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# “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

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## Abstract

Why does the European Union (EU) law allow for special treatment of the agricultural sector? Which exceptions exist in applying the EU competition rules in this sphere, and how has their interpretation evolved? How do these derogations address the fragmented nature of the agricultural sector and strengthen farmers’ bargaining powers, and what are the justifications for doing so? These are the questions that the current article seeks to answer, by analyzing the specific constitutional constellation of the EU’s agricultural policy alongside its competition rules. This article critically analyzes how derogations in the field of agriculture have developed in a market-oriented way, yet an unresolved tension remains with the objectives of the Treaty’s competition rules. This article revisits this tension and its underlying legal framework by taking account of the risk of political capture as well as of relevant socioenvironmental externalities, most notably environmental and social sustainability, which could shape its transformation in the future.

## Keywords

cartels, agriculture, Common Agricultural Policy, unfair trading practices

## I. Introduction

In 2012, the Hungarian Competition Authority (GVH) started an investigation into melon producers and several trade associations, the Hungarian Melon Association and Hungarian Interbranch

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Organization (IBO) for fruits and vegetables,<sup>1</sup> who together had allegedly agreed on a “fair” minimum price for watermelons produced in Hungary, as well as on restrictions to the distribution of imported watermelons. The alleged agreement had been initiated by the Hungarian Ministry for Rural Development, with the aim of securing a fair standard of income for farmers. After the GVH started its investigation, the Hungarian Parliament adopted an amendment to the applicable domestic legalization on IBOs,<sup>2</sup> which thereafter exempted otherwise restrictive agreements in the agricultural sector from the general prohibition on anticompetitive agreements contained in Hungarian competition law. Although this move was investigated by the European Commission, the latter merely raised concerns about the fact that the adopted law prevented the national competition authority (NCA) from sanctioning cartels on agricultural products. The Commission did, however, not question the underlying premise of exemption itself and eventually dropped the case.

Although this episode is, first and foremost, an example of political capture within the Hungarian competition enforcement system, the case raises fundamental questions that are equally relevant to the application of the European Union (EU) and national competition rules across the various Member States. Why does EU law allow for special treatment of the agricultural sector and what exceptions, in particular, exist to the application of the competition rules? How do the derogations found within EU law seek to remedy the fragmentation of farmers and strengthen their bargaining powers? What are the justifications for these derogations, and how has their interpretation evolved within the current EU law and policy framework? Tackling these complex questions—in short, when might ostensibly anticompetitive behavior be considered permissible in the agricultural sector, and on what basis?—is the focus of this article.

Ever since the inception of the Common Agricultural Policy (CAP) in 1962, the EU legislator has sought to find ways to reinforce farmers’ bargaining power, while endeavoring to reconcile such efforts with the EU competition rules. The perceived “special” nature of the agricultural sector underlies a fear that, if agricultural production and markets are left unregulated, they will fail to deliver a secure and safe supply of food at stable and reasonable prices, which will in turn lead to a decline of farm incomes and rural communities as well as natural resources and ecosystems. Accordingly, within the EU, agriculture has been subject to constant market intervention in the form of direct subsidies, rural development programs, and specific interventions in times of crisis.<sup>3</sup> Over time, however, this governance approach has been challenged by, among other factors, the increasing internationalization of trade, the growth of neoliberal policies and institutions, and the privatization of agricultural market regulation that increasingly requires a market-oriented approach. Thus, as market liberalism gained political momentum in the 1980s, the EU law and policy of agriculture similarly developed in a more market-oriented way. There is an inherent tension, however, between the notion that the agriculture sector merits special treatment yet that it also requires ever-greater market orientation.

To understand these developments, and the remaining unsolved tensions, it is necessary to analyze the specific constitutional constellation of the CAP and the EU competition rules. As the Court of Justice has recognized, the CAP enjoys precedence over the objectives of the Treaty’s competition rules.<sup>4</sup> The CAP is not a competition-free zone, however, and the agriculture sector has been increasingly subject to market mechanisms. Nonetheless, the CAP incorporates both general and specific derogations from the application of the EU competition rules. One of the main reasons for these exemptions, and indeed an explicit objective of the CAP itself pursuant to Article 39 of the Treaty

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1. Case Vj-62/2012. Gazdasági Versenyhivatal.

2. Act No. CLXXVI of 2012 on interbranch organizations and on certain issues of the regulation of agricultural markets adopted on Nov. 19, which amended Act CXXVIII of 2012.

3. A discussion of the main features of the CAP can be found on the Commission’s website at [http://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance\\_en](http://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en).

4. Case C 671/15, APVE and Others, EU:C:2017:860, para. 37.

on the Functioning of the European Union (TFEU), is to strengthen the bargaining power of farmers and their associations and to guarantee the fair standards of living and reasonable consumer prices. The most recent Regulation 1308/2013 (CMO), accordingly, specifically provides the instruments for such cooperation for all agricultural sectors. Yet this legislation has created even greater legal complexity between agricultural and competition law, and greater legal uncertainty, by preserving a mix of old and new policies that coexist in an unbalanced way. The different concepts underlying EU competition law and the agricultural derogations in the CMO Regulation thus give rise to regulatory confusion and uncertainty in interpretation. The lack of guidance has discouraged farmers and other private actors from making use of the relevant derogations and has encouraged NCAs to adopt diverging approaches to the interpretation of the agricultural exemptions.

Beyond the overarching tension between these different policy fields, this article reveals another layer of inconsistency. This relates to the transformation of the CAP itself as a result of, on the one hand, its adaptation to an institutional environment with liberalized markets and transnational value chains and, on the other, pressing social and environmental concerns such as sustainability, climate change, biodiversity, or food security. As the CAP has become subject to market rules to a greater extent, it has been opened up to existing EU legal mechanisms, such as a weighing against other EU policy objectives under the proportionality test developed in the context of the internal market rules, and the Treaty's linking clauses. However, these legal mechanisms have not (yet) been operationalized in a systematic way in EU competition law. Additionally, since 2004, EU competition law has operated within a narrowly defined analytical framework focused on price and the consumer welfare standard, that has so far proved relatively inflexible in terms of the integration of noneconomic concerns. This inconsistency surfaces, in particular, with regard to a new layer of EU law, namely, Directive 2019/633, which has been adopted to improve the bargaining power of agricultural producers *vis-à-vis* other market participants by prohibiting specific types of unfair trading practices.

This article will first map and critically analyze the tensions that have emerged between the special treatment granted to the agricultural sector under EU law and the EU competition rules. Second, it will assess how derogations in the field of agriculture have developed, over time, in a more market-oriented way, while maintaining an unresolved tension with the objectives of the Treaty's competition rules. The aim of this article is to revisit this tension and its underlying legal framework, by taking account of the risk of political capture as well as of relevant socioenvironmental externalities, most notably environmental and social sustainability, which could shape its transformation in the future. This article is structured into five sections. Through the prism of the *Hungarian Watermelon* cartel case, Section I introduces the fundamental questions concerning farmers' bargaining power in the EU, and how EU agricultural and competition policy each frame this issue. Section II investigates the unique features of agriculture as an economic sector that merit special policy treatment and explicates the specific economic and social justifications for collective action to strengthen farmers' bargaining power. Against this background, Section III analyzes the special constitutional status of agriculture in EU law and how EU competition rules are applied to the agricultural sector. Section IV extends this analysis to the recently adopted EU law concerning unfair trade practices (UTPs) that address power imbalances in the food sector. It demonstrates how this new layer of EU law further complicates the existing tension between agricultural policy and competition law within the internal market. Section V closes with some brief conclusions.

### A. The Hungarian Watermelon Case: Exempting Cartels in the Agricultural Sector

The *Hungarian Watermelon* case stands out, in the context of the GVH's enforcement practice since 2010, as the most criticized example of allegedly anticompetitive practices being granted exemption

from the enforcement of competition rules through legislative intervention.<sup>5</sup> Yet the case does not stand alone in the EU. The imbalance in bargaining power between farmers and purchasers has led farmers, for many years, to consider organizing cartels and to use collective action and horizontal cooperation to achieve common interests related to their agricultural businesses.<sup>6</sup> Strengthening the bargaining power of farmers and ensuring a fair and competitive marketplace for agricultural goods are important objectives of agricultural policies, both inside and outside of the EU. Producer cooperation and cooperatives allow farmers to create and appropriate a higher share of the added value of the products sold through the supply chain and to get better access to agricultural inputs. Cooperation between farmers has been seen as a way to modernize and rationalize the agricultural sector, improving efficiency and reinforcing the bargaining position of farmers in the supply chain. However, cooperation between competitors raises the question of its compatibility with competition law. Under certain strict conditions, producer organizations (POs),<sup>7</sup> farmers' associations, cooperatives, or IBOs<sup>8</sup> can work together and cooperate for the attainment of the CAP objectives. In fact, the Court of Justice has recognized the benefits of cooperatives and has stated that their creation does not itself raise competition law concerns.<sup>9</sup>

The *Hungarian Watermelon* case, however, developed in a rather particular way. After the GVH started its investigation, the Hungarian Parliament adopted an amendment to the Act on IBOs.<sup>10</sup> This amendment stated that, subject to the approval of the Minister for Agriculture and Rural Development, an otherwise restrictive agreement in the agricultural sector could be exempted from the prohibition of anticompetitive agreements under Hungarian competition law. The Minister is required to ensure that the restrictive agreement guarantees a fair income for the producers and that all market actors are allowed to join.<sup>11</sup> In addition, the amendment stated that the GVH must (a) refrain from imposing a fine for anticompetitive practices that violate Article 11 of the Hungarian Competition Act or Article 101 TFEU in respect of agricultural products and, instead, (b) issue a demand for the involved parties

