

**EU Competition Law and  
Sustainability in Food Systems**  
**Addressing the  
Broken Links**

February 2019, Brussels

# Background to this report

The Fair Trade Advocacy Office (FTAO) commissioned this piece of research to investigate the broken links between competition law and sustainability. The intent is to bring clarity on the changing backgrounds and ideologies behind competition law and providing food for thought for debates that envision a food system that works for the producers and workers and the planet. The views and recommendations expressed are those of the authors and not necessarily those of FTAO.

## Acknowledgements

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### Commissioners

The Fair Trade Advocacy Office (FTAO) speaks out on behalf of the Fair Trade movement for Fair Trade and Trade Justice with the aim to improve the livelihoods of marginalised producers and workers in the South. The FTAO is a joint initiative of Fairtrade International, the World Fair Trade Organization-Global and the World Fair Trade Organization-Europe. This report was commissioned by Peter Möhringer.

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This report has three main aims: a) to highlight the main issues that arise in the global food system arising from the application of mainstream European Union (EU) competition law; b) to discuss how social and environmental sustainability could be integrated into the current structure of EU competition law and suggest needed legal and political interventions; c) to identify concrete possibilities of engagement and those areas of substantive and procedural competition law that could be leveraged in order to improve the social and environmental quality of the global food system.

The underlying research was carried out using a combination of:

- a desk-based research (including reviews of academic literature and case law);
- b assessment of concrete examples and third parties' initiatives (field studies, reports, and reportages); and
- c collection of opinion—through semi-structured interviews—from academics, civil society and practitioners who are directly involved in the study and/or implementation of EU competition law.

In light of the research for the report, and interviews and written submissions, the following points emerged:

- 1 Competition law has played a central role in the construction of the contemporary EU food system and the maldistribution of value across the food chain. However, the distributive and environmental impact of competition law and the way in which it defines the relationships of power and value within the food chain are not natural or inevitable.
- 2 As the current antitrust mantra predicates the enforcement of competition law mainly when there are inefficiencies created at consumer level (consumer welfare approach), competition laws have generally allowed and contributed to the creation of markets based on cheap products, disregarding their environmental and social sustainability (Section 2).
- 3 The food system has witnessed increasing levels of concentration of market power, in particular, in sectors such as seeds, chemicals, food processing and retailing. These mergers and acquisitions have been cleared within the context of an EU regulation that has mainly considered consumer welfare and the sale of cheap and—to a certain extent—innovative products (Section 4).
- 4 There is a renewed interest in tackling issues of sustainability and fundamental rights by also using competition laws, but the current interpretation of the underlying provisions makes it particularly difficult if not impossible.
- 5 The current interpretation of Article 101 TFEU on anticompetitive agreements and cartels, from this perspective, is sometimes too strict and at other times too broad (Section 4.6):
  - a It is broad when it sanctions any discussion among competitors on the distribution of price along the value chain, without considering finalities and objectives. The consequence is that the risk of a sanction—real or perceived—is often used by authorities and market actors to deny the possibility of setting a transparent and coordinated common price for small scale farmers, except in cases of special derogations and exemptions (Section 5.7.).
  - b It is often interpreted in a way that rigidly dismisses any efficiency mechanism related to sustainability from the application of Article 101(3).

- 6 Similar problems haunt the application of Article 102 TFEU on the abuse of dominant position. When the exercise of vertical power across the food chain is assessed, sustainability-related efficiencies and market failures are not considered per se, neither as a justification for investigation nor as a concern of competition law (Section 4.2). Moreover, the law is often subject to a narrow interpretation that disregards all those abuses of power that do not strictly conform to the definition of dominance. The way in which European and national authorities regulate the abuse of dominant position, Art. 102 TFEU, is only partially recognising and disciplining the imbalance in bargaining power that characterises actors at different levels of the food chain and often degenerates in the extraction of value from smaller players (farmers, intermediaries, etc.) and accumulation of value in few hubs.
- 7 As the historical assessment of competition law shows (Section I), the legislative and jurisprudential characteristics of the current EU framework are contextual and politically defined: as such, they can and must be challenged if they are incompatible with the current and future social and environmental needs of people and the planet. Since its inception, competition law has changed its aims and objectives over time, showing that these i) are not immutable; ii) are connected to the economic and social policies of the legal system in which they are enforced; iii) can be changed and adapted to the present and future needs of people and the planet. We thus suggest that competition law should be re-thought in order to contribute to the construction of a food chain (and an economy) that respects the planetary boundaries and strengthens the social foundations of a just and equitable global society.
- 8 For this reason, Section 5 of this report looks at competition law as part of a regulatory environment that responds to the neoliberal ‘rule of law’, intended as “the principle whereby all members of a society (including those in government)” and — we would add — including all institutions “are considered equally subject to publicly disclosed legal codes and processes,”<sup>1</sup> and where the principles of efficiencies, effectiveness and market autonomy have priority over all other considerations. On the contrary, we claim that competition law, as much as economics and law, does not exist in a socio-environmental vacuum and is not an end in itself. It is instead a legal institution useful to assess, combat and restrain specific behaviours but, has however, to find application within the limits and the purposes of the overall legal and political environment. If a contract is illegal because it breaches a law on environmental protection, the agreement is null and no contractual party can sue for breach of contract: the sanctity of contract law does not trump mandatory and external legal constraints. In other words, the law is always applied in accordance with the rest of the regulatory environment. By the same token, EU competition law needs to be applied in accordance with other EU laws, principles, and objectives. However, this solves only the ‘if’ and ‘why’ of the question of whether competition law should consider such sustainability concerns. The ‘how’ is instead slightly more complex and needs adaptation from jurisdiction to jurisdiction. For this reason, at the end of the report we recommend practical solutions for the attainment of this transformation, although they are merely initial hints to spark further political and legal dialogue.
- 9 Despite the role that the law plays in allowing market failures and unsustainable practices, the present research concludes that most of the flaws could be solved through a broader interpretation and enforcement of competition laws that go beyond the current mainstream approach to consumer welfare and is coherent with the requirements of the Treaty of Lisbon.
- 10 A comprehensive and systemic reform of EU competition law along the double legal and political constraints represented by the planetary boundaries and the need to strengthen the social foundations of our society is not only needed, but also possible. Inspired by Kate Raworth’s idea of ‘Doughnut Economics,’<sup>2</sup> the report offers a series of suggestions and recommendations that concern both the interpretation of the current legal framework and the possibility to introduce changes to the substance and procedure of European and national laws.

- 11** The most important transformation is conceptual and concerns both the vision of competition law and its function. Article 101 and 102 TFEU and the Merger Regulation do not establish specific aims and objectives to be achieved in the enforcement of competition laws, neither do they embrace specific policy demands. It is thus essential to recognise that competition law is a public interest, which is influenced by the pursuit of legal, economic and policy aims. As these objectives may change over time, competition law offers the possibility—in theory—to balance the application of its underlying provisions against these objectives. At the present time, the core of competition law is represented by consumer welfare and a cost-benefit balance between it and the monetary value of socio-environmental concerns. As a consequence, sustainability has to be expressed in monetary terms and the case made that consumers are ready to internalise its consequences. However, national and European policy makers can seize the space offered by the undefined notion of public interest and clarify the objectives of competition law and the role that it must play in achieving sustainability rather than affecting it.
- 12** Another opportunity discussed in this report is represented by a right to a food-based interpretation of competition law which subordinates the economic goal of competition to the legal obligation of states to guarantee adequate, accessible, sustainable, nutritional and reliable food for everyone, within the context of a food chain that equally respects the rights of small-scale producers and consumers. National and European competition authorities not only have the opportunity to adopt a right to food-based approach to competition law but are required to do so because of the international obligations that have been assumed by each Member State and the content of the European Convention on Human Rights.
- 13** Specific regulation might be needed when ex-post competition law intervention is not fit for purpose. In particular, this report argues that sector-specific anti-trust regulation, such as block exemptions or other exceptions to the application of competition laws, may be desirable only when competition law is found to be the best institution to solve such market failures.

