APO concerned is legally recognised. The US exemption also establishes the Capper-Volstead criteria to be exempt. In neither jurisdiction can an agreement be exempt from the prohibition, if any of the parties to the agreement does not fulfil the requirements. Both legal regimes only provide protection *below* cooperative level, that is to say, agreements between two separate legal entities *on* cooperative level (between two cooperatives or between two producers organisations) are not exempt. Producers may join forces in an agricultural cooperative fulfilling the Capper-Volstead criteria in the United States or in a legally recognised producer organisation in the EU, but two separate legal entities shall not cooperate; in case of that the doctrine of single economic entity would be violated and the prohibition should be applied. Furthermore, both legal systems require that only those agreements are exempt which are – in the EU – strictly necessary to achieve the objectives of the respective PO or APO, or which are – in the United States – necessary to carry out any of the legitimate objects. The US legitimate objects and the EU objectives are analogous in that they make concentration supply possible. The specific aims to be pursued by a producer organisation, which are determined by the CMO Regulation, fit into the toolbox of means to realise the overall Common Agricultural Policy objectives in the EU. A slight and insignificant difference that the United States does not determine exact umbrella objectives to be pursued and realised by its agricultural policy, however it does not change the fact that it treats agricultural cooperatives in the competition environment the same way like the EU. Perhaps the most significant difference between EU and US regulation is that

the former also allows supply restrictions, as can be read from the *Endives* judgment. As to the concertation on quantities put on the market, the Court ruled that it escapes the prohibition in Article 101 TFEU, if it is agreed between the members of a legally recognised producer organisation or a legally recognised association of producer organisations and strictly necessary to reach the objective pursued by the respective PO or APO. On the contrary, the United States is rather against limiting production. The CMO Regulation explicitly declares that ensuring that production is planned and adjusted to demand, particularly in terms of quality and *quantity*, is a specific aim which can be pursued by a PO. That is to say, limiting production in the EU by a producer organisation is permissible and may be exempt from the general prohibition, if it takes place within a legally recognised PO. The United States does not address price fixing and supply control as two sides of the same coin, unlike the European Union where both economic activities are lawful from the perspective of the agricultural antitrust exemption. While the US only accepts restrictions which take place *post-production*, the EU also deems lawful *pre-production* cooperations. The exchange of strategic information is also permissible in both of the jurisdictions.

The economic justification of limited agricultural exemptions lies in the concept of countervailing power. The exemptions, which make possible for agricultural producers to combine forces, enable them to create countervailing power against the market power of buyers. One significant difference between the EU and US regime that the former does not include a control mechanism, if the association of agricultural producers faces a buyer which does not have monopsony power. In that case, the exemption can be misused because of the fact that the unity of farmers does not face a buyer whose economic power should be countervailed to increase efficiency. That is to say, when there is no monopsony power in the hands of a buyer which should be countervailed, the market power of sellers becomes supervailing power with likely adverse effects on competition. This is attempted to be controlled by the US antitrust provision which prohibits undue price enhancement by agricultural cooperatives. This is missing in EU antitrust. At a theoretical level, producer organisations or associations of producer organisations, if they meet the general criteria determined and bargain with buyers without market power, have at their disposal the possibility to increase sales prices to a level which is not competitive any more, and thus not efficient, given that their market power is not countervailing but supervailing in relation to their buyers.

Another significant difference between the EU and US regimes is that the former also provides for a derogation to interbranch organisations. These entities have members at different levels of the food supply chain, that is to say, the competition derogation applies to vertically

integrated organisations according to the rules laid down in Article 210 of the CMO Regulation. The derogation is only applicable to recognised entities, contrary to Article 209 of the CMO Regulation and the provisions of the Agri-Food Competition Regulation. Both vertical agreements of interbranch organisations and horizontal agreements for farmers, their associations, POs and APOs are based on self-assessment, whether they are compatible with the rules on the derogation.

From the viewpoint of functional comparison, both the EU and US regulation aim to achieve the same goal with the same legal means. The main function is to increase the bargaining power of producers against their buyers. The realisation of it takes place by excluding certain agreements of agricultural producers from the scope of the general prohibition of anti-competitive agreements. Even the most harmful of all agreements, price cartels, which distort competition by object, are also exempted until they are concluded within a legal entity. In antitrust terms, these would be *per se* prohibited because they are drawn up with the participation of competitors to fix sale price, however based on the doctrine of the single economic entity these agricultural associations are treated as one undertaking despite the fact that they unite competitors.

The structure of regulation is also similar. The provisions can be found in the legal sources of agricultural law. The US agricultural exemption, the Capper-Volstead Act is codified in Title 7 of the US Code which consists of the laws related to agriculture. The EU also separates its derogations from general antitrust rules, and codifies them, in part, in the legal act on the single common market organisation of agricultural products, and, in part, in a completely separate legal act, the Agri-Food Competition Regulation, which does not cover any other topic beyond the exemption. These regulatory choices strengthen and underpin my approach followed in Part One which uses agricultural law as its starting point to the analysis on competition-related rules applying to the sector.