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5. Case Vj-62/2012. For a more extensive discussion, see Katalin J. Cseres, *Rule of Law Challenges and the Enforcement of EU Competition Law, A Case-Study of Hungary and its Implications for EU Law*, 14 COMP. L. REV. 75-101 (2019).
  6. Incentives to act collectively relate to commercial or other benefits (landscapes, sustainability, climate change, and animal welfare) that are achieved less efficiently—or not at all—by acting alone. UNIVERSITY WAGENINGEN, SUPPORT FOR FARMERS' COOPERATIVES, REPORT TO EUROPEAN COMMISSION, Nov. 2012, at 10, [http://ec.europa.eu/agriculture/sites/agriculture/files/external-studies/2012/support-farmers-coop/fulltext\\_en.pdf](http://ec.europa.eu/agriculture/sites/agriculture/files/external-studies/2012/support-farmers-coop/fulltext_en.pdf) (last visited March 13, 2020).
  7. Producer organizations (POs) or their associations help farmers reduce transaction costs and collaborate when processing and marketing their products. Therefore, POs strengthen farmers' bargaining power through, for example, concentrating supply or improving marketing. The EU acknowledges the special role played by POs and, as a result, they can ask for formal recognition from the EU country in which they are based. POs take different legal forms, including agricultural cooperatives.
  8. Farmers and processors or traders in the supply chain can come together in interbranch organizations (IBOs). Those organizations adopt measures to govern the chain, without themselves being involved in production, processing, or trade. IBOs serve as a platform for dialogue, promoting best practices and market transparency. EU countries may also recognize IBOs if the IBO is made up of representatives of the production sector (i.e., farmers) or representatives of at least one other part of the agri-food supply chain (such as those operating in processing or the distribution of food products). Under certain conditions, the agreements, decisions, and practices adopted by IBOs can be exempted from EU competition rules. [https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/market-measures/agri-food-supply-chain/producer-and-interbranch-organisations\\_en](https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/market-measures/agri-food-supply-chain/producer-and-interbranch-organisations_en).
  9. Case C-399/93, *Oude Luttikhuis*, EU:C:1995:434, paras. 10–16.
  10. Act No. CLXXVI of 2012 on IBOs and on certain issues of the regulation of agricultural markets adopted on Nov. 19, which amended Act CXXVIII of 2012.
  11. Agricultural Organizations Act, Article 18/A(1) provided: "The infringement of Section 11 of the Competition Act cannot be established in case of agricultural products if the distortion, restriction or prevention of competition resulting from an agreement according to Section 11 of the Competition Act does not exceed what is necessary for an economically justified, fair income, provided that the actors of the market affected by the agreement are not debarred from benefiting from such income and that Article 101 TFEU was not applied."

to act in compliance with the applicable laws. If such parties fail to comply within the deadline set by the GVH, the GVH is entitled to impose a fine.

Similar laws exist in other Member States. In Germany, for example, Article 28 of its domestic Competition Act exempts agreements between agricultural producers, and agreements and decisions of associations of agricultural producers and federations of such associations, which concern either the production or sale of agricultural products, or the use of joint facilities for the storage, treatment, or processing of agricultural products. Crucially, however, the exemption does not apply to agreements that maintain resale prices and exclude competition.<sup>12</sup>

By contrast, the amendment of the Hungarian law has had far-reaching consequences for the enforcement practice of the GVH more broadly. In the *Watermelon* case, the GVH terminated its proceedings after the Minister found that the conditions for the exception were met.<sup>13</sup> However, the GVH also closed its investigation in other agricultural cartel cases,<sup>14</sup> even though it had vigorously enforced the cartel provision of the competition rules in the sector before 2012. In fact, price-fixing and market-sharing decisions of agricultural associations had previously been among the most frequent type of cartel cases pursued by the GVH.<sup>15</sup>

This newly neutered approach stands in marked contrast to other competition authorities within the EU. While there have been cases in other Member States and at EU level where antitrust investigations in the agricultural sector were closed without the findings of infringement or issuance of a fine, most of these decisions were taken due to lack of evidence.<sup>16</sup> The European Competition Network Food Report of 2012 showed that the food sector is one where NCAs have been most active. In the period 2004–2011, NCAs investigated more than 180 cases, most of which were horizontal agreements.<sup>17</sup> Indeed, the same Report shows that, in the same period, the GVH investigated and closed 11 cases, a relatively high number that put Hungary within the eight most active enforcers among the Member States.<sup>18</sup> According to the Commission's 2018 report on the application of the EU competition rules to the agricultural sector, however, Hungary investigated only one single case in the agricultural sector in the period between 2012 and 2017.<sup>19</sup>

Despite fierce criticism from legal scholars,<sup>20</sup> international organizations,<sup>21</sup> and by the GVH itself,<sup>22</sup> the Commission did not investigate the exemption as such. Instead, it focused solely on the

12. Act against Restraints of Competition (German Competition Act—GWB). Last amended by Article 10(9) of the Act of Oct. 30, 2017.

13. Case Vj-62/2012, paras. 13–15, 13–15, 42–46, and 56–57.

14. Such as in the *Sugar* cartel, in which the Hungarian Competition Authority (GVH) alleged that sugar producers had coordinated their market behavior with respect to prices, divided their industrial and retail purchasers, and shared information related to the quantities sold: see Case Vj-50/2009.

15. See Cases Vj-199/2005 Egg cartel (2006), Vj-69/2008 Wheat mill products I (2010); Vj-89-2003/58 Hunting cartel (2004).

16. EUROPEAN COMMISSION, STAFF WORKING DOCUMENT ACCOMPANYING THE DOCUMENT REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL. THE APPLICATION OF THE UNION COMPETITION RULES TO THE AGRICULTURAL SECTOR (COM(2018)706 final), [https://ec.europa.eu/competition/sectors/agriculture/staff\\_working\\_paper.pdf](https://ec.europa.eu/competition/sectors/agriculture/staff_working_paper.pdf), p. 41.

17. EUROPEAN COMPETITION NETWORK, REPORT ON COMPETITION LAW ENFORCEMENT AND MARKET MONITORING ACTIVITIES BY EUROPEAN COMPETITION AUTHORITIES IN THE FOOD SECTOR 21 (May 2012), [http://ec.europa.eu/competition/ecn/food\\_report\\_en.pdf](http://ec.europa.eu/competition/ecn/food_report_en.pdf).

18. *Id.*

19. COMMISSION STAFF WORKING DOCUMENT, ACCOMPANYING THE DOCUMENT REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL THE APPLICATION OF THE UNION COMPETITION RULES TO THE AGRICULTURAL SECTOR 33 (COM(2018) 706 final).

20. Balázs Csépai, *The Ceasefire Is Over*, 36 EUR. COMP. L. REV. 404–405 (2015); and Tihámér Tóth, *The Fall of Agricultural Cartel Enforcement in Hungary*, 36 EUR. COMP. L. REV. 364–366 (2015).

21. Álvaro Pina, *Enhancing Competition and the Business Environment in Hungary*, OECD ECONOMICS DEPARTMENT WORKING PAPERS 1123 (2014), 16.

22. Vj-62/2012 Watermelon (2013), paras. 70–72.

provisions that prevented the GVH from imposing fines where the agreement affected trade between Member States—a limitation that would appear to be directly at odds with the requirements of Article 5 of Regulation 1/2003. The Commission issued a reasoned opinion, requesting Hungary to ensure effective enforcement of competition law regarding agricultural products and to comply with its competition law obligations under EU law.<sup>23</sup> Under threat of a possible infringement procedure, the Hungarian Competition Act was amended in 2015. Its new Article 93/A states that the GVH may impose sanctions, including fines, where an agreement infringes EU competition law.<sup>24</sup> The Commission accordingly closed the case without further action.

However, the amended Article 93/A of the Hungarian Competition Act still maintains a broad exemption for agricultural products from the cartel prohibition of the same Act (i.e., the Hungarian equivalent of Article 101 TFEU), subject to a proportionality and necessity test linked to fair incomes for farmers. The amendment leaves the determination of whether these conditions are met to a political actor, namely, the Minister responsible for agricultural policy. This raises the question as to why the Commission did not address the “substance” of the exemption but instead linked its assessment to concerns regarding the effective enforcement of EU competition law and the duty of loyal cooperation. It also raises broader questions of the legal, economic, or social justifications for intervening in the economic relationships of market participants within the agricultural sector and the operation of EU law derogations from the application of the competition rules, such as the general derogation in Article 101 (3) TFEU, and most notably, specific derogations laid down in the CMO Regulation 1308/2013.

Since its inception, one of the key objectives of the CAP has been to provide a counterweight to the fragmentation of agricultural producers. The CAP actively promotes organization among farmers and collective action through POs and associations of POs (APOs). EU legislation has established a framework for POs by setting out rules on the recognition of POs in Member States and by providing for certain legal privileges including derogations from competition law.<sup>25</sup> Still, the special status of agriculture in EU law and policy, and its interaction with EU competition law, does not present a clear picture of what agricultural producers are allowed to do collectively. The next sections will map and analyze the existing EU legal framework and scrutinize how these rules reconcile the conflicting goals of these two legal areas.

## II. Characteristics of the Agricultural Sector and Economic and Social Justifications for Collective Action

Agriculture is an economic sector with unique features, which arguably deserves a special policy treatment for the following reasons. First, agricultural producers face numerous uncertainties and risks

23. EUROPEAN COMMISSION, APRIL INFRINGEMENTS PACKAGE: MAIN DECISIONS (Press Release of Apr. 16, 2014), [https://europa.eu/rapid/press-release\\_MEMO-14-293\\_en.htm](https://europa.eu/rapid/press-release_MEMO-14-293_en.htm). In this opinion, the Commission emphasized that, since 2004, the Commission and NCAs share parallel competences for the enforcement of EU competition law. They cooperate in the European Competition Network (ECN) to exchange information and inform each other of proposed decisions to ensure an effective and consistent application of EU competition rules.