Overall, the report recognises that some cracks exist in the current framework of competition law and that they can be leveraged to improve the socio-environmental footprint of the global food system. However, a transformation in the content and functioning of competition law must be accompanied by a better understanding of its dynamics, its content and the fact that it is politically defined. Born as a policy tool to fight private ‘trusts’ of power, antitrust law has more recently become an overly complex and often inaccessible legal instrument. However, it is still the expression of specific ideologies, although often disguised by technical economic and legal jargon. With this in mind, it is important to understand that working within the current framework of competition law is equal to asking ‘the master of market efficiency and competition as an end in itself’ to provide the tools to defy itself.

For a radical and structural transition towards socio-environmentally sustainable food systems, we may want to explore and implement other forms of social organisation (cooperatives, commons, indigenous forms of production and consumption, etc.). Throughout the world, plenty of examples exist where production, transformation, distribution and consumption of food are not based on competition and domination, but on practices of solidarity, coordination, mutuality and—often—the recognition of the necessity to respect and fulfil social and planetary boundaries if we are to achieve a truly sustainable food system.

This report does not engage with these alternatives but recognises the inherent limits of competition law. The authors welcome future research that looks at these different conceptions of market, social organisation and the way in which goods and services are produced, circulated and their value shared. These political and legal attempts should have a strong and clear understanding of competition law as their starting point and go beyond its limits and its aims. The scope of this report is instead to describe the current boundaries of competition law, trying to avoid technical jargon, and to propose a more holistic vision of the competitive processes in the market and in society.

**Abuse of dominant position:** a situation in which a dominant firm exploits customers or excludes competitors, usually to maintain, or even improve, its position in the market. This notion is particularly useful to understanding Article 102 of the TFEU (see Sections 2.1.2 and 4.2).

**Cartel:** an arrangement between two or more firms to avoid competition between them, for example by fixing prices and dividing geographic markets. This notion is mainly applied in the case of horizontal agreements and Article 101 of the Treaty on the Functioning of the European Union (TFEU) (see Sections 2.1.1 and 4.6).

**Economic dependence:** a situation of imbalance in the business relationship between two firms, which makes it impossible or excessively difficult for one to continue with the business without the other. For example, because one firm has undertaken specific investments in order to work with the other firm. The abuse of economic dependence generally takes the form of a refusal to purchase or sell, or arbitrary interruption of business relationships. This has implications in terms of bargaining power (see Section 2.1.2 and 4.2).

**Externality:** market exchanges (purchases, sales, mergers, acquisitions, etc.) may bring about effects—positive or negative—on third parties. If the effects are positive, we talk about external benefits. For example, the bees of a beekeeper pollinating the orchard of a neighbouring farmer. An external cost or negative externality (also just called externality), is instead a market failure, as it is a cost that spills over onto a third party. For example, a factory dumping waste in a river that flows downstream through a town.

**Horizontal agreement:** an agreement between competitors. This is at the heart of Article 101 of the TFEU and often cited by businesses to prevent any conversation around the adoption of a common livelihood price to be paid to farmers at the beginning of the food chain (see Sections 2.1.1 and 4.6).

**Market concentration:** is a function of the number of firms in a market and their market share. In general, the lower the number of firms the higher the market concentration. In the context of the food chain, this has implications in terms of the application of merger regulations (see Section 2.1.3.), bargaining power, innovation, availability of products and dependency (See Sections 2.1.2 and 4.2).

**Merger:** any combination of two companies previously independent. This is dealt with by the EU in Regulation 139/2004 on Mergers Regulation and the subsequent interventions by the European Commission and the European Court of Justice (see Sections 2.1.3 and 4.5).

**Monopoly:** a situation in which there is only one firm in the relevant market. This has implications in terms of abuses of dominant position (see Sections 2.1.2 and 4.2).

**Monopsony:** a situation in which there is only one buyer in the relevant market that can thus exercise significant bargaining power over producers. This is particularly relevant in the food sector (see Sections 2.1.2 and 4.2).

**Oligopoly:** a situation in which there is only a small number of competitors in a market.

**Oligopsony:** a situation in which there is only a small number of buyers in a market.

**Vertical agreement:** an agreement between a buyer and a seller along the same chain of production. This may have implications in terms of abuse of dominant position, anticompetitive agreements, unfair trading practices, bargaining power, dependency and distribution of value across the food chain (see Section 5 for some of the main issues that arise in this area).



Laisah Sela picking ripe cherries,  
Unen'Choit Cooperative Society,  
Papua New Guinea © Fairtrade ANZ



# Introduction: Competition Law and Socio-Environmental Sustainability

People, companies and governments are constantly engaged in the production, trade, and consumption of goods and services. According to the mainstream account, the ‘venues’ where these exchanges take place are called ‘markets’. Although these markets are the sum of a number of interactions that involve people and resources in a specific environment that is highly contextual and much more complex than pure formalised operations, mainstream economics theory abstracts them and defines them as rational and organised around principles and operations that are replicable everywhere in the world. The ‘laws of the market’ are presented as inescapable, universal and natural. Modern markets are therefore defined as structures allowing for the exchange of goods and services in a defined area. They follow specific economic rules and need to be economically efficient, in order to yield the optimal outcome.

Based on these abstract, and not sufficiently criticised assumptions, competition laws are used to better regulate the interactions between market participants, legislators and law enforcers and should only be concerned with the economic efficiency of the market. Any other question related to the effects of an exchange on society or on the environment should be left outside of the scrutiny of competition law. So, for instance, the fact that an exchange has negative effects on the environment would not play any role in an antitrust examination if it has no clear relation to the assessment of economic efficiency, which generally considers only prices, choice, and to some extent innovation<sup>3</sup>. Competition law ensures that businesses are competing fairly in the market, thereby preventing market distortions or remedying restrictions of fair competition in the market. At present, the mainstream theory wants these distortions and the efficiencies created by the same market interactions to have only an economic character.

However, at closer examination, this narrow view seems theoretically biased and dangerous in practice, in respect of the conduct it may allow and the harm that may go unchecked. Orthodox economists discovered the paradox underlying the concept of efficiency quite some time ago. In 1865, for example, William Stanley Jevons observed that an important issue haunts efficiency. In the context of the British Empire, Great Britain was one of the most (if not *the* most) industrialised countries in the world and was mainly relying on coal as a source of energy. According to the

theory technological innovation should have increased the efficiency of coal use. By contrast, Jevons observed that technological progress was leading to more coal consumption across many industries, due to increased productivity.

**Efficiency, therefore, did not mean reduced use of resources but rather increased consumption and exploitation.**

Furthermore, this efficiency paradigm failed to consider the costs of increasing production and fuel consumption on the environment (today known in economic terms as the ‘rebound effect’).

Competition laws in most modern jurisdictions slavishly apply this narrow approach to economic efficiency that overlooks other—possible—negative or positive effects that might be created by market participants. But is this narrow interpretation of the law the only possible one?