The United States of America		The European Union			
Section 6 of Clayton Act	Capper-Volstead Act	Agri-Food Competition Regulation	CMO Regulation, Art. 152(1a)	CMO Regulation, Art. 209	CMO Regulation, Art. 210
agricultural and horticultural organizations, instituted for the purposes of mutual help, not having capital stock or	persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers in	farmers, farmers' associations, or associations of such associations belonging to a single Member State	recognised producer organisations [general requirements for recognition shall be fulfilled]	farmers, farmers' associations, or associations of such associations, or recognised producer organisations [general requirements	recognised interbranch organisations [general requirements for recognition shall be fulfilled]

conducted for profit	associations, corporate or otherwise, with or without capital stock			for recognition shall be fulfilled]	
lawfully carrying out their legitimate objects	collectively processing, preparing for market, handling, and marketing, common marketing agencies	agreements concerning the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products	planning production, optimising the production costs, placing on the market and negotiating contracts for the supply of agricultural products, on behalf of its members for all or part of their total production	agreements concerning the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products	agreements necessary in order to meet the objectives listed in certain articles
-	negative criteria: one member – one vote <i>or</i> dividends not exceeding 8 per cent per year, <i>and</i> no dealing to an amount greater in value to nonmembers than to members	negative criteria: no obligation to charge identical prices, competition is not excluded, common agricultural policy objectives are not jeopardised			negative criteria: no partitioning of markets, not affecting the sound operation of the market organisation, no distortions created which are not essential to achieving the objectives of the CAP, no price fixing or quotas, not creating discrimination or elimination of competition in respect of a substantial proportion of the products
	negative criteria are formulated regarding the undertaking		negative criteria are formulated regarding the conduct		

As to the trade regulation pillar of agri-food markets, both the European Union and the United States have adopted sector-specific provisions. While the EU collects unfair trading practices in one legal act, namely the Directive (EU) 2019/633, the United States has several federal acts to address the problems of certain agricultural subsectors. The Packers and Stockyards Act regulates livestock, meat and poultry markets; the Perishable Agricultural Commodities Act the markets of fresh fruit and vegetables of every kind and character; the Unfair Trade Practices Affecting Producers of Agricultural Products Act agricultural markets in general in order to ensure that producers could exercise their rights related to associating under statutory possibilities. The UTP Directive of the EU covers agricultural and food products in general, including livestock, meat and poultry, as well as fruits and vegetables. The unlawful

practices enumerated in the Unfair Trade Practices Affecting Producers of Agricultural Products Act are mostly covered by Article 3(1)(h) of the UTP Directive which prohibits buyers from threatening to carry out, or carrying out, acts of commercial retaliation against the supplier if the supplier exercises its contractual or legal rights. The Perishable Agricultural Commodities Act has some practices falling under the scope of unfair competition law, such as shipping misbranded and misrepresented produce as to grade, quality, weight or state of origin, and altering inspection certificates or making false and misleading statements. These do not have an equivalent in the UTP Directive. The greatest difference comes to the fore with the Packers and Stockyards Act which is dubious in nature. There are conflicting views as to whether it is an antitrust statute, thereby it requires proof of negative effects on competition, or it lacks the antitrust character. Recently it has been treated as an antitrust statute, therefore it differs in principle from the UTP Directive, for the latter does not require any adverse effects on competition to be found. The lax formulation of the prohibitions in the Packers and Stockyards Act, however, suggests otherwise. The violation ‘engaging in or using any unfair, unjustly discriminatory, or deceptive practice or device’ seems like a general prohibition of unfair trading practices, nevertheless this provision has covered a wide variety of practices with antitrust or even unfair competition law character, such as discriminatory pricing, predatory pricing, deceptive advertising, and false weighing. The Packers and Stockyards Act is hard to explain and compare with any legal act of the EU, since it evolved as a consequence of the extreme consolidation of American meatpacking industry dominated by five, and recently four, giant meatpackers controlling approximately the two thirds of the market.

Let us turn the attention now to the comparison of the two EU Member States, Germany and Hungary. The simplest difference can be spotted with regard to the regulation of unfair trading practices. Germany had had no specific norms before the implementation of the UTP Directive emerged, while Hungary has already regulated the issue quite similarly in the Act XCV of 2009. That is to say, in German law there was no antecedent of the regulation, while Hungarian law has explicitly dealt with unfair trading practices of the food supply chain in the last twelve years. Germany implemented the UTP Directive nearly word-for-word in the *AgrarOLkG*, while Hungary did not touch any of the already existing Act’s provisions as a consequence of the appearance of the implementation obligation. This results in that a parallel can be drawn between, on the one hand, the differences of the UTP Directive and the Hungarian Act XCV of 2009, and, on the other hand, that of the Hungarian Act XCV of 2009 and the German *AgrarOLkG*. A significant contrast appears concerning the enforcement authority. Germany applies a dual structure operating with a sector-specific enforcement authority, the BLE and the

general competition authority, the BKA. *Prima facie* it may increase bureaucracy and requires intensive cooperation between the two authorities but still seems like a rational choice with the acknowledgement that the competition-related problems in agriculture and the food supply chain need a duplicated approach. On the one hand, sectoral oversight is necessary because of the peculiarities of the agricultural sector, on the other hand, the interests of competition are best served by the authority responsible for competition in general. In Hungary, the enforcement structure is only built on a sector-specific authority (NFC SO) which may lack the general knowledge necessary for controlling competition. Although the Hungarian enforcement has worked well and on a high intensity in the last twelve years, the inclusion of the Hungarian Competition Authority could raise the justification of decisions by introducing more competition-related arguments, notwithstanding the fact that it would be a completely new terrain for the Hungarian Competition Authority to step on. Regarding the substantial provisions in the UTP Directive, as mentioned earlier in connection with the Hungarian regulation, certain modifications should be adopted to be fully in line with the approach of minimum harmonisation. By not repeating in detail again, these should be related to the personal and material scope of as well as the practices enumerated in the Act XCV of 2009. The German implementation is fully in accordance with the UTP Directive, but by using the possibility inherent in the minimum harmonisation approach, the German legislation adopted stricter rules in certain aspects: three of the practices which are in the grey list of the UTP Directive have been codified in the black list in the *AgrarOLkG*.