24. Article 93/A of the HCA explicitly stipulates that the provisions that regulate the specificities of agriculture and that were originally part of Act CXXVIII of 2012 on agricultural associations and on the regulation of certain issues concerning the agricultural markets (Act on IBOs) are only applicable if the primacy of the competition rules of the EU do not prevail. Article 93/A.(5) states that paragraphs (1)–(4) shall only apply to a case, if the necessity of the application of Article 101 of the TFEU does not arise. The necessity of the application of Article 101 of the TFEU shall be established by the GVH in its competition supervision proceeding pursuant to Article 3(1) of Regulation 1/2003, before making the final resolution. *See* GVH, ANNUAL REPORT (2015), [http://www.gvh.hu/en//data/cms1035410/gvh\\_ogy\\_pb\\_2015\\_a.pdf](http://www.gvh.hu/en//data/cms1035410/gvh_ogy_pb_2015_a.pdf).

25. EUROPEAN COMMISSION, ENHANCING THE POSITION OF FARMERS IN THE SUPPLY CHAIN. REPORT OF THE AGRICULTURAL MARKETS TASK FORCE BRUSSELS (Nov. 2016), [https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/farming/documents/amtf-report-improving-markets-outcomes\\_en.pdf](https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/farming/documents/amtf-report-improving-markets-outcomes_en.pdf).

due to unpredictable weather conditions, climate change, and unpredictable plant and animal diseases. The amount and quality of output from agriculture from a given set of inputs are typically not known with certainty. There are long production breaks due to the biological processes on which agricultural production is based. Accordingly, production decisions have to be taken in advance, with limited knowledge of final outcomes, and in a possibly changing market situation.

Moreover, even in a growing economy, farm incomes remain chronically low.<sup>26</sup> Agricultural production is, in general, highly fragmented, comprising mainly small-scale food producers who are responsible for most of the food consumed worldwide and for most of the investment made in agriculture. In recent years, however, large-scale agriculture has begun to replace smallholders, while an increasing amount of the food produced by small-scale farmers is integrated into long and complex supply chains. Long food chains increase the instability and complexity of the food system. In fact, the longer the chain, the more coordination that is needed.<sup>27</sup> The fact that European agriculture is increasingly integrated into global markets also implies greater risks of market instability and increased price volatility. The consequence of reduced market intervention in the EU can be lower price levels, which affect farmers' incomes in the longer run and may undermine their very economic viability. There is concern that farmers, who are generally fragmented as a group and who are now less supported by policy tools that used to sustain producer prices in the past, have become the main shock absorber in the supply chain in relation to risks such as price volatility or prolonged periods of low prices.<sup>28</sup>

In addition, the past years have witnessed fundamental transformation of the global food system by various mergers, acquisitions, and consolidations. Concentration is taking place at the level of supermarkets and other retailers,<sup>29</sup> while the farmers' share is diminishing, because the agricultural sector is so fragmented compared to other sectors that are better organized and have therefore stronger bargaining power.<sup>30</sup>

The economic reason for the exceptional treatment of the agricultural sector is, accordingly, based on the view that applying the unadulterated market mechanism and the competition rules to agricultural products would lead to an inefficient allocation of resources, with especially negative effects on farmers' incomes.<sup>31</sup> The length and the degree of complexity of food supply chains depends upon the product and market characteristics. The divergences in concentration between the different supply chain levels create imbalances in bargaining power and sometimes in buyer power.<sup>32</sup> The high perishability of agricultural products in general, the technological inability to store them for long, and the

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26. Carsten Daugbjerg & Peter H. Feindt, *Post-exceptionalism in Public Policy: Transforming Food and Agricultural Policy*, 24 J. EUR. PUB. POL'Y 1568 (2017).

27. Food chains are long due to the expansion of distance, both geographically and in terms of democratic control. FAIR TRADE ADVOCACY OFFICE, EU COMPETITION LAW AND SUSTAINABILITY IN FOOD SYSTEMS: ADDRESSING THE BROKEN LINKS (Feb. 2019), [http://www.responsibleglobalvaluechains.org/images/PDF/FTAO\\_EU\\_Competition\\_Law\\_and\\_Sustainability\\_in\\_Food\\_Systems\\_Addressing\\_the\\_Broken\\_Links\\_2019.pdf](http://www.responsibleglobalvaluechains.org/images/PDF/FTAO_EU_Competition_Law_and_Sustainability_in_Food_Systems_Addressing_the_Broken_Links_2019.pdf).

28. FAIR TRADE ADVOCACY OFFICE, *supra* note 27, at 22.

29. The increase in the retailers' market share has a significant impact on the structure of the overall food chain, not only in terms of survival of small-scale farming but also labor conditions, the foreclosure of local grocery stores, and the environmental implications connected to a shift toward long value chains. FAIR TRADE ADVOCACY OFFICE, *supra* note 27, at 22.

30. This view was also prominent in EP resolutions and reports on the prospects of the CAP reform. PARLIAMENT RESOLUTION OF 7 SEPTEMBER 2010 ON FAIR REVENUES FOR FARMERS: A BETTER FUNCTIONING FOOD SUPPLY CHAIN IN EUROPE (2009/2237(INI)), <http://www.europarl.europa.eu/sides/getDoc.do? type=TA&reference=P7-TA-2010-0302&language=EN&ring=A7-2010-0225>.

31. Kai Purnhagen, *The End of Agricultural Exceptionalism in EU Free Movement Law and Competition Law after Lisbon?* WAGENINGEN WORKING PAPERS OF LAW AND GOVERNANCE No. 13/2019.

32. The growing physical and economic distance between farmers and consumers led to incomplete supply and demand information, which makes it increasingly difficult for individual farmers to make accurate market predictions before entering into production decisions for the next harvest.



absence of efficient transportation can leave individual farmers dependent on one or a few handlers (processors and distributors). This position has often been subject to abuse by the better organized and more concentrated middlemen.<sup>33</sup> The atomization of the agricultural level created difficult economic situations at times of oversupply. Moreover, farmers were many and scattered, isolated from each other and from their consumers. Therefore, they were easy prey for forms of abusive behavior.<sup>34</sup> In order to counterbalance the power of the marketing firms and to improve their position, farmers sought to organize themselves in cooperatives. They requested exemptions from the competition rules to do so and to engage in collective action.<sup>35</sup> These organizations provided both transportation and marketing services for farmers, thus facilitating better connection with consumers, allowing them to obtain fairer prices for their produce, and ultimately establish a more efficient and equitable system of production and distribution.

In the economic literature, it is acknowledged that individual farmers may benefit from membership of a PO through different channels.<sup>36</sup> Integration into horizontal organizations and pooling of their agricultural output enables farmers to strengthen their bargaining power *vis-à-vis* potential buyers and input suppliers, to reduce risks associated with farming activities, to gain market access to particular marketing channels, and to benefit from economies of scale. As members of a PO, moreover, farmers can invest collectively in assets or services that require high fixed costs, allowing them, for instance, to access new technologies and to improve efficiency and productivity, which ultimately leads to higher income.<sup>37</sup> While farmers may engage in collective action in order to achieve essentially private common interests, such as planning of production, such cooperative efforts may extend to more public goals including sustainability, climate change, and animal welfare, which cannot be achieved or only less efficiently by acting alone.<sup>38</sup>

Typically, farmers act collectively in an institutionalized form such as in a cooperative or a PO or involving downstream operators such as processors and retailers through vertical cooperation. IBOs or multipartite contractual arrangements in the supply chain may provide platforms for vertical cooperation among producers, processors, and retailers.<sup>39</sup> As will be explained below, the CAP actively promotes organization between farmers and collective action, through POs and APOs.<sup>40</sup>

### III. The Application of EU Competition Rules to the Agricultural Sector: A Special Constitutional Status

The exemption of the agricultural sector from the competition rules is often explained by reference to the atomistic nature of the farming industry and the inability of individual farmers to bargain on a level

33. Arie Reich, *The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation*, 42 *TEX. INT'L L. J.* 843 (2007).

34. *Id.*

35. Philippe Chauve et al., *Agriculture, Food and Competition Law: Moving the Borders*, 5 *J. EUR. COMP. L. & PRAC.* 309 (2014).

36. [http://ec.europa.eu/competition/publications/agricultural\\_producers\\_organisations\\_en.pdf](http://ec.europa.eu/competition/publications/agricultural_producers_organisations_en.pdf), at 4. Beatriz Velázquez et al., *Evaluating Price Enhancement by Processing Cooperatives*, 67 *AM. J. AGRIC. ECON.* 183 (1985).

37. Moreover, it leads to higher incomes for the members of a PO compared to situations where farmers act individually. There are also a number of intangible benefits associated with membership of a PO, such as improving social cohesion, partnership and trust among its members, and skills development, such as the ability to resolve conflicts and reconcile individual interests. See EUROPEAN COMMISSION, *ASSESSING EFFICIENCIES GENERATED BY AGRICULTURAL PRODUCER ORGANIZATIONS* (2014), [https://ec.europa.eu/competition/publications/agricultural\\_producers\\_organisations\\_en.pdf](https://ec.europa.eu/competition/publications/agricultural_producers_organisations_en.pdf), at 4. Beatriz Velázquez et al., *About Farmers' Bargaining Power Within the New CAP*, 5 *AGRIC. ECON.* 16 (2017); and Alessandro Sorrentino et al., *Strengthening Farmers' Bargaining Power in the New CAP*, *INT. J. FOOD SYSTEM DYNAMICS, Proceedings in System Dynamics and Innovation in Food Networks 2017*, 123-127 (2017).

38. EUROPEAN COMMISSION, *supra* note 25, at 38-39.

39. *Id.*

40. EU legislation established a framework for POs by setting out rules on the recognition of POs in the Member States and by making financial support available for setting up POs, through the rural development policy pillar of the CAP.

field, given the few firms that dominate the processing and marketing of agricultural produce. Accordingly, competition law cannot be applied to the agricultural sector in a fair or constructive manner, hence the need to exempt the sector wholesale from application of these rules.<sup>41</sup> In the United States, in order to allow agricultural cooperatives to raise the capital necessary for their efficient operation, a special exemption for the sector was enacted as early as in 1922.<sup>42</sup> The Capper-Vollstead Act<sup>43</sup> provides a general derogation for joint selling by cooperatives. Similarly, as noted, Germany enshrines an exception from its domestic competition laws for cooperation between producers in agricultural cooperatives and POs.<sup>44</sup> Thus, the special treatment of agriculture within EU competition law is not unique. What is more remarkable, however, is the broader constitutional framework within which such exceptions lie at EU level.