This report answers this question in the negative. Firstly, it observes that from an historical and legal perspective, there is no compelling reason to limit the application of competition laws to narrow speculations of price efficiency mechanisms (Section 1). In order to make this argument, this report elucidates the status quo of EU competition law, briefly introducing the main provisions in simple terms (Section 2). Then, it examines the actual and potential aims of competition policy and competition law enforcement (Section 3). Moreover, it explores the actual and potential applications of different public policy aims in competition law enforcement (Section 4). In that connection, it presents the actual situation of food systems (Section 5) and examines, in detail, the major competition policy issues affecting food value chains (Section 6). In its conclusion, the document formulates proposals for an alternative reading of the law and offers suggestions for the future development of a sustainable competition law where environmental and social limits are not simply integrated but become building blocks in the construction of markets and in the relationship between its actors and nature.

# 1 The Political History of Competition Law on both Sides of the Atlantic

Traditional accounts of the history of modern competition law report that it first appeared in 1890, when the Sherman Antitrust Act was passed by the United States Congress to tackle the high level of concentration that was affecting some of the most sensitive sectors of the federal economy.<sup>4</sup> At a moment of diffused monopolies, high prices, low investments and control of the economy by a few financial conglomerates, the Sherman Act aimed to break down cartels, foster competition and fix the failures of markets in the name of low prices for consumers and growth for the country.<sup>5</sup> It was a moment of economic turmoil, and the same was true for economic thinking: far from being undisputed, the principles that were crystallised in the Sherman Act (and that have been at the centre of competition law for the last 130 years) had just been rescued from being marginalised.

Despite the mainstream accounts and the idea that the Sherman Act signalled the dawn of competition law, the economic and legal rationale behind the interaction between states and markets are rooted in an intellectual and financial transformation that began long before the Sherman Act, when Great Britain was still the leading global empire. It was then, when the Corn Laws were still protecting English farmers and colonialism was at its height, that the idea of free trade as the best way to achieve global well-being was advanced by Adam Smith and then integrated by classical political economists such as Thomas Malthus, David Ricardo, John Stuart Mill and the like.<sup>6</sup> Then, with the diffusion of utilitarianism and mathematical reconstructions of the economy in the second half of the 19th century at Cambridge, Yale and Chicago, classical principles got reinterpreted through the lenses of equilibrium and marginal cost, giving birth to the contemporary understanding of economics.

**As a matter of fact, modern competition law is materially and historically embedded in Western history and in the Western way of thinking about society and the role and organisation of the market.**

Certainly, the experiences of the United States and of Europe differ, but they share premises, practices and outcomes that cannot be disconnected from the geographies and historical moments where they were conceived, implemented and criticised. Similarly, processes of transplanta-

tion, imitation, imposition and adaptation (often favoured by the intervention of international financial institutions and donor countries) expanded the global influence of the regulatory and intellectual frameworks developed on both sides of the Atlantic.

This report does not thoroughly engage with the rationale and ideologies that articulated market-based capitalism and the shift away from mercantilism and state-led economies. Similarly, we cannot spend time discussing the way in which the internationalisation of liberal and neoliberal capitalism was accompanied by the diffusion of the European and North American visions of competition law. However, it is interesting to note the historical and personal settings in which these ideas were proposed. For example, the idea of breaking up monopolies and reducing state intervention in the economy was formulated by Adam Smith almost 150 years after the Statute of Monopolies, a legislative act that defined the powers of the UK Crown to grant the rights to incorporate and have a monopoly over trade routes, was passed in 1624.<sup>7</sup> When Smith was discussing the need to liberalise trade and the difference between market and natural prices of commodities, he was reacting to a national economy where few corporations could legally operate in Great Britain (the East India Company being the most famous and powerful one) and these were granted the exclusive right to trade with specific areas of the world so that they could appropriate extra value at the expense of nature, workers and, more importantly for Smith, consumers and the general public.<sup>8</sup> As a matter of fact, it was the close connection between the monopoly guaranteed by the state and the private form of the joint stock company that had transformed Great Britain into an empire on which “the sun never sets”.

If Smith’s idea of a free market was affected by the vision of the British Empire and its Commonwealth, it is also a fact that Malthus and Ricardo’s theories were intrinsically determined by the political and historical framework where these two economists operated and are closely connected with the relationship between land, food, economy and society. In the case of Malthus, for example, his ideas of insufficiency and overpopulation were developed at a time when the European population had increased and states with no resources to feed their own citizens looked at private investments and entrepreneurship to guarantee increased yields and higher productivity. Similarly, Ricardo (who was

also a grain trader) supported his ideas on opportunity cost and comparative advantage, that derive from the combination of capital (land and machinery) and labour, by citing the example of English clothes and Portuguese sherry wine. Sherry wine was a good that English merchants particularly appreciated at the time, and was then produced in Portuguese estates owned by English families. The enthusiasm around these theories, that have been debunked and criticised for centuries, was thus a consequence of the commercial and political interests of the time and the need to legitimise the reproduction of the status quo.

Classical political economists were thus fully embedded in the British imperial economy of the time, both theoretically and practically. From their condition of social and economic privilege, and sometimes for their own interest, they conceived a world where the premise for free trade had to be put in place by means of a public authority. For many of them, joint stock companies (the precursors of modern corporations) were the most effective way of organising production and labour, and the role of the state was to fix market failures dependent on factors which were internal or external to the market itself. In the 18th century, the market began being perceived as separate from people and nature, and the state was there as a regulator that should guarantee fluidity of interactions. However, it was only in the 19th century with the consolidation of businesses and the accumulation of ownership by a few corporate actors, that the United States fostered a public discussion around the role of trusts (as a combination of industries so big they could pose a threat) and whether they were harmful for the economy.

In response, the Sherman Act was passed in 1890. However, in the United States there was neither agreement on what constituted economic theory, nor on the role of the law in shaping and controlling the market. On the contrary, interactions between the law, economics and society were full of turmoil.<sup>9</sup> In 1898, when four hundred delegates joined the Chicago Trust Conference, the political tensions and conflicts of vision were obvious.<sup>10</sup> As reported by Hatfield and other academics who attended the conference,<sup>11</sup> the participants engaged in heated debates that saw trusts and competition, not as pure legal and technical issues to be discussed by lawyers, but rather social and political concerns that gathered together capitalists, manufacturers, unskilled labourers, trade unionists, farmers professional

reformers, skilled mechanics, labour commissioners, advocates of single tax systems, economists, commercial travellers and anarchists. For some of the participants, for example, the solution against trusts was not their dismantlement through the implementation of legal limits to mergers and control, but the introduction of unlimited shareholders' liability for the company's debt, so as to discourage consolidation and the growth of businesses in both the economic and political spheres.

For decades after the Sherman Act was adopted, the relationship between states and the market was often characterised by political considerations<sup>12</sup>, interventionism and the recognition that public utilities (like jobs and welfare) were best provided by means of public investments and non-market dynamics. However, the Cold War and the fall of the Berlin Wall radically changed the scenario.