The agricultural antitrust exemptions of Germany and Hungary are also different in some aspects. The German regulation is more similar to that of the EU than the Hungarian one. The exemption in *GWB* is nearly a word-for-word repeat of EU provisions, however it is complemented with a separate provision on vertical resale price maintenance. The extension of the *GWB* exemption in the Section 6 of *AgrarOLkG* can be paralleled with Article 152(1a) of the CMO Regulation. The Hungarian exemption from the prohibition of anti-competitive agreements in Section 93/A of the Hungarian Competition Act is different in that it includes procedural provisions, and the Ministry of Agriculture is involved in the decision-making process as to whether the distortion, restriction or prevention of competition resulting from the agreement exceeds what is necessary to obtain an economically justified and fair remuneration and whether the market participant affected by the agreement is foreclosed from obtaining such remuneration. If the agreement passes the necessity test and the market participant affected by the agreement is not foreclosed from obtaining that economically justified and fair remuneration, the prohibition of anti-competitive agreement does not apply. The Hungarian Competition

Authority is bound by the Minister's resolution. Moreover, even if the prohibition of anti-competitive agreements applies, the Hungarian Competition Authority cannot fine the respective undertakings instantly. First, the Authority has to address the undertakings to bring their conduct into line with the legal provisions, and can only fine them if the set deadline expires without results. It is a significant relief in relation to the German provisions. What could be said about the enforcement provisions of the implemented UTP Directive in Germany can also be said about the Hungarian antitrust exemption. It is a reasonable choice to include in the decision-making process a sector-specific authority which has a complete picture on the respective sector. The Ministry of Agriculture in Hungary has all the means to overlook and supervise the agricultural sector and its certain subsectors, and the Hungarian Competition Authority can determine the amount of fine if the requirements are not met. On the contrary, in German law the *Bundeskartellamt* is the only authority which assesses whether an agreement related to agricultural products can be exempted from the prohibition. A dual enforcement structure may better provide is with a full and in-depth picture both on sector-specific features and competition-related considerations.

The Hungarian agricultural antitrust exemption in Section 93/A of the Competition Act has serious shortcomings. The wording of its personal and material scope is not formulated clearly. It protects 'market participants in the market affected by the agreement'. It does not say a word about agricultural producers or their associations. Nor does it determine those economic activities which are covered by the exemption. It uses the expression 'regarding agricultural products the prohibition of anti-competitive agreements does not apply, if...'. Therefore, it does not limit the scope to certain activities which are horizontal in nature, such as agreements on any kind of cooperation in connection with primary production, or common marketing. On the contrary, both German exemptions regulate the derogations with clear content and similarly to EU law. The regulation of the issue in Germany may prove to be an example to be followed by Hungarian legislation regarding the precisosity and unambiguity.

	Hungary	Germany	
Legal source	Section 93/A of the Competition Act	Section 28 of GWB	Section 6 of AgrarOLkG
Personal scope	not determined clearly	agricultural producers, associations of agricultural producers and federations of such associations	agricultural organisations
Substantive scope	the conduct is related to	the production or sale of	activities carried out in

	an agricultural product	agricultural products, or the use of joint facilities for storing, treating or processing agricultural products; vertical resale price maintenance concerning the sorting, labelling or packaging of agricultural products	the area covered by its recognition
Negative criteria	the distortion, restriction or prevention of economic competition does not exceed what is necessary to produce an economically justifiable and reasonable profit <i>and</i> the operator on the market covered by the agreement is not foreclosed from earning this income	they do not maintain resale prices and do not exclude competition	

4 Regulation in force in light of food sovereignty

This chapter aims to evaluate the legal regulation in force in light of a food sovereignty-based competition policy. By food sovereignty-based competition policy I mean a mode of controlling competition in agri-food markets which takes into consideration the perceptions of the food sovereignty paradigm on competition.

Patel's statement that the European Union is better off than the United States in terms of food sovereignty¹¹⁷⁷ is also correct regarding competition rules. According to *Fairbairn*, food sovereignty could provide the ambition US agri-food movements are currently lacking,¹¹⁷⁸ and the food sovereignty-based competition policy may prove to be useful for agricultural policymakers concerned with antitrust and trade regulation in US agri-food markets.

Agricultural producers in the EU are protected to a greater extent than in the United States. In principle, both jurisdictions apply an antitrust framework which is concerned with economic efficiency and consumer welfare. While the US system does not recognise any other

¹¹⁷⁷ PATEL 2009, pp. 668–669.

¹¹⁷⁸ Madeleine FAIRBAIRN (2012) Framing transformation: the counter-hegemonic potential of food sovereignty in the US context, *Agriculture and Human Values*, Vol. 29, p. 228.

legitimate goal for antitrust, the EU does so but with the limitation that the primary objective is still to enhance economic efficiency in the form of consumer welfare. However, there are other ancillary goals which are pursued by EU antitrust. These further EU antitrust objectives leave more room for the enforcement authority to manoeuvre in the area of non-efficiency-based considerations which can be beneficial from the standpoint of agricultural policy.

From a food sovereignty approach, the EU exemption under the prohibition of anti-competitive agreements takes better account of agricultural policy, given that it requires the attainment of CAP objectives as a condition for the respective agreement to be exempted. It is missing in US antitrust. Furthermore, given that one of the CAP objectives is the raising of living standard of agricultural producers, which is also an implicit objective of food sovereignty, the EU exemption is more in line with the paradigm than the US one which is only concerned with economic considerations.