### A. The Constitutional Embedding of Agricultural Policy in EU Law

In the EU's constitutional framework, agricultural policy enjoys a unique status.<sup>45</sup> Although, as basic principles of primary EU law, the Treaty competition rules apply to the agriculture sector in its entirety, the TFEU grants a special status to the agricultural sector.<sup>46</sup> Under Article 42 TFEU, the competition rules apply to the production of and trade in agricultural products only to the extent determined by the European Parliament and the Council, acting within the framework of Article 43(2) TFEU. Moreover, any application (or disapplication) of the competition rules in this context must take into account the objectives of the CAP as set out in Article 39 TFEU, namely, increasing productivity, achieving a fair living standard for the agricultural community, stabilizing agricultural markets, assuring the availability of supplies, and ensuring reasonable consumer prices. The Court of Justice has thus long recognized the precedence of the CAP over the objectives of the Treaty in the field of competition,<sup>47</sup> and the Court's interpretation provided the Council with broad discretion as to whether and how competition law should be applied to agricultural products.

This approach has been reiterated most recently in the important *Endives* judgment,<sup>48</sup> where a Grand Chamber sitting of the Court specified the analytical framework applicable to assess cooperation within and by POs and APOs from an antitrust perspective. The case concerned a decision of the French Competition Authority, which sanctioned various anticompetitive practices in the endive production and marketing sectors. The practices had been implemented by producer POs, APOs, and various other entities and involved concertation regarding both the price of endives and the quantities placed on the market, as well as the exchange of strategic information. The question before the Court of Justice was thus whether the alleged cartel fell under EU competition rules. In its judgment, the

41. Reich, *supra* note 33.

42. Capper-Vollstead Act, 7 U.S.C. §§ 291-292. (7 U.S.C. 291, 292).

43. This act identified the legitimate objects of agricultural cooperatives as “collectively processing, preparing for market, handling and marketing” the agricultural products of its members for their mutual benefit. Producers of such products were defined as “[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers.” The agricultural exemption was enacted in order to correct distortions of competition in the agricultural sector and to allow farmers to counterbalance the monopsonist or oligopsonist market power of middlemen. Hence, it only extends to the formation of cooperatives among farmers, and only among them and to the legitimate activities of such cooperatives, including joint processing, handling, and marketing. *See* Reich, *supra* note 33.

44. The relevant provisions are Article 28 Gesetz gegen Wettbewerbsbeschränkungen (cooperatives) and Article 11 Marktstrukturgesetz (POs).

45. For its interaction with free movement rules, *see* Purnhagen, *supra* note 31.

46. EUROPEAN COMMISSION, THE APPLICATION OF THE UNION COMPETITION RULES TO THE AGRICULTURAL SECTOR, COM(2018)706 final.

47. *See* Cases C-139/79, *Maizena*, EU:C:1980:250, para. 23; C-280/93, *Germany v. Council* EU:C:1994:367, para. 61; C-373/11, *Panellionios Szdesmos Viomichanion Metapoiisis Paknou* EU:C:201:567, para. 39; and C 671/15, *APVE and Others*, EU:C:2017:860, para. 37.

48. Case C 671/15, *APVE and Others*, EU:C:2017:860, para. 37.

Court held that only practices that are strictly necessary for the pursuit of one or more of the objectives assigned to the PO or APOs concerned may be exempt from the EU competition rules. The reasoning behind this approach is that POs (and APOs) form the “basic elements” of the agricultural sector, equivalent to the “undertakings” that comprise the subjects of the competition rules. Consequently, any agreements, decisions, and concerted practices that take place within that basic element are excluded from Article 101(1) TFEU as this Article is unconcerned with the relations between different entities within a “single economic unit,” a doctrine established in the Court’s case law since the early case of *Centrafarm*.<sup>49</sup> Agreements, decisions, and concerted practices between *different* basic elements are, however, equivalent to relations between different undertakings and are therefore subject to Article 101(1) TFEU.

Accordingly, the scope of the exclusions is construed strictly, and such practices must remain solely within that PO or APO in order to escape the prohibition of agreements, decisions, and concerted practices. Furthermore, practices adopted within an entity not recognized by a Member State in pursuance of one of the objectives assigned to POs and APOs cannot escape the prohibition of Article 101 TFEU. It follows that agreements or concerted practices that are not concluded *within* a PO or an APO, but *between* several POs and/or APOs, go beyond what is necessary in order to fulfill those responsibilities. Lastly, practices established between several POs or APOs and, all the more so, practices involving not only such POs or APOs but also entities not recognized by a Member State in the context of the implementation of the CAP in the sector concerned cannot escape the prohibition under Article 101 TFEU. In its *Endives* judgment, the Court therefore increased the clarity about the way in which the EU competition rules and agricultural regulation should be applied together, but, at the same time, it left other issues unresolved. These include the question of whether POs and APOs are recognized by a Member State and thus can be exempted from the competition rules and whether, in this sense, Member States have the authority to exempt cooperation between farmers from the competition rules.<sup>50</sup>

In sum, the Court in *Endives* confirmed that the CAP is not a competition-free zone. On the contrary, the maintenance of effective competition on the markets for agricultural products is treated as one of the underlying objectives of the CAP. Yet at the same time, the judgment implies that the focus under Article 101(3) TFEU on consumer welfare alone “cannot be the only yardstick for the assessment of cooperation among producers in the agricultural sector.”<sup>51</sup> This suggests, importantly, that our understanding of the concept of efficiency deployed in the agricultural sector to justify derogations from the norm of open and undistorted competition should be interpreted in a more expansive manner than from the rather narrow general concept applied under Article 101(3) TFEU.<sup>52</sup> This is of relevance, in particular, following the 2013 reforms to the CAP, discussed in further detail below, which introduced an efficiency requirement to grant exemption for horizontal agreements between farmers.<sup>53</sup> Thus, the concept of efficiency, as it is understood in the agricultural sector, must be adjusted to the specific legal framework of Article 42 TFEU and to the case law of the Court of

49. Case C-16/74, *Centrafarm BV and Adriaan de Peijper v Winthrop BV*. EU:C:1974:115.

50. See also Cases C-137/00, *Milk Marque and National Farmers’ Union*, EU:C:2003:429, paras. 57 & 61, and C 671/15, *APVE and Others*, EU:C:2017:860, paras. 37 & 48, and Jan Blockx, *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, Nov. 15, 2017, <http://competitionlawblog.kluwercompetitionlaw.com/2017/11/15/ecj-preliminary-ruling-french-endives-two-simple-rules-attune-article-101-tfeu-common-agricultural-policy/>.

51. EUROPEAN COMMISSION, *supra* note 25, at 41. See also the European Parliament, RESOLUTION OF 7 JUNE 2016 ON UNFAIR TRADING PRACTICES IN THE FOOD SUPPLY CHAIN (2015/2065(INI)), recital 28: “[the European Parliament] considers it essential to ensure that EU competition law takes into account the specific features of agriculture and services the welfare of producers as well as consumers . . .”

52. EUROPEAN COMMISSION, GUIDELINES ON THE APPLICATION OF ARTICLE 81(3) OF THE TREATY (O.J. C 101/97, Apr. 27, 2004).

53. Chauve et al., *supra* note 35, at 310.

Justice recognizing the precedence of the CAP objectives. The result is that any (new) rules on agricultural exemptions are contingent upon the generation of efficiencies that contribute to the fulfillment of *any* of the five CAP objectives listed in Article 39 TFEU and not *only* the consumer welfare standard.<sup>54</sup> In sum, the existing agricultural derogations from competition law must be seen in their wider constitutional context, and in particular, concerns regarding unequal bargaining power have to be assessed against the background of this specific context.

## B. EU Law Derogations

Pursuant to Article 42 TFEU, the EU legislator can modify the standard competition rules when applying them to agricultural products, taking into account the CAP objectives set out in Article 39 TFEU. The EU legislator has, accordingly, laid down specific rules for farmers, associations of farmers, POs, and IBOs, insofar as they produce or trade in agricultural products.

These rules were first laid down in Regulation 26/62, which acknowledged that the Treaty competition rules and their implementing provisions apply to the agricultural sector, but nonetheless introduced three exceptions to the application of Article 101 TFEU in particular. First, decisions and practices forming an integral part of a national market organization could escape the application of Article 101 TFEU. Second, Article 101 TFEU was inapplicable to agreements, decisions, and practices that were necessary to accomplish the objectives of the CAP. Third, agreements, decisions, and practices that involved farmers and their associations within a single Member State, and which concerned the production or sale of products or the use of joint facilities for storage, treatment, or processing purposes, but which did not impose any obligation to charge identical prices, were also exempted from Article 101(1) TFEU, unless the Commission found that competition was thereby excluded or that the CAP objectives were jeopardized.<sup>55</sup>

Regulation 26/62 was eventually superseded, almost half a century later, by Regulation 1234/2007, which established the first Single CMO Regulation. The latter reserved the exceptions, however, generalizing the possibility of recognizing various entities that were intended to facilitate cooperation between farmers and the grouping of supply, such as producer groups, POs and APOs, operator organizations, and IBOs.<sup>56</sup> EU law has long favored cooperation between farmers, either through cooperatives or through formal entities recognized under EU law, on the basis that they encourage modernization and rationalization of the sector and improve efficiency.<sup>57</sup> It, however, was unclear to what extent POs and other forms of cooperation remained exempt from Article 101 TFEU.