**A look at which countries enacted competition law rules, the quality of their regulations and the timing of their legislative interventions says a lot about the geo-political construction of the world and the power struggle between the capitalist and Soviet model.**

In the 1980s only 20 countries had enacted competition laws in the world. By the 1990s and the year 2000, the number had grown to 80. In 2009 there were 107 countries covering the four corners of the planet, from Latin America to Asia.<sup>13</sup>

The history of antitrust law in the European Union is more recent than that of the USA but is closely connected with the debate that has taken place on the other side of the Atlantic and is intrinsically intertwined with the European project itself. The goal of a common market for goods was the founding project of the European Economic Coal and Steel Community in May 1950, with the elaboration of common rules for governments and private actors. As the then EU competition officer, Mario Monti, remembered at an American Bar Association Meeting in 2001,<sup>14</sup> Jean Monnet (one of the founding fathers of today's European project) recalled the role played by the then Secretary of State, Dean Acheson, in introducing a competition culture to Europe. The newly born organisation of markets had to be, according to Monnet, "the opposite of an international cartel designed to segment and exploit national markets

by means of restrictive practices.”<sup>15</sup> However, “European Commission (EC) competition provisions were not reflecting a wholehearted commitment to fierce competition: merger control was not mentioned with a single word in the Treaty of Rome, and dominant market positions were not prohibited as long as there was no ‘abuse’ of it.”<sup>16</sup>

As discussed by Davis, Kaplinsky and Morris:

*“[o]ver the forty years after its introduction, EU competition law widened to promote a range of objectives including economic democracy, fairness, competition in the internal market, and protection of final consumers and small and medium enterprises. However, over the past decade EU competition law has become increasingly influenced by the principles embodied in US jurisprudence, reflecting the influence of the neoliberal Chicago School of Economics on US competition policy.”<sup>17</sup>*

Despite a series of contrasts and tensions that went further than those that had emerged in the United States at the end of the 19th century, the current framework appears squeezed towards a technocratic and regulatory understanding of competition law as promoted by the Chicago School: as recalled by Monti, the US model of sound economics and protection of consumer interest was assumed as a term of reference and the interventions of national and regional authorities was aimed at, and limited by these goals.

The shift from social objectives to efficiency which characterised Reaganomics in the United States happened at a slower pace in the EU. Actually, in the 1980s and 1990s the United States accused the European Union of not being sufficiently orientated towards efficiency in adjudicating competition matters. At the beginning of the 1980s, like many other countries in the world, the European Community was shocked by a profound transformation in the way competition was conceived, regulated and reproduced by the Directorate General Competition (DG Comp), the European term of reference, and national competition authorities who acted as the territorial bodies in charge of constructing an efficient market. However, case law and discourse analysis proves that “its content, form and scope have become increasingly neoliberal in orientation.”<sup>18</sup> If political decisions and ideology were the basis for the establishment of antitrust law at the end of the 1800s, almost one hundred years later another politically and ideologically driven political context defined the future trajectory of competition law, and laid the foundations for the main-

stream conception that is currently reproduced all over the EU. Interestingly, this shift in the pendulum towards ‘market autonomy and efficient competition as an end in itself’ took place within the context of a legal framework that was virtually unchanged since the enactment of the European treaties. Thus, a political action in the opposite direction, led by civil society and policy makers, and supported by a deep understanding of the legal complexity of competition law, is not only desirable but also technically possible.

### Political will, legal awareness and broad support are today’s missing ingredients.

This brief historical reconstruction reveals that the origin of antitrust law in the West, and thus in the world, was tainted by conflicting economic analyses and political choices: each solution had a particular distributive outcome and must be understood in its geo-political context. For example, the Anglo-American School sees the main and sole purpose of competition policy as achieving economic efficiency, and therefore perceives any other consideration (environment, human rights, etc). as something external. Similarly, the German school adopts a ‘purist’ approach to competition law and suggests that the tools of competition should not be serving any political purpose but only that of competitive progress. The increase in relevance of the Chicago school of thought, and the normalisation of market fundamentalism and neoclassical economic principles that took place in the second half of the 20th century, must be seen as an expression of specific dynamics and not as the crystallisation of natural events. The diffusion of post-Chicago schools of thought on competition law, with academics and practitioners from different geographies, suggests that it is possible to structure and imagine a different competition law for the 21st century. Some of the examples discussed in this report, such as the case of South Africa and the consideration of the employment implications of an acquisition involving Walmart, reveal that theory can also be put into practice. Yet, it requires challenging both the dominant mantra of competition law and the dogma of neoliberal economics where the market is efficient, business is innovative, finance is infallible, the state is incompetent and the household, the earth, power and society do not matter.<sup>19</sup> This report would like to be a step in the direction of a different way of conceiving competition and law within the relationship between people and the planet. Yet, no transformation in legal thinking and practice can be successful without the generation of strong and diffused political and social support.

## 2 What is Competition Law?

The word ‘competition’ refers to either the act of competing or the existence of a condition of rivalry in a certain environment. According to standard economics, people and firms compete for the acquisition of scarce resources, and this competition generates efficiencies in the form of lower prices and more choice. In other words, since resources, such as commodities, products and services are not infinite, and because mainstream economics see society as based on exclusions rather than cooperation, it is claimed that economics is about the ‘natural’ competition to obtain them. Based on this assumption, classical and neoclassical economic theories have tried to construe models to explain the ‘economic laws’ that steer competitive processes for the allocation of scarce resources, ultimately leading to efficient allocation of such resources. Their conclusion is that markets are self-regulating entities, responding to the laws of supply and demand, achieving optimal outcomes for all the parties involved and, as a consequence, for the whole of society. Higher demand of a certain good will generate an increase in production to the optimal level, with prices being set accordingly. Hence, according to these theories, that have largely influenced the application and interpretation of current regulatory frameworks both in the EU and the United States, the government—that is seen as incompetent and incapable of achieving efficient outcomes—should not interfere with the distribution of resources in society, for the market is the best ‘institution’ to allocate them. What follows is a brief recount of how these theories apply to competition law and policy.

Neoclassical theories use the concept of perfect competition, in which an almost infinite number of competitors sell goods and provide services as the background. This theoretical model relies on a number of assumptions: there is no information asymmetry, products are homogeneous, and markets are free from entry barriers. As a result, it is assumed that competition drives prices down to the marginal cost of production (which is the cost for producing an extra unit of the product sold). If indeed, all customers are rational decision-makers and firms are profit maximisers in a situation of perfect competition, in order to sell their goods, they will have to continuously compete for customers until the point where the price equals the marginal cost of production.

Under these conditions, neoclassical economics affirms that when one of the competitors raises prices, customers immediately switch to other sellers—forcing this firm to re-adjust prices to the market level (equilibrium price).

Ultimately, perfect competition should generate allocative efficiency, in which the allocation of resources represents consumers’ preferences, thus ensuring low prices at the best conditions for consumers<sup>20</sup>. This model of perfect competition would demonstrate the self-regulating nature of the market, which—in theory—does not need the external intervention of the regulator, as it is most efficient when it is left free.

However, is this true in real markets? The theory relies on a number of assumptions that appear to be extremely difficult, if not impossible, to replicate in real life: for example, that all market actors have rational preferences, that they are profit maximisers, and that they act independently on the basis of full and relevant information. However, in the real world, markets are imperfect, entry barriers may impede the entry of new competitors, information may be available only to a few market participants and products may sometimes be difficult to compare. In addition, the real world is not only characterised by markets, states, finance, business and trade, but also by households, the planet, society, as the wealth of trust and reciprocity that keeps people together beyond exchange interactions,<sup>21</sup> the commons as resources that are nurtured, shared and reproduced (including the capacity of Nature to reproduce itself) and so on.