A significant difference between US and EU competition regulation is that the latter has a much more intensive protective pillar through trade regulation rules, such as the UTP Directive. The United States has even experienced that with the appearance of the consumer welfare antitrust paradigm, the interpretation of the Packers and Stockyards Act has shifted in unfavourable direction from an agricultural policy perspective. Recently it is rather interpreted as an antitrust statute and not as trade regulation. It means that it is much more difficult for claimants to have a violation found, for adverse effects on competition shall be proved.

All in all, the EU system of agri-food competition rules fits better with the food sovereignty's perceptions on competition than that of the United States. Given the top-down process of integration in the European Union, this finding is also correct in relation to Germany and Hungary, that is to say, they are better suited for taking into consideration the demands of food sovereignty regarding the organisation of agri-food markets and competition. That is another reason behind my choice to elaborate the food sovereignty-based alternatives for regulating competition in an EU context.

5 Food sovereignty-based alternatives for regulating competition in agri-food markets

This chapter aims to propose two alternatives for regulating competition in agri-food markets. Taken into account that the perceptions of food sovereignty on competition have been found compatible with EU competition policy, I aim to formulate my reform proposals in the context of the European Union, having in mind that reforms carried out at EU level—even those which are soft law in nature—may permeate Member States' legislation and enforcement

trends.

The doctrinal framing adopted in Part One that handles agri-food competition law as *Sonderrechtsgebiet* meant that I analysed only sector-specific provisions in Part Two. It may seem uncommon now that my proposals are not formulated in connection with the previously scrutinised legal instruments but abuse of dominance and merger control. Nevertheless, despite the increasing concentration of agri-food markets and the lack of abuse of dominance cases therein, these instruments currently do not serve the attainment of agricultural policy objectives. The gap identified in Part Two, that is the inappropriate handling of buyer power from an agricultural policy perspective, may, however, be narrowed with the review of the rules on abuse of dominance and of merger control. The legal possibility to better align them to the expectations of agricultural policy exists in EU law, taking into consideration the sufficiently broad authorisation to provide derogation for the sector from general competition rules as well as the precedence of agricultural policy objectives over competition policy.

The strength of the food sovereignty-based competition policy drawn up lies in the fact that it concentrates on one sector—the agricultural sector. Calls for a more socially sensitive and inclusive competition policy are mostly formulated in general terms, as seen in Subchapter 2.3, applying to all economic sectors. Differently from all other sectors and public policies behind them, agricultural policy objectives—which are specific social objectives—are given priority over competition rules. The policy choice, therefore, is given, and thus the deviation from a narrow efficiency-based paradigm of competition policy in the context of the agricultural sector does not seem like a radical step. Since it is explicitly declared in EU context that the specific social objectives of agricultural policy shall be taken into account in relation to competition policy and law, a food sovereignty-based competition policy—which is only interpretable regarding the agricultural sector—is not a profound „shock” for general competition policy. The food sovereignty-based competition policy takes a prosocial view which is in line with the starting point that competition regulation in agri-food markets shall take account of agricultural policy objectives which are social in nature.

The alternatives take into consideration and aim to sustain the elements of multifunctional agriculture but also provide more than that. The alternatives are food sovereignty-based because they consider it important that competition be supervised and regulated under the watchful eyes of the state. If I took an approach only respecting the model of multifunctional agriculture but not the considerations of food sovereignty, the guardian role of the state would be missing. The constituting feature of food sovereignty that accepts the indirect supervisory

role of the state over the competitive process through adopting the rules of the game is in accordance with the existing and influential ordoliberal competition policy. That is to say, no competition policy must be elaborated from scratch but I can insert sector-specific considerations into a contemporary competition policy framework which, as found earlier, is suitable for that. I have two alternatives. One attempts to extend the scope of antitrust, while the other is built on the harmonious relationship between antitrust and (trade) regulation.

Food sovereignty-based competition policy means that legislation and enforcement aim to alleviate the situation of agricultural producers in the competitive process of agri-food markets. It aims to target those economic conducts which are not covered by conventional antitrust, in particular harms suffered by agricultural producers as suppliers against their buyers. The means for that are twofold: through adopting either antitrust or trade regulation rules, or both. The proposed modifications are related to those cases when producers are likely victims of buyer power abuses or misuses. I propose that in cases related to agri-food products, be them unilateral behaviours or mergers and acquisitions, assessing the impacts the conduct may have on procurement markets and evaluating economic dependence of suppliers on buyers should play a key role in deciding the outcome of the respective case. As seen in Part One and Part Two, there are no sector-specific antitrust rules for abuse of dominance and merger control. The consequence of this was already felt in 1899. The *Civic Federation of Chicago* convened and held a conference to address the problem of trusts. Here the fear for the vulnerability of agricultural regions was already mentioned, given that the *Merger Movement* had created companies with market power that could raise the price of manufactured goods while lowering the price of raw materials.¹¹⁷⁹ One century passed, and still there is no solution. More than ten years ago, the American Antitrust Institute also proposed that „developing agricultural market guidelines for assessing buyer mergers” and „challenging buyer mergers whenever they are likely to result in the exercise of buyer power” would be necessary.¹¹⁸⁰ Since then, there has been no development in that respect, neither in the EU, nor in the United States. This is despite the fact that the EU seems to keep its doors open to some kind of agriculture-specific merger control, when it declares in the Merger Regulation’s Recital (7) that

„[t]his Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action

¹¹⁷⁹ MARTIN 1959, p. 6.

¹¹⁸⁰ AMERICAN ANTITRUST INSTITUTE 2008, p. 283.

necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.”¹¹⁸¹

It is a confirmation that the declaration of the precedence of agricultural policy objectives over competition rules in Article 42 TFEU may not only guide the EU legislation in connection with anti-competitive agreements (and abuse of dominance) found in EU primary law but also merger control included in EU secondary law.