When a crisis took place in the European dairy sector in 2009, there was pressure on the Commission and NCAs to find a solution that allowed farmers to organize selling cartels. This, ultimately, took the shape of the so-called Milk Package in 2012,<sup>58</sup> which explicitly allowed for collective negotiations by farmers and for a set of standard rules on contract terms, in order to better support farmers *vis-à-vis* the milk processing sector.

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54. *Id.* at 311.

55. Jan Blockx & Jan Vandenberghe, *Rebalancing Commercial Relations Along the Food Supply Chain: The Agricultural Exemption from EU Competition Law After Regulation 1308/2013*, 10 EUR. COMP. J. 392 (2014).

56. *Id.* 387–401.

57. Case C-399/93, *Oude Luttikhuis*, para. 12: “that legal form is favored both by national legislators and by the Community authorities because it encourages modernization and rationalization in the agricultural sector and improves efficiency.”

58. REGULATION 261/2012 OF 14 MARCH 2012 AMENDING REGULATION 1234/2007 AS REGARDS CONTRACTUAL RELATIONS IN THE MILK AND MILK PRODUCTS SECTOR [2012] OJ L94/38.

*1. Reforming the CAP: The CMO Regulation 1308/2013.* When the Commission launched a debate on further reforming the CAP in 2010,<sup>59</sup> one of the main objectives was to improve the agricultural sector's competitiveness and to enhance its value share in the food chain. In 2011, the Commission presented proposals to reform the CAP, which aimed to make the CAP more competitive but also more sustainable. Thus, farmers would be assisted to better respond to market signals and to new challenges such as food security, food safety, environment concerns, and climate change. The EU Parliament, building on the precedent set by the Milk Package, was concerned about the ongoing perceived lack of bargaining power of farmers in the agricultural sector and thus proposed an almost total exemption for the sector from the application of the competition rules.<sup>60</sup> The Commission, however, considered that such an approach would bring into question the market orientation of the CAP, and its concerns were shared by the Council and NCAs. They argued that merely permitting cartelization would not address the problems faced by European farmers in the long run because, among other things, the sector faces significant competition from outside of the EU. In addition, mere cartelization runs counter to some objectives of the CAP as set out in Article 39 TFEU.

The new rules laid down in Regulation 1308/2013 ("the CMO Regulation"), itself later amended by Regulation 2017/2393 ("the Omnibus Regulation"), significantly revised the application of competition rules in the area of agriculture. Article 206 of the CMO Regulation laid down the principle that the EU competition rules apply to agricultural products unless otherwise regulated by the Regulation. Accordingly, the CMO Regulation contains certain derogations from the application of Article 101(1) TFEU, which either apply generally for all agricultural sectors or specifically for only certain sectors. Some derogations apply in any market situation, while others may be applied only in times of crisis. In some cases, the measures can be taken or triggered only by "recognized" POs, while others apply to all farmers and their associations, with or without recognition as a PO. Special rules also apply to recognized IBOs. Moreover, since strengthening the role of producers is a key objective of the new CMO Regulation, POs, APOs, and IBOs can now be recognized for *all* agricultural sectors and not just in fruit and vegetable production.<sup>61</sup>

Article 209 (1) of the CMO Regulation provides a general derogation from Article 101(1) TFEU for collective activity by farmers, provided that their arrangements do not (i) jeopardize the objectives of Article 39 TFEU, (ii) entail an obligation to charge identical prices, or (iii) exclude competition. As farmers self-assess the applicability of the derogation to their agreements without informing their Member States or the Commission, the Commission has no data on how often farmers rely on this derogation.<sup>62</sup> Due to changes in the Omnibus Regulation introduced as of January 2018, however, under Article 209(2) of the CMO Regulation, parties now have the option to request an opinion from the Commission on the compatibility of their agreements with the objectives in Article 39 TFEU.

Furthermore, Article 152 of the CMO Regulation, as amended by the Omnibus Regulation, provides an explicit derogation from Article 101(1) TFEU for recognized POs/APOs. In order to constitute recognized entities for this purpose, POs/APOs must integrate an activity such as transportation or

59. EUROPEAN PARLIAMENT, COMMUNICATION ON THE CAP TOWARDS 2020, MEETING THE FOOD, NATURAL RESOURCES AND TERRITORIAL CHALLENGES OF THE FUTURE, COM(2010) 672 final.

60. The EU Parliament proposed to allow price-fixing cartels without any limit on market share and to permit farmers to create dominant POs and to agree on production output and, in times of crisis, on *any* possible joint measures. The Parliament's proposal would, in essence, have freed the agricultural sector of competition rules.

61. These rules apply to all sectors except for milk and sugar, where specific sectoral rules apply. The rules on contractual negotiations (collective bargaining) that were first suggested for the milk sector as part of the "Milk Package" were thus extended to the beef, olive oil, and table olives sectors as well as cereals and some other arable crops.

62. The competition authority in the Netherlands dealt with the predecessor article to Article 209 CMO—Article 176 of Regulation 1234/2007—in two investigations. In one of these, in 2012, the NCA fined a group of agricultural producers, wholesalers, and processors for an agreement that limited the production of silver-skin onions.

promotion and so on. In order to rely on the derogation from Article 101(1) TFEU, the PO/APO must genuinely exercise the integrated activities, concentrate supply, and place products of its members on the market. If those conditions are met, the PO/APO may plan production, place products of its members on the market, and engage in contractual negotiations (joint sales) on behalf of its members.

In the *Endives* judgment, as noted above, the Court of Justice confirmed that the competition rules apply to agreements between POs/APOs and other nonrecognized entities, albeit with limited scope. The Court acknowledged that a PO or an APO may, in order to achieve the objectives of the common market organization, have recourse to means different from those which govern normal market operations and, in particular, to certain forms of coordination and concertation between agricultural producers.<sup>63</sup> This means that subject to strict conditions, the competition rules thus may not apply to the practices of producer members within a recognized PO or recognized APO, provided that the entity is duly recognized by the Member State and the practices are actually and strictly necessary for and proportionate to the pursuit of the objectives assigned to the PO or APO concerned.

Of direct relevance to the facts of the *Hungarian Watermelon* case, moreover, is Article 210 of the CMO Regulation, which regulates IBOs that are recognized by their respective Member States (as governed by Article 157 of that regulation). They must notify their agreement to the Commission before implementation. Such agreements may not, however, entail price-fixing.<sup>64</sup>

**2. The Unresolved Tension Between CAP and Competition Rules.** The new EU rules aimed to secure the restructuring and consolidation of the agricultural sector in a pro-competitive way, through the promotion and creation of cooperatives and other efficiency-enhancing forms of cooperation among producers as a means of becoming more competitive and reinforcing their bargaining position within the value chain.<sup>65</sup> However, the framework remains based on what has been described as a “historically grown patchwork of ad hoc approaches and solutions, which lack common organizing principles.”<sup>66</sup> The lack of uniform guidance has encouraged NCAs to adopt diverging approaches, and to “move the borders” of EU primary law, by interpreting the agricultural exemptions in their own way.<sup>67</sup> The framework thus reflects a constant struggle between exceptionalism and application of “normal” competition rules.<sup>68</sup>

As a result, the different concepts that underlie EU competition law and the agricultural derogations found in the CMO Regulation have given rise to regulatory confusion. While the intention was to strengthen the position of farmers in the value chain, the 2013 reforms have arguably exacerbated the legal complexity of the underlying regime. Uncertainty, divergent interpretations, and the difficulties for POs in complying with the minimum requirements for exemption together form a significant deterrent to the existence and recognition of POs and cooperatives in particular. Widely different conditions apply across sectors without clear justification.<sup>69</sup> This jeopardizes the attainment of the CAP’s objectives and may lead to an elimination of competition, as the *Hungarian Watermelon* case illustrates.

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63. Case C-271/15, *Sea Handling v. Commission*, EU:C:2016:557, para. 43.

64. EUROPEAN COMMISSION, REPORT FROM THE COMMISSION ON THE APPLICATION OF THE UNION COMPETITION RULES TO THE AGRICULTURAL SECTOR, COM (2018)706 final, p. 12.

65. European Commission, *supra* note 16.

66. EUROPEAN COMMISSION, *supra* note 25, at 41.

67. *Id.*

68. Purnhagen, *supra* note 31, at 18.

69. In particular, there are three notable differences: (i) joint selling and price setting are allowed in raw milk in the dairy sector; (ii) the possibility for contractual relations is extended to olive oil, beef and veal, and arable crops, but under the requirement of fulfilling additional conditions (namely, a need to generate significant efficiency); and (iii) POs in the fruit and vegetable sector are required to sell the entire production of their members, which, according to the Court of Justice, requires the setting of prices. See Velázquez et al., *supra* note 37.

While agricultural legislation lists the concentration of supply and the planning of production as key activities for POs, competition authorities may consider production planning agreements or joint selling by a cooperative or a PO as in principle prohibited and in need of an individual exemption. This is due to the fact that a selling price-fixing agreement in the classical sense of competition law does not occur normally in the case where the producer grouping acquires products from its members—that is, where the property is transferred from the members to the producer grouping—and sells the aggregated products at a single price. In this case, the producer grouping acts as any other single undertaking which sources its input from various suppliers and sells at a single price. However, the Commission Guidelines concerning the implementation of the new rules regarding joint sales by producers of olive oil, beef and veal, and arable crops do not take account of this specific case and treat such cases as *prima facie* cartels that need specific derogation.<sup>70</sup>

This uncertainty concerning the precise scope of the legal qualification of POs in relation to competition law lay at the core of the *Endives* case, in which the original infringement decision by the French NCA was subsequently annulled by the French Appellate Court, thus neatly illustrating how different national enforcers may provide different readings of the agricultural derogations for POs under EU law and can potentially reach diverging outcomes in a specific case.