Moreover, competition may be distorted, thus preventing the market from reaching its optimal economic outcome. We know that in real markets firms may collude, thus avoiding competition, or one firm may gain a position of dominance and abuse this power. For instance, instead of competing against each other, producers may decide to create a cartel and fix higher prices for the goods they sell. This market failure will need the external intervention of the government—which in Europe means under the rules of competition law in Europe, or antitrust and anti-monopoly law in other jurisdictions. Finally, one should ask, what is this optimal economic equilibrium? As we will show in Chapter 3, even in the ‘perfect competition’ model, these theories do not question how resources are distributed, since they focus only on their ‘efficient allocation’<sup>22</sup>.

**There is plenty of evidence that competition (even a ‘perfect one’) does not benefit everyone.**

On the contrary, the exploitation of farmworkers in Italy linked to online double-race auctions<sup>23</sup> promoted by discounts and large retailers (see Section 4 below) illustrates that competition is often suffered by workers, because competition exercises pressure on ‘the sphere of production, and particularly labour, to deliver higher profitability, be it by higher productivity, longer working days or lower wages.’<sup>24</sup> If companies must be globally competitive in order to survive, they have to cut costs.

Another victim is the environment, with safeguards, precautionary measures and higher standards of production often sacrificed in the name of cheaper products that can be competitively placed on the market.<sup>25</sup>

Uncompetitive people and non-competitive forms of protection of society and the environment are thus excluded by the global economy, left behind by the ‘winners’ of this selfish and destructive race.

## 2.1 EU Competition Law in a Nutshell

The system of EU competition law is the historical product of a series of internal and external transformations, including the decentralisation of competence and the dialogue between Member States and the centre. The practical result was the construction of a legal framework that combines European institutions with national actors. At the European

### 1 MARKET FAILURES

Perfectly competitive markets, as already seen, are considered to be self-regulating entities able to reach a spontaneous ‘general equilibrium’. However, this condition may be prevented by a ‘market failure’, which might occur, in particular, in four cases.

Firstly, there are monopolies and cartels—in other words antitrust infringements. As already shown, these constructs aim to distort competition, thus impeding the establishment of a general equilibrium in the market.

Secondly, the equilibrium state may be distorted or prevented by externalities. Usually, parties to an exchange bear the costs and benefits from the outcome of the deal. However, sometimes, the same exchange may bring about effects—positive or negative—for third parties. If the effects are positive, we talk about external benefits. For example, the bees of a beekeeper pollinating the orchard of a neighbouring farmer<sup>26</sup>. An external cost or negative externality (also just called externality), is instead a market failure, as it is a cost that spills over onto a third party. For example, consider a factory dumping waste in a river that flows downstream through a town. The citizens will have to bear the cost of cleaning up the river—a cost that was un-bargained for by them<sup>27</sup>. While the factory has calculated the mere cost of dumping, the cleaning costs and the possible health care costs due to the toxicity of

the water generate a social marginal cost defined as “the sum of private marginal cost and the additional marginal costs involuntarily imposed on third parties by each unit of production”<sup>28</sup>.

Thirdly, economics generally describes a market failure regarding public goods. These are goods bearing two specific characteristics. Firstly, their consumption is ‘non-rivalrous’, which means that the consumption by one person does not exclude the simultaneous consumption by another person. Secondly, nobody can be excluded from their use (so called non-excludability). For example, national defence, lighthouses, environmental protection, official information goods (such as statistics and others) are all public goods that by definition do not pursue a profit maximising aim.

Fourthly, the last case of market failure is severe information asymmetry, which takes place when in an exchange one person has considerably less information than the other, to such an extent that the exchange is impeded or severely distorted in its outcome. Consider the case of a car seller who—not having any obligation to display information to the buyer—sells a used car, which even though it looks in good condition to untrained eyes, is in fact a car that has several defects (a ‘lemon’ in US slang).<sup>29</sup>

level, competition law is enacted by primary rules (the EU Treaties), secondary legislation (directives and regulations) and the European Commission and the European Court of Justice as the two bodies in charge of implementing competition law at the EU level. At the national level, National Competition Authorities (NCAs) and courts are in charge of assessing and sanctioning anti-competitive behaviours that do not reach the 'European threshold'. To offer some further details, Regulation 1/2003 established a decentralised enforcement system in which National Competition Authorities directly apply EU competition law in addition to the European Commission (EC). At the same time, NCAs also apply national competition statutes, but when there is a conflict between EU and national competition law the former prevails (Article 3(2)).<sup>30</sup>

**The decision to introduce the fundamental rules of competition in the EU Treaties (on horizontal and vertical agreements, abuse of dominant position and state aid) is not only a sign of the centrality and importance that competition played in the vision of the common market, but is also a legal constraint for further change of the EU laws.**

As we discuss in this report, it is true that the treaties and the rest of the regulatory framework leave some space for a vision of competition law that is less subordinated to the principles of neoliberalism. However, a radical reform of the framework would thus require a redefinition of the Treaties, i.e. a coordinated and agreed effort by all Member States.

The current system of EU competition law is designed around the general objective of preventing market distortions caused by anticompetitive behaviours. Competition law aims, therefore, to ensure that businesses are competing fairly, by offering goods and services that are always cheaper, of better quality and more diverse. In particular, competition law includes provisions against cartels (horizontal agreements) and abuses of dominance (see Sections 2.1.2 and 4.2). These two sets of provisions are formulated as prohibitions of specific behaviours and, similarly to criminal laws, punish the infringer after the violation has taken place. The European Commission for infringements of EU relevance and the National Competition Authorities for those of domestic relevance, have the power to enforce these laws. In addition, the EU Merger Regulation<sup>31</sup> allows

both to prohibit all concentrations of power that may pose a threat to free competition in the EU.

The gist of EU competition laws can be found in Articles 101-108 TFEU<sup>32</sup> and in the Merger Regulation. All businesses have to respect these laws and consequences for their infringement can be very severe: hefty fines, orders to divest part of the business and modification of contracts or of other behaviours, are just some examples. Because of the importance of anti-competitive agreements, abuse of dominant position and regulation on mergers, this chapter briefly explains the functioning of these legal provisions in EU law. The discipline of State Aid, enshrined in art. 107 ss. of the TFEU, is discussed in chapter IV with regard to its direct relevance for the food chain.

### **2.1.1 ART. 101 TFEU: ANTICOMPETITIVE AGREEMENTS**

Cartels and other anticompetitive agreements are considered to be the most serious type of infringement of competition law. Companies partaking in a cartel agree not to compete, depriving consumers from the benefits of fair market competition. Antitrust laws target these agreements vehemently because, by their very nature (sometimes in competition law terms expressed with 'per se' or 'by object'), they distort, prevent or restrict competition in the market.

For example, in 2015 the European Commission fined eight manufacturers and two distributors of retail food packaging trays a total of €115.865.000 for having fixed prices and allocated customers. In other words, the companies agreed upon the selling prices of their trays and packaging. Moreover, they committed not to sell or advertise their products in the geographic area assigned to other members of the cartel, therefore dividing the European market in order to avoid any possibility of having to compete against each other for a client. Besides these textbook cases of restrictions by object, it is possible that the collusion is not by its very nature injurious to competition but has anyway adverse effects on competition in the internal market. For example, in the case of the tractor manufacturer, John Deere, which created a UK registry where information on tractor sales was shared. The European Court of Justice found out that the registry had the effect of softening competition by reducing uncertainty and created a barrier for the entry of new competitors that did not want to share the same infor

## 2 ARTICLE 101(3) TFEU

In the current EU legal framework, it is exceptionally possible to exempt an anticompetitive agreement or an abuse of dominance<sup>33</sup> from the application of competition laws. Article 101(3) establishes that any agreement “*which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit*” is not punished according to the paragraphs 1 and 2 of the same article, if the agreement does not:

- “(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question”.*

The object of Article 101(3) is therefore an agreement, which is, in principle, anticompetitive, according to Article 101 (1). However, Article 101(3) allows a balancing of efficiencies produced by this anticompetitive agreement with its anticompetitive effects. If the efficiencies outweigh the inefficiencies, the agreement will survive competition law scrutiny.