The alternatives of a food sovereignty-based competition policy do not aim to reform competition law in general. They aim to reform agri-food competition law, the sectoral competition law for agri-food markets. In the EU the policy choice of giving preference to agricultural policy over competition rules is given, therefore competition in agri-food markets rather constitute part of agricultural policy than that of competition policy. It means that my proposals are primarily underpinned by agricultural policy arguments and secondarily by antitrust arguments. It is another question that ordoliberal competition policy and food sovereignty have been found to be in line with one another, in particular if one concentrates on those ordoliberals who dealt with agricultural issues, such as Röpke. However, with my proposals I do not want to get completely detached from general antitrust considerations; I aim to express my ‘sectoral radicalism’ with modifications which may seem significant from the standpoint of mainstream antitrust but slight and necessary from that of agricultural policy. Ordoliberal competition policy with going beyond efficiency-based considerations and promoting the competitive process as such and individual economic freedom leaves room for the food sovereignty’s perceptions on competition. Not being fully detached from general competition policy considerations is tried to be indicated by my finding that there is such competition policy which can be reconciled with food sovereignty, and it is ordoliberal competition policy. Given that ordoliberal competition policy has been a determining factor in the competition regime of the EU, I make my proposals in connection with it.

Let us start with the alternative of stretching the reach of antitrust. The mainstream antitrust paradigm aims to define itself as the guardian of consumers. Guarding consumers is attempted to be realised through stepping up against those economic conducts which may result in increased consumer prices. A narrow consumer welfare paradigm does not consider harm done to agricultural producers. This deficiency is primarily a matter of concern in connection with unilateral conducts. Although the association and „collusion” of agricultural producers

¹¹⁸¹ Merger Regulation, Recital (7).

within farmers' associations and producer organisations are ensured *ex lege* without resulting in the antitrust violation of the prohibition of anti-competitive agreements, this possibility and sector-specific exemption makes only sense when agricultural producers are those who would commit an antitrust violation, and not when they are the likely victims of an antitrust violation.

The abuses experienced and voiced by agricultural producers shed light on the shortcomings the current antitrust regimes have when they aim to assess more complex market situations in certain sectors which not only exist for profitability but also have non-economic contributions. Although *Lianos and Carballa-Smichowski* formulate their finding in connection with the digital economy, their opinion may also be a guide to the agricultural sector. „The traditional concept of market power used by competition authorities cannot engage with th[e] new reality in which (economic) power manifests beyond price and output within a relevant market.”¹¹⁸² The traditional concept of market power is not only unfit to take into account considerations other than price and output but also unable to acknowledge and prevent the „dangers” unrelated to efficiency loss. And this is not the concept's fault but it derives from its limitedness. Of course, intermediary market participants between agricultural producers and consumers do not have the sufficient extent of market power which is necessary to have a unilateral antitrust violation found, but they have the power to significantly influence the latitude of agricultural producers in their market behaviour. This necessarily spills over and determines whether the agricultural sector and in particular smallholders and family farms can fulfil their functions beyond production—functions that are given consideration in the framework of the food sovereignty paradigm and the concept of multifunctional agriculture.

As historical experience showed in Chapter 3 of Part One regarding the US market in live animals, sectoral regulation in itself is insufficient to protect suppliers. While the consent decree on the basis of the Sherman Act between the government and the largest meat packers prevented market concentration after divestiture in the period from 1920 to 1980, as soon as it was terminated, the market started to become concentrated and even rose to a concentration level higher than before the divestiture. It shows that sector-specific regulation may lose its function in case general antitrust provisions as a strong hinterland do not support it. Sector-specific rules in force cannot forestall concentration which, however, may multiply the occurrence of anti-competitive unilateral conducts against those market participants who sectoral rules aim to protect. The key to the better functioning of agri-food markets—if the policy choice

¹¹⁸² Ioannis LIANOS–Bruno CARBALLA-SMICHOWSKI (2022) A Coat of Many Colours—New Concepts and Metrics of Economic Power in Competition Law and Economics, *Journal of Competition Law & Economics*. Available at: <https://doi.org/10.1093/joclec/nhac002> [Accessed: 12 May 2022].

has already been made that producers should be protected in the competitive process—would be to prevent further concentration of the intermediary stage (processing, wholesale, retail). It could be fulfilled *ex ante* by a stronger merger control applying to those market participants who buy agri-food products for processing and/or resale. Agri-food markets already concentrated could become more bearable for producers by sectoral rules on abuse of dominance. I am of the opinion that antitrust rules have more deterrent effect than trade regulation rules. Using the features which *Buccirossi et al.* determined as factors influencing the deterrent effect of competition regulations (sanctions and damages, financial and human resources, powers to investigate, quality of the law, independence from political influence, separation of investigative and adjudicatory power),¹¹⁸³ I render it more likely that an antitrust statute could better serve these aspects and thus could be more efficient in preventing detrimental conducts.

Abuse of dominance has no sector-specific rules which would take into consideration the unique features of the agricultural sector. Typically and generally, the business partners of agricultural producers, i.e. those to whom they sell their products, are not in a dominant position. Agricultural producers as suppliers bargain with buyers (food processors, retailers) who are not in a dominant position, therefore the protective shield of antitrust does not cover these bargains. Article 102 TFEU abuses—such as directly or indirectly imposing unfair purchase prices or other unfair trading conditions, applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, and making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage—are not interpretable, if no dominance is found.