In short, the precise scope of the possibilities and constraints that apply to producer cooperation is unclear. Conflicting rules translate into legal and commercial uncertainty for both producers and downstream stakeholders, while ambiguous rules risk giving rise to diverging approaches by NCAs.<sup>71</sup> Additionally, farmers do not have access to legal tools that afford them legal clarity up-front. Due to the principle of self-assessment, responsibility for legal assessment rests on the stakeholders in the first instance. However, neither farmers nor their POs can normally afford specialized legal advice. Lack of clarity concerning the applicable rules can have an unsettling effect on the self-organization of farmers and risks ultimately undermining the efficiency of the whole supply chain.<sup>72</sup> Such uncertainty has been voiced, *inter alia*, in a recent study commissioned by the Fairtrade Foundation, which shows that businesses almost unanimously believe that competition law is a barrier to taking collective action to tackle low farm-gate prices and wages.<sup>73</sup>

Thus, while the CMO Regulation aimed at facilitating cooperation among farmers, it left an increasingly problematic issue unresolved. This concerns the increasing lack of bargaining power of farmers *vis-à-vis* large retailers. This has resulted in exploitative market practices that have some characteristics of contractual breaches for unconscionability or economic duress and some distinctive features of abuses of dominance. It has been long debated and disputed, however, whether and which legal rules should be applied. More recently, however, EU law has taken the approach of legislating directly against such practices, as will be described in the following section.

#### IV. UTP Legislation to Address Power Imbalances

The adaption of agriculture to market mechanisms and its integration into transnational value chains has resulted in growing individual and collective retailer power. A shift in the balance of power has

70. EUROPEAN COMMISSION, GUIDELINES CONCERNING THE IMPLEMENTATION OF THE NEW RULES REGARDING JOINT SALES BY PRODUCERS OF OLIVE OIL, BEEF AND VEAL AND ARABLE CROPS (OJ C 431, Dec. 22, 2015), paras. 13 & 18, and EUROPEAN COMMISSION, *supra* note 25, at 58–59.

71. EUROPEAN COMMISSION, *supra* note 25, at 42–43.

72. *Id.* The fact that there is less public market management further adds to the importance of a clear definition of the governance role that the actors in the supply chain are expected to play.

73. The research argues that collective action is required because businesses are afraid to act alone, due to the obstacle of first mover disadvantage. <http://www.fairtrade.org.uk/Media-Centre/News/January-2019/No-Retailer-Wants-to-go-First-to-Raise-Low-Farmer-Prices-Finds-Fairtrade-Report>.

been taking place between retailers and suppliers and between national and transnational levels, thus raising concerns both about farmers' relative lack of market power and about decreasing local markets for EU retailers.<sup>74</sup> The structure of the food supply chain has further been influenced by the rise of private labels in food retail.<sup>75</sup> This concentration of power has led to an increase in UTPs in the sector and to exploitation by means of a shifting of risks and costs to the weaker contractual partners.<sup>76</sup> Concerns about rising retail power have steered Member States to intervene with specific or general legal rules in the contractual relationship between business market actors. Some Member States, for example, Germany and Hungary, have opted for issue-specific legislation; while others, like Belgium, Estonia, and the Netherlands, have adopted a self-regulatory model. Yet more have pursued a hybrid approach that combines legislation and self-regulation, including Slovakia, Spain, and Portugal, whose model comprises both legislation and codes; Italy, where the code definition of UTPs has been incorporated by reference in legislation; and the United Kingdom, where the Grocery Code and Adjudicator involve private rule-making and public enforcement.<sup>77</sup>

The fact that power is distributed unevenly in a supply chain may not in itself, however, be a sufficient reason to intervene. Power imbalances are, to a certain extent, considered as normal market features under both contract law and competition law. Accordingly, "other" regulatory tools that address unfair trading practices may be necessary.

### A. "Bargaining Power" in Competition and Contract Law

Superior bargaining power can lead to the unilateral imposition of unfair conditions on other contracting parties. Nevertheless, in both contract and competition law, there is substantial disagreement about the meaning and the legal relevance of bargaining power.<sup>78</sup> Legal decision makers disagree both on what the legal standards are for identifying and assessing the presence of superior bargaining power and on the appropriate remedies to respond to such situations.

The legal doctrine of inequality of bargaining power and contract law subdoctrines that explicitly or implicitly incorporate bargaining power such as duress, undue influence, and unconscionability focus on whether and how the state or courts should intervene in private individual arrangements to correct and remedy such power disparities. The function of this legal concept in contract law has been to regulate the relationship between contracting parties and to ensure a relatively equalized landscape of bargaining capacity.<sup>79</sup> However, contract law regimes typically do not intervene in the freedom of contract of the contracting parties purely on the basis of power disparities.<sup>80</sup> That is, it is not the mere

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74. Ioannis Lianos & Claudio Lombardi, *Superior Bargaining Power and the Global Food Value Chain: The Wuthering Heights of Holistic Competition Law?*, CLES RESEARCH PAPER SERIES (Jan. 1, 2016).

75. By eliminating the intermediate level of large food processors and shortening the chain with retailers directly engaging farmers and first stage transformers. See Sorrentino et al., *supra* note 37, at 221.

76. FABRIZIO CAFAGGI & PAOLA IAMICELI, UNFAIR TRADING PRACTICES IN THE BUSINESS-TO-BUSINESS RETAIL SUPPLY CHAIN (2018), <https://op.europa.eu/en/publication-detail/-/publication/a6faa665-b17e-11e8-99ee-01aa75ed71a1>, 5. Cafaggi and Iamiceli argue that the inappropriate exercise of market and contractual power may bring about an inefficient allocation of tasks, together with undesirable distributional consequences. Such imbalances may encourage certain behavioral practices on the part of the stronger party in a given commercial relationship or transaction.

77. CAFAGGI & IAMICELI, *supra* note 76, at 7 & 8.

78. Katalin J. Cseres, *Competition and Contract Law*, in TOWARDS A EUROPEAN CIVIL CODE 205-238 (ARTHUR HARTKAMP et al., eds., 2011).

79. Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005).

80. In the German BGB §138, "a gross disparity in value between the performances does not in itself render the contract void for being contrary to bonos mores." §138 (2) explicitly requires the exploitation of one of the enumerated weaknesses in addition to the obvious inequality. In Dutch law, inequality in the mutual performances does not render a contract in itself void under Article 3:44 IV BW; instead, one party must make an abuse of the circumstances in which that party finds



presence of unequal bargaining power that triggers intervention but rather some abuse or exploitation thereof.

In competition law, the legal concept of abuse of a dominant position, contained within Article 102 TFEU, has a similar function to prevent undertakings with market power from distorting the competitive process and to guarantee effective competition as a means to secure a level playing field, to enhance consumer welfare, and to ensure an efficient allocation of resources.<sup>81</sup> In EU law, Article 102 TFEU has accordingly been interpreted to have the aim of ensuring the effectiveness of the fundamental freedoms against the exercise of private power to preclude market access or to eliminate competitors.<sup>82</sup>

While in most national contract laws a gross disparity in value between performances does not in itself render the contract void, the situation changes when one party takes excessive advantage of the other by abusing a situation of unequal bargaining power. This might arise, for example, where one contracting party is in urgent need of medication and the other contracting party provides the medication at an excessive price. This situation has been referred to as the doctrine of *qualified laesio enormis*.<sup>83</sup> The doctrine actually incorporates a similar test to the abuse notion in competition law.<sup>84</sup> If we translate the contract law concept into competition law terms, one could argue that the disparity between the parties' bargaining power resembles the situation where an undertaking has market power. Market power in itself is not illegal, and as such dominant undertakings are entitled to compete on the merits, just like in contract law where disparity does not form a ground for invalidity.<sup>85</sup> Seeking to *make use* of such inequality between the contracting parties could conceivably amount to an abuse of a dominant position.<sup>86</sup>

Yet competition law as it currently stands may fail to provide an adequate solution to address certain UTPs in food supply chains.<sup>87</sup> Unequal bargaining power between market actors, and the resulting contractual imbalances this creates, can affect the bilateral relationship of the parties concerned, but this does not necessarily imply any antitrust infringement. Competition law, instead, is concerned with practices that have an *overall* effect on the market, so that consumer welfare and the competitive process is damaged, rather than practices that have an adverse effect on any particularly vulnerable market participant. Recital 9 of Regulation 1/2003, which empowers Member States to

himself. The contract is then voidable. Similarly, there is no doctrine of *laesio enormis* in English law. See HUGH BEALE ET AL., eds., CASES, MATERIALS AND TEXTS ON CONTRACT LAW 455, 458 (2002).

81. EUROPEAN COMMISSION, DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 102 OF THE TREATY TO EXCLUSIONARY ABUSES (Dec. 2005); EUROPEAN COMMISSION, GUIDANCE ON THE COMMISSION'S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 OF THE EC TREATY TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS (OJ C 45/7, Feb. 24, 2009), hereafter, "GUIDANCE ON ARTICLE 102."
82. Heike Schweitzer, *The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC*, in EUROPEAN COMMISSION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 102, 4–5 (Claus Ehlermann & Mel Marquis eds., 2008).
83. BEALE ET AL., *supra* note 80.
84. *Id.* See Principles of European Contract law, Article 4:109: Excessive benefit or unfair advantage.
85. Case 322/101, *Michelin v Commission* EU:C:1983:313, para. 57.
86. The Court of Justice has, in the context of exclusionary conduct, defined the term "abuse" as: "[a]n objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition." Article 102 contains a nonexhaustive list of examples that form abuses, including "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions." See Case C-85/76 *Hoffmann-La Roche* EU:C:1979:36, para. 91.
87. ANDREA RENDA ET AL., STUDY ON THE LEGAL FRAMEWORK COVERING BUSINESS-TO-BUSINESS UNFAIR TRADING PRACTICES IN THE RETAIL SUPPLY CHAIN (Feb. 2014).

adopt unfair trading rules but clearly distinguishes such regulation from the EU competition framework, thus establishes a fairly rigid boundary between the competition rules and other laws on UTPs.<sup>88</sup> Consequently, in situations where a party with superior bargaining power uses this advantage to impose unconscionable or unfair conditions on other market participants, “other” regulatory solutions are required.<sup>89</sup>