But what kind of efficiencies do the Commission consider?

The present Guidelines on the application of Article 101(3) TFEU<sup>34</sup> examine in particular four cumulative conditions for the application of Article 101(3) TFEU:

- a** The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress;
- b** Consumers must receive a fair share of the resulting benefits;
- c** The restrictions must be indispensable to the attainment of these objectives; and finally
- d** The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

The objective of these four conditions being the creation of efficiencies at consumer level that allow the offer of cheaper or better products, so compensating for the adverse effects of the restriction of competition. Although having a non-binding nature, these Guidelines are of fundamental importance. The Guidelines therefore embrace a particularly narrow interpretation of Article 101(3), one in which only economic efficiency is considered. Hence, it has been observed that while Article 101(1) is concerned with allocative efficiency, Article 101(3) may provide a justification if the agreement improves productive efficiency.<sup>35</sup> However, this perspective fails to include social and environmental efficiencies, such as the restriction of sales of ‘cheap’ alcohol or unhealthy food, and the usage of environmentally unfriendly plastic bags in supermarkets<sup>36</sup>. But this situation is not immutable, as the law itself is not narrow in itself and leaves room for a different, more extensive, interpretation.

mation. In other words, the agreement—although not being per se anticompetitive—had anticompetitive effects on the internal market and had to be accordingly sanctioned. The anticompetitive agreement can take any form; written, oral, or can even consist of a mere ‘concerted practice’.

EU law encapsulates cartel prohibition in just one provision, Article 101 TFEU, comprising three paragraphs: 1) the first paragraphs details the type and the limits of the prohibition; 2) the second paragraph describes the consequences of such an infringement; 3) paragraph 3 offers a possibility to cartelists to defend themselves by showing that the cartel is actually beneficial to the market.

But let us describe this provision in a little more detail. Article 101 (1) TFEU prohibits any agreement between businesses having as their object, or effect the prevention, restriction or distortion of competition within the European internal market<sup>37</sup>. This provision, therefore, prohibits any market conduct fulfilling the following conditions:

- a** Existence of a cooperation in the form of:
  - i** an agreement between independent undertakings;
  - ii** a decision of, by or within an association of undertakings;
  - iii** a concerted practice between independent undertakings;
- b** coordination of market behaviour of the undertakings;
- c** coordination having as their object, or effect, the prevention, restriction or distortion of competition; and
- d** having an appreciable effect on trade between Member States.



The concept of agreement covers not only formal and legally binding contracts but also informal, non-enforceable 'gentlemen's agreements'.

The typical scenario includes a number of firms agreeing to fix prices or quantities of their goods or services, avoiding therefore to compete. Competition law's scrutiny is not limited to anticompetitive agreements, as virtually all jurisdictions also punish anticompetitive concerted practices.

Firms do not necessarily need to conclude an agreement to violate Article 101 TFEU, as, for instance, alignment of market behaviours in order to distort competition in the market would be sufficient to determine the existence of an anticompetitive agreement.

In order to be sanctioned, the agreement has to cause a prevention, restriction or distortion to the competition in the relevant market. The consequence of this violation will be to declare the agreement void as established in Article 101 (2) TFEU<sup>38</sup>. Additionally, the European Commission and the National Competition Authorities have the power to impose fines and order behavioural and structural remedies on the undertakings partaking to the cartel.

### 2.1.2 ART. 102 TFEU: ABUSE OF DOMINANT POSITION

Cartels need, by definition, more than one firm to exist and operate. But this does not mean that market distortions can be caused only by anticompetitive agreements.

There are situations in which one firm alone is able to generate similar distortive effects in the market. This is generally due to the fact that the firm is in a position of dominance and has abused this power, excluding competitors or exploiting consumers and other competitors. For example, in 1978 the European Court of Justice confirmed a decision of the European Commission fining United Brands (UBC), one of the major producers of bananas in the world. UBC was found to have charged excessive prices and imposed unjustified conditions for the distribution and ripening of its bananas. Although there were other banana producers, the EC found that UBC was able to behave independently from its competitors, forcing distributors to accept unfavourable conditions for the supply of bananas and artificially raising the prices at consumer level.

## 3 POWERS OF THE COMMISSION: BEHAVIOURAL AND STRUCTURAL REMEDIES

Article 7 of Regulation 1/2003 provides that where the Commission has found an infringement of competition law, it can impose behavioural or structural remedies to make sure that the infringement and the market distortion effectively come to an end.

### a) Behavioural remedies

A behavioural remedy is an order directed to an antitrust infringer to do something (positive) or not to do something (negative) in order to mend the market distortions created, and prevent the future distorting effects by the same conduct. Take, for instance, the case in which a dominant undertaking infringed competition laws by refusing to deal with another undertaking. Here, the Commission can order the infringer to supply the victim of this abuse of dominance<sup>39</sup>. Differently, in the case of a violation of Article 101 TFEU, the Commission has no power to order the infringing undertakings to supply someone, because Article 101 doesn't address refusals to supply and it empowers the EC to sanction the nullity of an agreement, not to create a new agreement<sup>40</sup>.

### b) Structural remedies

In its arsenal, the EC also has the power to order changes to the structure of undertakings that infringe competition laws. Article 7 (1) Regulation 1/2003 subordinates the adoption of structural remedies in the absence of behavioural ones. Hence, the EC is allowed to resort to structural remedies only if there is no equally effective behavioural remedy.

For instance, the Commission may order the divestment of assets. It may proceed against a vertically integrated firm that anticompetitively refuses to give access to an essential facility, or it may order a spin-off of an anticompetitive joint venture.

Article 102 TFEU, prohibits this type of behaviour. It describes a scenario under which there is a dominant undertaking, which has the power to behave independently from other market forces and abuses its power, by preventing, restricting or distorting, competition in the relevant market.

In particular, Article 102 establishes a number of conditions for the finding of such an abuse:

- a one or more undertakings hold a dominant position in a certain relevant market;
- b the dominance relates to the internal market or a substantial part of it;
- c there is an abuse of this position of dominance;
- d there is an actual or potential effect on trade between Member States.

**If this dominant player abuses its power – distorting the competitive process in its relevant market – competition law will intervene with a set of remedies very similar to the ones seen for cartels.**

All these anticompetitive behaviours have to be performed by ‘undertakings’. Competition law rules (Articles 101 and 102 TFEU) refer, indeed, as the subject of their provisions, to ‘undertakings’ which are not necessarily companies, as this concept also encompasses associations, cooperatives, and professional regulatory bodies, whether or not the entity has a legal personality or a corporate form<sup>41</sup>. Neither the term ‘undertaking’ nor the concept of economic unit are defined by European law, not even in ‘soft law’ provisions. The EU courts have however defined the undertaking as an ‘economic entity’ “regardless of the legal status of the entity or the way in which it is financed”<sup>42</sup>.