These practices, however, are common occurrences committed against agricultural producers. No dominance—as understood in the current antitrust regime—is necessary for buyers to engage in and to be able to commit these practices. Obviously, the existence of a dominant position shall be decided on a case-by-case basis. Sectoral differences can be expressed in the respective case, but the question arises as to how far law enforcement is willing to deviate from the general (average) trend when there are only general rules, but the respective product market (sector) under investigation is very different from all other sectors. If one concentrates on the most important factor and the first indicator of dominance and accepts the 40% market share as a guide to and starting point for finding a dominant position, is it likely that an undertaking with

¹¹⁸³ Paolo BUCCIROSSI–Lorenzo CIARI–Tomaso DUSO–Giancarlo SPAGNOLO–Cristiana VITALE (2014) Deterrence in Competition Law. In: Martin PEITZ–Yossi SPIEGEL (eds.) *The Analysis of Competition Policy and Sectoral Regulation*. New Jersey: World Scientific Publishing, pp. 423–454.

25%-30% market share will be found dominant? No. Deviating with 10%-15% from the guiding principle may seem like bravery or folly, a lack of good judgment on part of the enforcer.

However, if there is a sector-specific rule giving legislative underpinning of the deviation, the situation is totally different. Nevertheless, there is no sector-specific rule regarding abuse of dominance, but it is rare to find any intermediary food buyer, be it a processor or a retailer, which is dominant in conventional terms. They need no dominance in legal sense to force suppliers into terms and conditions which are not advantageous to them at all. This power is the consequence of the unique features of agri-food markets. The ruling in EU case law that buyer power does not require direct evidence of end consumer harm is an alleviation and seems like a derogation from the narrow consumer welfare-paradigm, but this does not affect the prerequisite that dominance shall be found. It leads us to the conclusion that abuse of dominance is not a useful antitrust means in agri-food markets, because food processors and retail chains are not dominant in the conventional sense. This has brought to the fore other regulatory solutions, such as the provisions on relative market power and unfair trading practices which fall outside the area of conventional antitrust.

The third pillar of antitrust, merger control also has no sector-specific rules applying to the agricultural and food sector. That is to say, mergers and acquisitions between food companies, including processors and grocery retail chains, are assessed pursuant to general rules. This is despite the acknowledged facts that food supply chains are becoming more and more integrated vertically and their respective levels (e.g. processing and retailing) more and more concentrated horizontally.

As can be experienced, food prices increase, consumer welfare decreases, but two of the three antitrust pillars remain inactive in finding solutions for sector-specific problems. General antitrust rules, without any exception norms adopted for agriculture, are unfit to find answers to sectoral anomalies. Just as the rules on anti-competitive agreements would be inappropriate without a limited agricultural exemption to handle sector-specific features, so are the rules on abuse of dominance and merger control.

As to abuse of dominance and merger control, I aim to present my proposals jointly. In abuse of dominance cases related to agri-food markets, I aim to make a proposal with two elements. Both elements are connected to and both thresholds appeared in the merger analysis in *Carrefour/Promodès*^{1184, 1185}. I am of the opinion that if a certain market situation may raise

¹¹⁸⁴ COMP/M. 1684 – Carrefour/Promodès.

¹¹⁸⁵ See its detailed analysis: Maurice DE VALOIS TURK–Ignacio Herrera ANCHUSTEGUI (2021) *Ex Post Assessment of European Competition Policy: Buyer power in concentration cases*. Draft report prepared for the 2021 Annual

concerns to be assessed in a merger analysis, it should also do so in an abuse of dominance context, and *vice versa*.

As to abuse of dominance, it would be reasonable to consider the introduction of a lower-level intervention threshold in the form of exactly determined market shares as a first proxy regarding food retailers and processors, as it was done in several national legal systems concerning food retailers.¹¹⁸⁶ It should not be included in EU secondary law but in a Commission guideline/communication as a reference point to the Commission itself. This ‘soft’ reform—using soft law instruments instead of formal amendments to competition provisions—would fit the trends of the 21st century’s first decade when EU competition law was being reformed in all of its three pillars predominantly with guidelines.¹¹⁸⁷ As to the institutional aspect of a possible review of competition rules in agri-food markets, it would be welcome to include and give equal role to both the Directorate-General for Agriculture and Rural Development and Directorate-General for Competition.

The intervention threshold could be determined in the form of a cascading system consisting of two pillars: the market share of the buyer downstream as processor/retailer and the share of the sales of the supplier in relation to the buyer. That is to say, the threshold referring to the downstream market should be combined with assessing economic dependence of suppliers on the buyer in the upstream market. Assessing economic dependence could happen on the basis of the so-called threat point. The threat point is reached, if the buyer represents at least 22% of the sales of its supplier, which constitutes *de facto* economic dependence. While the first element referring to the downstream market is absolute in nature because it assesses the whole market in general (retailing or processing market), the second element referring to the upstream market is relative because it only assesses the relationship between the buyer and the supplier. Both rates are expressed in exact terms and provide for unambiguous legal clarity.

The cascading nature of the system could be the following. (1) A processor/retailer is presumed to be dominant, if it reaches 35% in market shares in the processing/retail market; if it reaches 35%, the threat point should not be examined. (2) A processor/retailer is presumed to be dominant, if it reaches 30% in market shares in the processing/retail market and reaches the threat point, i.e. 22%, in relation to the respective supplier. (3) A processor/retailer is presumed

Conference of the GCLC.

¹¹⁸⁶ For example, in Finland: Section 4a of No 948/2011: „An undertaking or an association of undertakings with a minimum of 30 per cent market share in the Finnish daily consumer goods retail trade shall be deemed to occupy a dominant position in the Finnish daily consumer goods market. This includes both the retail and procurement markets.”