Many EU Member States have implemented national rules on UTPs, either in separate legislation, within their competition laws, or in their civil code.<sup>90</sup> While national regulatory choices differ, their underlying rationale is to prevent the exploitation of weaker trading partners. This means, in practice, cases where a party in a superior bargaining position restrains the independent business activities of the other party and forces the latter to accept disadvantages that it would reject if competition worked properly. The commonly employed criterion for the assessment of superior bargaining position is the “probability of finding an alternative trade partner,” that is, some kind of relationship of economic dependence.<sup>91</sup>

One of the more interesting questions that arises in the direct regulation of UTPs is whether the aim of such provisions is solely to regulate the individual contractual relationship with a view to protecting a weaker party or whether wider market competition should be taken into account either in the elaboration of the rule or its application.<sup>92</sup> If the consequences of economic dependence are purely distributional, one could argue that such a situation should be handled through civil courts and should not be a concern for competition authorities. However, distributional effects are often difficult to disentangle from efficiency effects. Coercive practices may have at least indirect efficiency effects, both positive in the short run and negative in the longer run. Jenny thus contends that the argument against the inclusion of provisions regulating abuse of superior bargaining power in competition law does not rest on the fact that such abuses have no effects on competition and efficiency but rather on the fact that they do not reach the threshold to warrant intervention by competition authorities in each case.<sup>93</sup>

## B. Directive 2019/633

UTPs that transfer risks and costs onto farmers and small enterprises do not merely have distributional effects but may also impact on the development opportunities of enterprises and thus harm consumers at the end of food supply chains.<sup>94</sup> Although many EU Member States have adopted rules regulating UTPs, in some countries, there is no or only ineffective protection

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88. ECN, *supra* note 17, at 73.

89. The central regulatory dilemma has been which field of law should regulate unequal bargaining power and when such provisions should trigger enforcement. See INTERNATIONAL COMPETITION NETWORK, ICN REPORT ON ABUSE OF SUPERIOR BARGAINING POSITION PREPARED BY THE TASK FORCE FOR ABUSE OF SUPERIOR BARGAINING POSITION 15 (2008).

90. As of 2017, five Member States remained without any form of dedicated unfair trade practice (UTP) legislation or voluntary framework in the EU: Denmark, Luxembourg, Malta, Poland, and Sweden. See EUROPEAN COMMISSION, JRC TECHNICAL REPORT: UNFAIR TRADING PRACTICES IN THE FOOD SUPPLY CHAIN. A LITERATURE REVIEW ON METHODOLOGIES, IMPACTS AND REGULATORY ASPECTS 42 (2017). See also overview in CAFAGGI & IAMICELI, *supra* note 76, at 2 & 9.

91. Further relevant criteria have been identified in “degree of trade dependence on the firm by the other,” “supply and demand forces of the product or service,” and “difference in scale of business between the parties” as well as the “position of the abusing firm in the industry.” See ICN REPORT ON ABUSE OF SUPERIOR BARGAINING POSITION PREPARED BY THE TASK FORCE FOR ABUSE OF SUPERIOR BARGAINING POSITION 19 (2008).

92. EDDY DE SMIJTER & LARS KJOELBYE, *The Enforcement System Under Regulation 1/2003*, in THE EC LAW OF COMPETITION 87 (Jonathan Faull & Ali Nikpay eds., 2007).

93. FREDERIC JENNY, THE “COMING OUT” OF ABUSE OF SUPERIOR BARGAINING POWER IN THE ANTITRUST WORLD (2008), [http://www.unctad.org/sections/ditc\\_ccpb/docs/ditc\\_ccpb0008\\_en.pdf](http://www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0008_en.pdf).

94. Viktoriia Daskalova, *Counterproductive Regulation? The EU’s (Mis)adventures in Regulating Unfair Trading Practices in the Food Supply Chain*, TILEC DISCUSSION PAPER, No. 027 (2018); FABRIZIO CAFAGGI & PAOLA IAMICELI, *THE NEW DIRECTIVE*

against UTPs.<sup>95</sup> In order to remedy the asymmetry of bargaining power that exists specifically between farmers and agricultural buyers, the European Commission in 2019 adopted EU-wide legislation on unfair trading practices.

The European Commission first, however, promoted a self-regulatory regime that comprised the development of a set of principles by stakeholders in the agri-food chain in 2011, followed by an initiative for implementation and enforcement in 2013. The food supply chain initiative (FSCI) arose out of a proposal by the Commission's High Level Forum for a Better Functioning Food Supply Chain. This is a form of "governed self-regulation," whereby the European Commission plays a key role as a facilitator. One of the problems in the FSCI, however, is an absence of involvement by farmers' associations, who decided to exit the initiative immediately after it was created. While the FSCI thus monitors and enforces the principles of the code of practice, its effectiveness has been questioned. Still, in 2016, the Commission published a report on UTPs in the food supply chain that focused on the MSs' regulatory frameworks and the impact of the FSCI. In this report, the Commission acknowledged positive developments in parts of the food chain and concluded that the Member States' different approaches could address UTPs effectively. Therefore, the Commission did not see the added value of a specific harmonized regulatory approach at EU level.

Soon thereafter, however, in June 2016, the European Parliament issued a resolution encouraging the Commission to act in a more concrete manner. The European Parliament resolution underlined, in particular, the fragmentation and divergences across Member States. A subsequent report by the Agricultural Markets Task Force made recommendations on various issues, including UTPs. Finally, in 2017, the Commission published an impact assessment for consultation identifying different regulatory options, which started the legislative process for what became the Directive 2019/633 concerning unfair trading practices with respect to trade in agricultural and food products.<sup>96</sup>

Directive 2019/633 defines unfair trading practices as business-to-business practices that deviate from good commercial conduct, that are contrary to good faith and fair dealing, and that are unilaterally imposed by one trading partner on another.<sup>97</sup> It is a minimum harmonization Directive, which thus allows Member States to introduce further domestic protections within the defined framework.<sup>98</sup> The objective is to reduce the occurrence of UTPs in the food supply chain, by introducing a minimum common standard of protection across the EU.<sup>99</sup> The legal basis upon which the Directive was enacted is Article 43 TFEU, which results in a distinct focus on the protection of farmers within the supply chains. The Directive nonetheless also offers protection to enterprises located along the food supply chain beyond the agricultural sector and thus the regulatory reach of the Directive flows beyond Article 39 TFEU. The Directive bans a variety of unfair trading practices, such as late payments for perishable

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ON UNFAIR TRADING PRACTICES (UTPs) IN AGRICULTURAL SUPPLY CHAINS (2019), [http://www.responsibleglobalvaluechains.org/images/PDF/Unfair\\_trade\\_prac\\_tices\\_new\\_directive.pdf.2](http://www.responsibleglobalvaluechains.org/images/PDF/Unfair_trade_prac_tices_new_directive.pdf.2).

95. Some countries, such as Germany, have stretched the application of the competition rules beyond the boundaries of Article 102 TFEU using concepts such as "abuse of superior bargaining power" or "abuse of economic dependence." This type of legislation, although introduced within a competition law framework, does not turn upon the specific UTP's impact on market competition.

96. CAFAGGI & IAMICELL, *supra* note 76, at 2 & 3.

97. DIRECTIVE 2019/633 ON UNFAIR TRADING PRACTICES IN BUSINESS-TO-BUSINESS RELATIONSHIPS IN THE FOOD SUPPLY CHAIN (OJ L 111/59, Apr. 25, 2019), hereafter DIRECTIVE 2019/633.

98. Member States, for instance, can broaden the scope of application and reduce the fragmentation to bilateral contractual relationships within unitary chains: *see* preamble of DIRECTIVE 2019/633, paras. 1, 39, & 44, and Article 1.

99. The rationale for EU intervention was based on the inadequacy and heterogeneity of legislative responses at the Member State level. The main goal of DIRECTIVE 2019/633 is the definition of a common standard to prevent the undesirable consequences of power imbalance, namely, the occurrence of UTPs.

food products, last minute order cancellations, unilateral or retroactive changes to contracts, forcing the supplier to pay for wasted products, and refusing written contracts.<sup>100</sup>

As the Directive is primarily focused on exploitative abuses that arise in the absence of actual dominance, it aims to complement competition law by covering situations of unequal bargaining power. While the Directive addresses dependence and superior bargaining power, it does not, however, establish clear criteria to operationalize these concepts. As an approximation of relative bargaining power, the Directive uses the annual turnover of the different market operators. In this way, the Directive establishes turnover-based categories of operators according to which protection is afforded.<sup>101</sup>

However, relying solely on a quantitative turnover system (Article 1) may not be a reliable indicator of market power, superior bargaining power, or even of economic dependence, insofar as the methodology of competition law assessment relies on a combination of quantitative market share thresholds and qualitative analysis of market power. Similarly, as discussed above, contract law doctrines rely on a qualitative assessment of bargaining power. This leaves certain commercial relations uncovered by the Directive.<sup>102</sup>

At the same time, the Directive includes a black and a gray list (Article 3 (1) and (2)) of certain practices that are per se prohibited as unfair or prohibited unless agreed in clear and unambiguous terms in the original or a subsequent agreement between the parties. This is a technique often used in EU consumer contract law such as the Unfair Contract terms<sup>103</sup> and Unfair Commercial Practices Directive.<sup>104</sup> However, this approach lacks a more specific methodology of assessment.

