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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

Theses of the PhD research

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Contents

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I. Subject and aims

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 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

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[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.

[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

cure the anomalies still appear.[6] Perhaps the question should be posed in a different way. Does and can regulating competition[7] have the function, or rather the power, to mitigate the market failures in agri-food markets?

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, so should the agriculture-specific competition rules be accepted. It is manifest that competition policy does not provide primary means to fight for sustainability[8] 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.

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 pioneering role in antitrust. Germany is involved because in Europe it has significantly

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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.

[8] 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.

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.[9] As a consequence of industrialised agriculture and globalised markets, many atomised agricultural producers as well as small and medium-sized agricultural enterprises among these hundreds of millions of people are vulnerable against the trading practices of giant agricultural and food corporations, including food retail chains.

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 retailing but also processing level. Buyer power is not considered a problem unanimously.[10] 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.

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[9] 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.

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

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.[11] 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. 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.

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.

II. 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,

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

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.

In the thesis, sector-specific antitrust and trade regulation rules applying to agri-food products constitute the umbrella term ʻagri-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 ʻantitrust 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.

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 ʻagri-food law' and ʻcompetition 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 ʻcompetition 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 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.

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",[12] 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 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 sytem 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 unambigously European (German) competition policy framework, i.e. ordoliberalism, with food sovereignty, and not a US one, such as the Chicago Scool 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.[13]

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[12] 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. 432.

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

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 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.

III. Methods

The methodology used throughout the thesis is primarily the analysis of authoritative texts (legal sources, such as legislation and case law),[14] 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,

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

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

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 to collect and order an area of law before it is analysed in detail.[15] 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 nature[16]—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."[17] 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."[18] 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 context[19] which 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

[15] 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.

[16] 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.

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

[18] 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.

[19] Ioanna TOURKOCHORITI (2017) Comparative Rights Jurisprudence: An Essay on Methodologies. Special Issue - Comparative Law, *Law and Method* [Online], p. 2. Available at: https://doi.org/10.5553/REM/.000030.

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.[20] 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".[21] 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.

IV. Research results

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

[20] Geoffrey SAMUEL (2014) *An Introduction to Comparative Law Theory and Method*. Oxford: Hart Publishing, pp. 57–58, 65–120.
[21] Ignacio Herrera ANCHUSTEGUI (2017) *Buyer Power in EU Competition Law*. Paris: Concurrences, p. 12.

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.

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.[22]

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

[22] TÓTH Tihamér (2020) *Uniós és magyar versenyjog [EU and Hungarian competition law]*. Budapest: Wolters Kluwer, p. 48.

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 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.

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"[23], 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.[24] 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.[25] 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 activitity 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 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).

I aim 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 strength of the food sovereignty-based competition policy drawn up lies in the fact

[23] Henk RENTING–Walter A.H. ROSSING–Jeroen C.J. GROOT–Jan Douwe VAN DER PLOEG–Catherine LAURENT–Daniel PERRAUD–Derk Jan STOBBELAAR–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.

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

[25] WILLIAM D. SCHANBACHER (2019) *Food as a Human Right – Combatting Global Hunger and Forging a Path to Food Sovereignty*. Santa Barbara: Praeger Security International, pp. 49–50.

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.[26] 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.[27] 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

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

[27] 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.

„*[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 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*."[28]

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 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.

As historical experience showed 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

[28] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Recital (7).

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 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),[29] 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 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

[29] 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.

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*[30].[31] I am of the opinion that if a certain market situation may raise 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 concernig food retailers.[32] 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.[33] 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

[30] COMP/M. 1684 – Carrefour/Promodès.

[31] 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 Conference of the GCLC.

[32] 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."

[33] 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), p. 43.

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 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.[34] 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 acquisitons. 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 guidelines[35] 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 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

[34] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Recital (32).

[35] 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.

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.

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?

V. List of publications related to the topic

Martin Milán Csirszki (2022) Is There Room for Food Sovereignty Considerations in EU Competition Policy? A Theoretical Framework, *Croatian Yearbook of European Law and Policy* (in press).

Martin Milán Csirszki (2022) The Comparison of the US and EU Agricultural Antitrust Exemption, *Yearbook of Antitrust and Regulatory Studies* (not yet published but accepted).

Martin Milán Csirszki (2022) The Early Stage of US Antitrust and Trade Regulation in the Agricultural Sector, *Journal of Agricultural and Environmental Law*, 17(32), pp. 27–41; https://doi.org/10.21029/JAEL.2022.32.27.

Martin Milán Csirszki (2022) Agrárversenyjog az Európai Unióban, *Jogtudományi Közlöny*, 77(4), pp. 166–174.

Martin Milán Csirszki (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. 58–68; https://doi.org/10.5281/zenodo.5552897.

Martin Milán Csirszki (2021) Unfair trading practices in the agriculture and food supply chain – comparing the 2019/633 EU directive with the Hungarian regulation, *European Integration Studies*, 17(1), pp. 191–197.

Martin Milán Csirszki (2021) Az agrárjog és a versenyjog kapcsolódási pontjai, *Miskolci Jogi Szemle*, 16(1), pp. 133–148.

Martin Milán Csirszki (together with Hajnalka Szinek Csütörtöki and Katarzyna Zombory) (2021) Food Sovereignty: Is There an Emerging Paradigm in V4 Countries for the Regulation of the Acquisition of Ownership of Agricultural Lands by Legal Persons? *Central European Journal of Comparative Law*, 2(1), pp. 29–52; https://doi.org/10.47078/2021.1.29-52.

Martin Milán Csirszki (2021) The applicability of Parsons' action system to the food system, *Journal of Agricultural and Environmental Law*, 16(30), pp. 40–58; https://doi.org/10.21029/JAEL.2021.30.40.

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Martin Milán Csirszki (2020) Az Amerikai Egyesült Államok versenyjogi szabályozásának történeti áttekintése, különös tekintettel a mezőgazdasági szövetkezetek helyzetére, *Jogelméleti Szemle*, 21(1), pp. 212–221.