¹¹⁸⁷ WITT 2019, p. 43.

to be dominant, if it reaches 25% in market shares in the processing/retail market and reaches twice the threat point, i.e. 44%, in relation to the respective supplier. These would be presumptions for dominance. The authority should, of course, prove that this dominant position has been abused to the detriment of the undertaking's suppliers of agri-food products.

The lowest level of dominance—25% of market shares—is based on and taken over from Recital (32) of the Merger Regulation which declares that the impediment of effective competition is not likely when the market share of the undertakings concerned does not exceed 25% either in the common market or in a substantial part of it.¹¹⁸⁸ As a rule of thumb, why not examine then the market behaviour of an undertaking with 25% market shares in an abuse of dominance context, if a post-merger entity with 25% market shares may impede effective competition?

The control of mergers and acquisitions related to undertakings engaged in buying agri-food products, in particular to food retail chains and food processors, should follow a similar approach. These numerical measures above could mean a strict but exactly determined starting point for the assessment of mergers and acquisitions. It would mean that more emphasis is put on economic dependence of suppliers on buyers post-merger caused by the respective merger/acquisition. The Commission's horizontal merger guidelines¹¹⁸⁹ does not say a lot about the assessment of mergers creating or strengthening buyer power in upstream markets. In its point 61, it concentrates on monopsony power which may bring about foreclosure effects *on the buyer's rivals* and may harm *consumer welfare*. It does not mention at all the likely impacts the merger/acquisition may have on suppliers. In its point 62, it attempts to shortly describe bargaining power against suppliers which is deemed pro-competitive because of the possible pass-on of cost reductions to consumers in the form of lower consumer prices. That is to say, the merger guidelines do not suppose that the examination should necessarily cover the relationship between the merged entity and its suppliers. It is only concerned with consumer welfare and only condemns buyer power, if it may result in increased consumer prices as a consequence of foreclosing the buyer's rivals. The sentence '[t]he Commission *may* also analyse to what extent a merged entity will increase its buyer power in upstream markets' seems soft, and it does not place emphasis on likely effects which may take place in upstream markets post-merger. Concerning agri-food markets, it would, however, be reasonable to do so in light of the policy choice of preferring agricultural policy objectives to general competition rules. Although one of

¹¹⁸⁸ EC Merger Regulation, Recital (32).

¹¹⁸⁹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 031, 05/02/2004, pp. 5–18.

the CAP objectives—to ensure that supplies reach consumers at reasonable prices—seems to favour consumers instead of producers, and a balance always needs to be found among CAP objectives, taking into account the intensive competition downstream (for example, between retail chains), I find it unlikely that provisions requiring a stricter assessment of procurement markets would result in higher consumer prices.

Expanding the reach of antitrust with this method would be a step from the narrow consumer welfare-paradigm to fairness-based antitrust in agri-food markets. However, fairness would be given an exact meaning expressed in intervention thresholds. The advantage of expanding the reach of antitrust is that it intervenes earlier than other regulation could. It intervenes before a higher level of concentration would be created, therefore it mitigates buyer power problems *ex ante* and does not give the chance for agribusinesses to get to a situation where they can abuse their buyer power.

The second food sovereignty-based alternative would leave antitrust untouched but adopt trade regulation provisions to provide better protection against disadvantageous conducts against agricultural producers. Antitrust would remain exclusively the advocate of economic efficiency like in the current paradigm, however further sectoral provisions would be adopted to provide a protective shield for farmers against conducts harmful from the standpoint of the objective of increasing their living standard. This alternative is identical with the regulation in force. The weakness of this alternative is its *ex post* nature, that is to say, antitrust does not intervene until economic efficiency in the form of consumer welfare is decreased, and it gives room for market situations harmful for producers to develop. By not preventing the creation of situations which are harmful from the perspective of agricultural policy objectives, trade regulation should be the one which ensures the protection of producers, because antitrust cannot do so due to its narrow approach. However, the possibility of trade regulation provisions to correct detrimental market situations for farmers is limited because there is no regulation to catch the root of the problem.

The advantage and disadvantage of these alternatives can be illustrated as follows. By expanding the reach of antitrust regarding abuse of dominance and merger control in agri-food markets, we attempt to hinder the murderer from buying a weapon. Leaving antitrust untouched and waiting for trade regulation to do the work mean that the murderer already has a weapon at his disposal and we attempt to discourage him to use that weapon. From the perspective of agricultural policy, that weapon is buyer power, be it monopsony or bargaining power, abused or misused against agricultural producers.

By lowering the intervention threshold related to abuse of dominance and merger control, food sovereignty-based competition policy prevents the creation of buyer power to a greater extent than the current antitrust paradigm. With this, from an agricultural policy perspective, producers would be less vulnerable to unfair trading practices, because the root cause of the problem is attempted to be handled.

It would mean a step towards fairness-based competition policy in agri-food markets. The whole issue is a series of policy choices. If competition law did not want to be concerned about sustainability, it could do that by saying that environmental protection is not about economic efficiency and economically efficient business conducts do not necessarily lead to sustainable solutions, but the latter is not a problem for competition law to deal with. And still, it has taken a different perspective. So why does it insist on excluding agricultural policy objectives from its assessment?

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Case T-128/98 – Judgment of the Court of First Instance (Third Chamber) of 12 December 2000: Aéroports de Paris v Commission of the European Communities, ECLI:EU:T:2000:290

Case 123/83 – Judgment of the Court of 30 January 1985: Bureau national interprofessionnel du cognac v Guy Clair, ECLI:EU:C:1985:33

Case 61/80 – Judgment of the Court of 25 March 1981: Coöperatieve Stremsel- en Kleurselfabriek v Commission of the European Communities, ECLI:EU:C:1981:75

Case T-61/89 – Judgment of the Court of First Instance (Second Chamber) of 2 July 1992: Dansk Pelsdyravlerforening v Commission of the European Communities, ECLI:EU:T:1992:79

Judgment of the United States Court of Appeals, Second Circuit of 27 June 1974: Alfred Dunhill, Ltd. v. Interstate Cigar Co.