It is unclear why and on which basis the enumerated unfair practices were selected. While the definition of unfairness is indefinite and the legal standard of assessment is similarly imprecise, more specific methodology of assessment can be distilled both in competition and in contract law. Many scholars have attempted to unravel the meaning of fairness in competition law<sup>105</sup> and have generally concluded that the metric of fairness provides a means of identifying distortions of the competitive process and the contracting process and of assessing the extent of such distortions.<sup>106</sup> This approach is mirrored in various national private laws. It also coincides with one line of interpretation given to the

100. Other practices are permitted if subject to a clear and unambiguous upfront agreement between the parties: for instance, a buyer returning unsold food products to a supplier, a buyer charging a supplier payment to secure or maintain a supply agreement on food products, or a supplier paying for a buyer's promotion, advertising, or marketing campaign.
101. DIRECTIVE 2019/633 takes the position that although an approximation, this criterion nonetheless gives operators predictability concerning their rights and obligations under the Directive. An upper limit should prevent protection from being afforded to operators who are not vulnerable or which are significantly less vulnerable than their smaller partners or competitors: preamble of DIRECTIVE 2019/633, para. 14.
102. Viktoria Daskalova, *The New Directive on Unfair Trading Practices in Food and EU Competition Law: Complementary or Divergent Normative Frameworks?*, 10 J. EUR. COMP. L. & PRAC. 281 (2019), 282.
103. Directive 93/13/EEC on unfair terms in consumer contracts (OJ L95/29, Apr. 21, 1993) protects consumers against unfair standard contract terms imposed by traders.
104. Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (OJ L149/22, June 11, 2005) regulates unfair business practices in EU law.
105. From a few but relevant landmark cases, the Commission established a two-stage test to indicate abusive contractual terms, comprising tests of both indispensability and equity, coupled with a test of proportionality to balance the interests falling under the two tests: see ROBERT O'DONOGHUE & JORGE PADILLA, *THE LAW AND ECONOMICS OF ARTICLE 82 EC 640* (2006). Furthermore, in competition law, the concept of fairness has been associated with *transparency, objectivity, certainty, and limited discretion*.
106. Gerber argued that "[i]f conduct causes harm to a competitor using methods that are considered 'unfair' in the marketplace, this may indicate that the conduct is not 'competition on the merits' and, therefore, that it could have a distorting effect on the competitive process. In this sense, the concept is not a 'test' for actually determining that conduct distorts competition; it is rather an indicator of potential distortion. The same is true for the concept of economic freedom." See DAVID J. GERBER, *THE FUTURE OF ARTICLE 82: DISSECTING THE CONFLICT 6* (2007), <http://www.eui.eu/Documents/RSCAS/Research/Competition/2007ws/200709-COMPed-Gerber.pdf>.

fairness test in the Directive on unfair contract terms, which suggests that the requirement of good faith in the Directive should not be read as an independent condition of fairness and that the test of unfairness should simply be whether the term in question causes a significant imbalance to the detriment of the consumer.<sup>107</sup>

Furthermore, it remains an open question whether the approach of the Directive allows for sufficient flexibility to encompass other UTPs that may emerge in time. The current prohibitions are specific and few, giving rise to the risk of a limited and ad hoc focus on certain discrete UTPs.<sup>108</sup>

This new layer of EU law sits uncomfortably with both the contract law and competition law doctrines of unequal bargaining power. It intervenes in the economic relationships of agricultural market participants and limits their contractual freedom. Its regulatory scope reaches beyond agricultural products, insofar as the Directive also regulates areas more traditionally within the purview of internal market and competition rules.<sup>109</sup> The Directive, instead, seems to have emerged from a political reflection of the unresolved tension between EU agriculture policy and competition law.<sup>110</sup> That tension persists between the special treatment of agriculture and its increasing market orientation, but at the same time, the contracting scope of the derogations granted from the competition rules leaves many agricultural sectors actors (farmers and their associations) prey to yet another problematic situation of power imbalances in the food sector and emerging UTPs. While the Directive has purported to answer to this call by remedying the situation directly, it has, in fact, created a new layer of EU law which, in its current form, falls short of clearly conceptualizing why and when superior bargaining power should trigger intervention and which legal standards should guide the assessment of such power disparities and shape the remedies. In this sense, the Directive may further complicate the existing tension between agricultural policy and competition law and thus actually *exacerbate* the existing legal uncertainty for stakeholders.

## V. Conclusions

Once an insulated and quite distinct policy area within EU law, over the past two decades, EU agriculture law and policy has moved away from the use of market-distorting instruments and has been (partially) transformed, by adapting to market mechanisms while also preserving certain features of its exceptional character. As these new policy approaches responded to the increasing centrality of neoliberal policies and institutions, agriculture has been integrated into the international trade system (through the WTO) and into more general regimes such as EU competition law. However, its integration and interaction with competition law reflects multiple struggles over legal exceptions and incorporates a complex web of legal rules that are largely inaccessible to the small-scale farmers who need to rely on them the most.

This is well illustrated by the *Hungarian Watermelon* case discussed at the outset of this article. The case resulted in an amendment of the Hungarian Competition Act, which currently maintains a broad exemption for agricultural products from the cartel prohibition of the domestic Competition Act. The amendment is subject to a proportionality and necessity test linked to fair incomes for farmers, leaving the ultimate decision whether those conditions are met to a political actor, the Minister with

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107. This interpretation can also be based on the Preamble of DIRECTIVE 2019/633, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties. See Thomas Wilhelmsson, *Between Market and Welfare: Some Reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts*, in ASPECTS OF FAIRNESS IN CONTRACT 25–59 (Chris G. Willett eds., 1996).

108. Hanna Schebesta et al., *Unfair Trading Practices in the Food Supply Chain: Regulating Right?*, 9 EUR. J. RISK REG. 690–700 (2018).

109. Purnhagen, *supra* note 31.

110. European Parliament resolution of June 7, 2016, on unfair trading practices in the food supply chain (2015/2065(INI)).

responsibility for agricultural policy. The *Watermelon* case has become a symbol of how systemic and larger scale weakening of constitutional safeguards, in particular the protection of fundamental rights and institutional independence, have impacted the authority of EU and national economic law and its enforcement in certain Member States. It provides primary evidence of how national legislation can disrupt the effective enforcement of economic law in competition law and how objectives of economic patriotism have been implemented in national law. But at the same time, it provides a salient blueprint of the ambiguity and legal uncertainty of the legal framework that connects competition law and agriculture policy.

While the complexity and uncertainty that such a legal framework reveals are important issues in themselves, one should also look beyond these and consider the impact that the system has on social, environmental, and even political values that may get lost within such legal complexity. Agricultural practices and farmers are important drivers of sustainability, biodiversity, and food security within the EU, but they are also pivotal to the survival of rural communities, landscape, and environment in many Member States. Rural farm communities have also been presented as the models of local grassroots of democracy.<sup>111</sup> Accordingly, these underlying values are likewise at stake within this debate, even though such concerns may not have direct and immediate impact on the daily practice of competition law. They nonetheless pose fundamental questions for businesses within the agricultural sector more broadly and change the types of market failures that competition law is likely to encounter and may need correct in the marketplace.

Moreover, while EU agricultural policy has become incorporated into a broader internal market that takes into account, inter alia, sustainability, climate change, and food security issues, the competition rules have so far retained a more limited focus. Comparatively short shrift is given to broader public interest concerns within the assessment framework, while exceptions to the established prohibitions are tolerated only to the extent that these result, ultimately, in the enhancement of consumer welfare, as defined in fairly narrow economic terms.<sup>112</sup> Many commentators have called for a more inclusive EU competition policy that responds to pressing social and environmental aspects of the economy beyond the strict economic logic of price efficiency.<sup>113</sup> In addition, specific legal mechanisms in EU law have been put forward that could guide the balancing of public policy values with those of competition law, such as the proportionality test applied in the free movement rules,<sup>114</sup> the *Wouters* doctrine concerning inherent restrictions to competition,<sup>115</sup> and the cross-sectional clauses of the Treaty.<sup>116</sup> More radically, and abstractly, a more holistic approach based on the EU's economic constitution has been advanced,

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111. Daugbjerg & Feindt, *supra* note 26.

112. *See supra* note 52.

113. See Suzanne Kingston, *Competition Law in an Environmental Crisis*, 10 J. EUR. COMP. L. & PRAC. 517 (2019); Anna Gerbrandy, *Rethinking Competition Law within the European Economic Constitution*, 57 J. COMMON MARK. STUD. 127 (2019); FAIR TRADE ADVOCACY OFFICE, *supra* note 27, at 22; and Ioannis Lianos, *The Poverty of Competition Law*, CLES RESEARCH PAPER SERIES 2/2018, 16-17; Ioannis Lianos, *Polycentric Competition Law*, 71 CUR. L. PROB. 161 (2018); JOSEPH STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2012); and Lina Khan & S. Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017).

114. See Gerbrandy, *supra* note 113; Kingston, *supra* note 113, and Cases C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) EU:C:1979:42; C-178/84 Commission v Germany (Beer Purity) EU:C:1987:126, and C-133-136/85 Rau EU:C:1987:244. The first application of the proportionality test with respect to EU legislation is typically associated with the Internationale Handelsgesellschaft case which arose in the context of the CAP: *see* Case C-11/70, EU:C:1970:114.

115. Case C-309/99 *Wouters and Others*, EU:C:2002:98.

116. BEN VAN ROMPUY, *ECONOMIC EFFICIENCY: THE SOLE CONCERN OF MODERN ANTITRUST POLICY? NON-EFFICIENCY CONSIDERATIONS UNDER ARTICLE 101 TFEU* 223-226, 254 (2012).

founded on “the relation of law to the fundamentals of the economic system,”<sup>117</sup> aimed at a certain “ideal of coherence in the organization of public power.”<sup>118</sup>

Agriculture is intimately interlinked with various social and environmental concerns, from the preservation of soil and biodiversity, to protection from climate change, and the distribution of power along the food chain. Today, it is clear that private action and initiatives have a crucial role in realizing these pressing social and environmental concerns. Such private initiatives will, however, not materialize or be effective without the application of competition rules that effectively consider and integrate socioenvironmental implications of competition decisions. It remains an open question, however, whether the complex mesh of rules, regulations, and exceptions described in this article are up to this difficult yet vitally important task.

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117. Tuori Kaarlo, *La Constitution économique parmi les Constitutions européennes*, 25 REV. INT. DROIT ÉCON. 559 (2011).

118. TONY PROSSER, *THE ECONOMIC CONSTITUTION* (2014).