### 2.1.3 EU MERGER REGULATION 139/2004

In addition to the provisions on anticompetitive agreements and abuse of dominance, EU competition law includes a third pillar—merger control. Business organisations may change the nature of their competitive position by merging or acquiring the ownership of other firms or their operating units.

**Mergers and acquisitions entail the consolidation or acquisition of assets of two legal entities into one entity (already existing or new).**

Merger control regimes aim to impede the formation of a concentration restricting competition in the market. In this vein, the EU Merger Regulation 139/2004<sup>43</sup> (‘EUMR’) sets out procedural rules allowing the European Commission to decide whether to clear or block concentrations having an EU-dimension. The EUMR addresses those mergers leading to the creation or reinforcement of a dominant position, which is likely to bring about a surge in prices for consumers, lower quality of products and services, reduce choice, or limit innovation.

**Differently from Article 101 and 102 TFEU, the merger control takes place ex ante, thus aiming to prevent the formation of concentrations potentially detrimental to competition.**

This means that the competent antitrust authority has to decide whether to give the green light to the merger (unconditional clearance decision)<sup>44</sup>, accept it with commitments (conditional clearance decision)<sup>45</sup>, or prohibit it, if the merger is incompatible with the internal market<sup>46</sup>. Like the approach of Articles 101 and 102, the EUMR does not explicitly consider public policy interest that may encroach on the enforcement of competition law. Competitors adopt a wide range of activities in the market and their behaviours may affect the competitive process, and ultimately consumers, in many different ways. Consequently, how do we decide when a market distortion deserves the attention of the Authority or when instead it is not within the scope of competition law? For many, this question can be answered only if one clearly defines the aim or purpose of competition law.

### 3 What is Competition Law For (According to the Mainstream Vision)?

There have been many attempts to define the past and present competition policy aims. Dealing with the behaviour of firms in the market, competition law is potentially a far-reaching legal instrument. And strict definitions hardly capture the multiform nature of this policy instrument. Testament to this, is also the fact that the goals of competition law have changed over time in virtually all jurisdictions. However, more than ever in the last thirty years, scholars and practitioners have started to engage in heated debates on the scope of competition law, in what has already been defined as a ‘battle for the soul of antitrust.’<sup>47</sup> The bone of contention is represented by the neoclassical vision of competition law and economics, which deeply affected the application of antitrust laws in the United States and influenced the interpretation of these legal instruments in the rest of the world.

As Section 1 of this report has explained, after WWII and until the late 1960s, the Harvard school of thought, with its structure-conduct-performance paradigm, determined the policy approach to antitrust enforcement in the United States, favouring the intervention of the authorities in order to restore the competitive structure of the market. Highly critical of the continuous intrusion of the public authorities in the market, the Chicago school (in particular Professor Robert Bork, Judge Posner, and Judge Easterbrook) advocated for the adoption of the more ‘neutral’ (neo)classical economic theories<sup>48</sup> which, according to their view, would allow for the intervention of the antitrust authority only as an *extrema ratio*, when the market is inefficient in the allocation of resources. The guiding principle became the consumer welfare standard, in particular, calculated by the monitoring of price levels. In the EU, this trend more recently translated into buzzwords such as ‘consumer welfare’ or ‘more economic approach’<sup>49</sup>, which—if loosely interpreted—both intend to vest competition law enforcement using a more economically informed approach. “What about the distribution of the resources”? one may ask. And does this approach consider other market failures, such as damage to the environment or job displacement?

Allocative efficiency, disregards distributive justice and market failures not related to those few preselected criteria. However, some economists explain, this is for the best. According to the mainstream approach to competition law,

while competition law takes care of strictly defined market failures, it is for other branches of law to tackle other market failures or other externalities that are generated by the same market behaviours. Tax law, for instance, will solve problems of distributive justice, while special statutes will offer remedies to environmental damage and job losses.

But is this true from a comparative institutional analysis perspective? In other words, is this neat division between market and non-market institutions going to solve market failures created by competitive distortions? For instance, will environmental law stop a merger that threatens to reduce biodiversity by combining two of the main seed producers?

In the case of the European Union—and this is relevant for the final part of this report—, Protocol 27 on the internal market and competition and the European Court of Justice have made clear that competition rules are part of the internal market rules and are therefore necessary to achieve the aims of the internal market more generally.<sup>50</sup> If this is the case, the analysis of EU competition law and its objectives should not be separated from the broader goals of the European Union: even in the present context, competition is not an end in itself but a means to build what article 3 of the Treaty on the European Union defines as a ‘social market economy’.

**The notion of a ‘social market economy’ replaced the expression ‘open market economy with free competition’ that was included in the former Article 4(1) of the Treaty of the European Community.**

Because words matter, especially when they are concretised in legal texts and international agreements, we must thus consider that competition law has become a tool in the hands of national authorities and courts to achieve goals and public interests that go beyond that of creating an effective competitive structure.<sup>51</sup>

### 3.1 EU Competition Law's Objectives and Goals

For the traditional antitrust enforcement mantra, competition authorities should consider only the economic concerns related to the prevention, restriction or distortion of competition, which are not to be weighed against public interest concerns, of any kind<sup>52</sup>. For the supporters of this position, balancing competition goals with other interests “has the potential to have a significant adverse effect on legal certainty (among other things)”. In their opinion, “environmental and sustainability goals are better served via separate macro-level policy (e.g. emissions targets, animal welfare standards, etc.)”<sup>53</sup>.

According to this position the guiding principles and objectives of antitrust have to be limited to consumer welfare<sup>54</sup>. This standard assumes that competition law should be enforced to the benefit of consumers only, meaning that antitrust should intervene only when market distortions are detrimental to consumers, in terms of prices, and more moderately, choice and innovation.

For others, competition law enforcement and competition policy entail the application, or at least the consideration, of a number of different policy aims. In other words, for some it is important to understand if, and to what extent, competition law is ‘permeable’ to the penetration of other public interest concerns,<sup>55</sup> and which public interest concerns—over the years—have been legally associated to specific competition policy aims. Thinkers and practitioners all over the world are opening up to a more holistic and systemic understanding of competition law, and they claim that “uncertainty surrounding the application of certain provisions (such as Art. 101(3) TFEU) in contexts where non-economic goals are pursued should be dispelled so that the current uncertainty should not serve as an excuse against the inclusion of public goals in the activities of undertakings.”<sup>56</sup>

For these authors, competition law has never been applied in a vacuum, since many different objectives have characterised its policies and enforcement, from the promotion of efficiency and consumer welfare; to the protection of market structure and economic freedom; to the core market values of the EU—in *primis* market integration.<sup>57</sup> On the contrary,

*“Historically, competition law and anti-trust law exists as one method of ensuring that markets function in a way that benefits citizens and limits the ability of corporations to externalise costs on to government. So, introducing additional considerations about well-being, lobbying ability, and other impacts of concentration would indeed require regulators and policy-makers to consider more variables, but at least some of these may be variables that they understand better than the current information on which decisions are based.”*<sup>58</sup>

As recognised by the European Commission too: “...competition policy cannot be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context.”<sup>59</sup> Recently, an ideological battle has begun to determine the limits of competition law and policy, in particular with relation to the application of other public policy concerns.