2. Germany

Fundamental Law of the Republic of Germany [*Grundgesetz für die Bundesrepublik Deutschland*]

Act Against Restraints of Competition [*Gesetz gegen Wettbewerbsbeschränkungen (GWB)*]

Act Against Unfair Competition [*Gesetz gegen den unlauteren Wettbewerb (UWG)*]

Agricultural Act [*Landwirtschaftsgesetz (LwG)*]

Act on the Development of Market Structure in the Agricultural Sector [*Agrarmarktstrukturgesetz (AgrarMSG)*]; later it was amended and renamed: Act on the Strengthening of Organisations and Supply Chains in the Agricultural Sector [*Gesetz zur Stärkung der Organisationen und Lieferketten im Agrarbereich (Agrarorganisationen-und-Lieferketten-Gesetz – AgrarOLkG)*]

Act on the Protection of Trade Secrets [*Gesetz zum Schutz von Geschäftsgeheimnissen (GeschGehG)*]

Decision of 3 July 2014 of the Bundeskartellamt in the case no. B2-58/09 against EDEKA Zentrale AG & Co. KG

3. Hungary

Act V of 1923 on Unfair Competition [*1923. évi V. törvény a tisztességtelen versenyről*]

Act XX of 1931 on Agreements Regulating Economic Competition [*1931. évi XX. törvény a gazdasági versenyt szabályozó megállapodásokról*]

Act LXXXVI of 1990 on the Prohibition of Unfair Market Conduct [*1990. évi LXXXVI. törvény a tisztességtelen piaci magatartás tilalmáról*]

Act LVII of 1996 on the Prohibition of Unfair Market Conduct and Competition Restriction
[1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról]

Act LXXXI of 1996 on Corporate and Dividend Tax [1996. évi LXXXI. törvény a társasági adóról és az osztalékadóról]

Act XVI of 2003 on Agricultural Market Regulation [2003. évi XVI. törvény az agrárpiaci rendtartásról]

Act CLXIV of 2005 on Trade [2005. évi CLXIV. törvény a kereskedelemről]

Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices Against Consumers
[2008. évi XLVII. törvény a fogyasztókkal szembeni tisztességtelen kereskedelmi gyakorlat tilalmáról]

Act XCV of 2009 on the Prohibition of Unfair Distribution Practices Against Suppliers in Relation to Agricultural and Food Products [2009. évi XCV. törvény a mezőgazdasági és élelmiszeripari termékek vonatkozásában a beszállítókkal szemben alkalmazott tisztességtelen forgalmazói magatartás tilalmáról]

Act CXXVIII of 2012 on Interbranch Organisations and Certain Aspects of Agricultural Market Regulation [2012. évi CXXVIII. törvény a szakmaközi szervezetekről és az agrárpiaci szabályozás egyes kérdéseiről]

Act CLXXVI of 2012 on the Amendment of Act CXXVIII of 2012 on Interbranch Organisations and Certain Aspects of Agricultural Market Regulation [2012. évi CLXXVI. törvény a szakmaközi szervezetekről és az agrárpiaci szabályozás egyes kérdéseiről szóló 2012. évi CXXVIII. törvény módosításáról]

Act CXII of 2014 on the Amendment of Act CLXIV of 2005 on Trade in Relation to the Operation of Undertakings in Order to Achieve Fair Market Conduct [2014. évi CXII. törvény a kereskedelemről szóló 2005. évi CLXIV. törvénynek a tisztességes piaci magatartás megvalósulása érdekében a vállalkozások működésével összefüggő módosításáról]

Act LXXVIII of 2015 on the Amendment of Act LVII of 1996 on the Prohibition of Unfair Market Conduct and Competition Restriction as well as of Certain Provisions Relating to the Proceedings of the Hungarian Competition Authority [2015. évi LXXVIII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvény, valamint a Gazdasági Versenyhivatal eljárásaival összefüggő egyes törvényi rendelkezések módosításáról]

Act XCVII of 2015 on Certain Aspects of the Organisation of Agricultural Product Markets, Producer and Interbranch Organisations [2015. évi XCVII. törvény a mezőgazdasági termékpiacok szervezésének egyes kérdéseiről, a termelői és a szakmaközi szervezetekről]

Act LIV of 2018 on the Protection of Trade Secret [2018. évi LIV. törvény az üzleti titok védelméről]

Act CXL of 2020 on the Amendment of Act CLXIV of 2005 on Trade [2020. évi CXL. törvény a kereskedelemről szóló 2005. évi CLXIV. törvény módosításáról]

4. United States

Sherman Act of 1890

Clayton Act of 1914

Federal Trade Commission Act of 1914

Packers and Stockyards Act of 1921

Perishable Agricultural Commodities Act of 1930

Lanham Act of 1946

Unfair Trade Practices Affecting Producers of Agricultural Products Act of 1968

Hart-Scott-Rodino Antitrust Improvements Act of 1976

Related publications of the author

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DECLARATION

I, dr. Martin Milán Csirszki, declare that the submitted PhD thesis is the result of my own work, the references in the thesis are clear and complete.

I have uploaded my academic publications to the MTMT repository (MTMT ID: 10069735). I enclose a printout of the list of publications that include the references.

Miskolc, 3 October 2022

dr. Martin Milán Csirszki