According to some scholars, competition law has a ‘sponge’ and ‘membrane’ composition, which “acknowledges that the effects of the domestic environment are an integral part of competition law and are echoed in the properties of the law. In doing so it points to the margin for subjective, or at times, arbitrary decision making that may be shielded under the perceived structure of the law and the legitimacy of economic analysis.”<sup>60</sup> Others, instead, posit that while the economic welfare approach is inherently flawed, finding the goals of competition law does not solve the problem of what institution is the best placed to solve a specific problem. In this case, Lianos advocates, comparative institutional analysis should inform the choices of decision makers and in particular the selection of the ‘least imperfect alternative’ institution.<sup>61</sup> In the words of one of our interviewees, “EU competition policy is legally required to integrate e.g. environmental protection, to explicitly reject such consideration is liable to annulment by the courts”<sup>62</sup> (See Box 11 on the history of Art 11 of the Treaty on the Functioning of the European Union).

**National and European competition authorities, including the European Court of Justice, should thus approach competition law cases to solve both issues related to anticompetitive behaviours and other public policy concerns, only if it is the best placed institution.**

In the end, and on a practical examination of the facts, competition law has always been subject to legal and economic analysis, as well as to policy objectives.<sup>63</sup> Often-times, the most complex cases were exactly those in which it was harder to strike a balance among these three forces. Abundant case law is testament to this, such as the Haviland case<sup>64</sup> and the many others we use and analyse in this report. To understand this aspect of antitrust, one has to firstly remember that competition law itself is a public interest concern, as it serves markets and society as a whole. In the next chapter we consider therefore this aspect, pondering the possibility to weigh competition law against other public interest concerns.

#### 4 CONSUMERS AT THE CENTRE OF THE (COMPETITION) WORLD

The recent past has seen a visible surge in the importance of the consumer welfare standard at the European Commission. In 2005, Competition Commissioner stated that

*“Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources”*<sup>65</sup>.

However, consumer welfare is not a statement of facts or an exact science. It is indeed subject to interpretation as are many other concepts. Neoclassical economic price theory tends to define consumer welfare in a narrow way, so that consumers are merely buyers of goods and their welfare mainly corresponds to the price they have to pay for that product or service.

If we were to adopt a slightly broader approach, we may consider that other possible conditions are detrimental to consumers, such as the lower quality of the goods sold, less choice, and less innovation.

If the category of ‘price’ does not offer a lot of space for intellectual and legal manoeuvre, the notions of quality and innovation, on the other hand, may provide interesting hooks to bring to the fore considerations that do not directly affect consumers’ pockets but may have a bene-

ficial impact on the non-consumer actors (e.g. workers) and the environment. If we were to adopt an even broader attitude towards consumers’ welfare, we would realise that they do not represent a homogeneous and uniform category and we therefore should take into consideration their desires, aspirations, morals, ethical orientations and behaviours. However, we may also have to ask if the planetary and social emergencies that affect our planet are compatible with an interpretation of competition law that unquestionably posits the consumers and the act of consumption at the centre.

At the current stage of global value chains and interconnected planetary challenges, there is little doubt that the adoption of better social and environmental practices, like remunerative prices leading to a living income for farmers, or the ban on aggressive pesticides, could generate significant benefits that are not directly internalised by consumers. The fact that the overall quantity of positive externalities that is generated by better coordinated practices is not taken into consideration is a political choice that inevitably creates a bias in favour of competition. True, the last part of para 85 of the EC Guidelines states that: “society as a whole benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources.” However, the recognition of the overall societal benefit has not managed to become mainstream thinking and overtake the consumers-based approach.

## 4 The Socio-Environmental Unsustainability of the Food System: a Competition Law Assessment

Small-scale food producers are responsible for most of the food consumed in the world and most of the investments made in agriculture. This is particularly the case in the Global South, where an estimated 500 million smallholder farms support almost 2 billion people. In Asia and sub-Saharan Africa, to provide two examples, 80 percent of the food is produced through non-conventional and non-industrialised agriculture.<sup>66</sup> Most of this food is consumed locally and contributes to food and nutrition security. However, it cannot be forgotten that large-scale agriculture is replacing smallholders and that an increasing amount of the food produced by small-scale farmers is integrated into long and complex supply chains that often connect land in the Global South with cities all over the world (mainly in the Global North and the affluent developing economies). Behind fish, that represented the most traded food in the world in terms of value in 2014, long distance chains are particularly important not only for products like coffee and cocoa (whose value chains are evident legacies of its colonial past, and can be produced both in plantations and small-scale plots), but also soybean, wheat, palm oil and corn that are produced on large-scale monocultures and shipped throughout the planet to satisfy the needs of human beings, animals and incinerators.<sup>67</sup>

**One characteristic of long food chains, already highlighted by Harriet Friedman in 1994,<sup>68</sup> is the expansion of distance, both geographical and in terms of democratic control over the food chain.**

This has the effect of increasing the instability of the food system, but also its complexity as a multi-layered system with the intervention of multiple jurisdictions. While the multi-territoriality and length of the chains may be an advantage in terms of multiplication of spaces of intervention, it is also the case that they increase the cost of doing business and provide an incentive to consolidation, homogenisation and financialisation.<sup>69</sup> The longer the chain, the more coordination is needed and the more important it is to have the ability to invest in order to reach economies of scale: the emergence of lead firms and the intensification of capital-intensive food chains are only two of the consequences of the transformation of the food system. In addition, long-chains that feed consumers (or livestock or engines) far away from production are intensifying the need

for standardised products and the competition between farmers, with an impact on biodiversity, labour conditions and the interaction with the environment.

A traditional competition law-based approach to the food chain means, therefore, to engage with the distribution of power along the chain, both vertically and horizontally, and investigate the way in which market dynamics determine price, availability, research and development and the general well-being of consumers. Moreover, it means accepting the territorial limits of competition law and struggling with the “systemic gap in the capacity of nations (sic) states to address the competitive behaviour of firms operating across national boundaries.”<sup>70</sup> On the contrary, a holistic approach to competition law in the food system would be such as to enquire about the consequences that market share and the concentration of power play throughout the value chains beyond a rigid economic approach.<sup>71</sup> Moreover, it would mean to fully integrate matters of public interest (biodiversity, nutritional content of the diet, sustainability, workers’ and animal rights) and recognise that they are not external to the market and competition. Furthermore, it would require thinking about the long-term socio-environmental implications of competition decisions, including the risk of strengthening conventional agriculture, the disappearance of small-scale farming, the power imbalance created by unfair contractual practices, the adoption of agro-ecological practices, and the emission of green-house gases, etc.

In the last years, the panorama of the global food system has been transformed by a series of acquisitions, mergers, joint ventures and consolidations that have significantly reshaped it. In response, numerous reports, policy briefs and academic papers have been produced that aim to assess the competitive implications of a shrinking global food system. The common denominator of these reflections is the way in which the concentration of shares and market has been happening at all levels of the food chain (from land to the restaurant sector)<sup>72</sup> and that mainstream competition law has not been capable of providing adequate tools to assess and redress worrisome non-market considerations.

In particular, a 2017 report by IPES-Food focused on the sectors of seeds and agrochemicals; fertilisers; livestock genetics; animal pharmaceuticals; farm machinery; agri-

culture commodity traders; food and beverage processors, and food retailers.<sup>73</sup> To these, we could add the area of precision farming and big data, the problem with horizontal ownership by financial institutions (pension funds, private equity funds, insurance funds, etc). However, a holistic approach to competition law and the food chain would not be satisfactory to address the issues of concentrations and consolidations.<sup>74</sup> On the contrary, in order to attempt to change competition law and use it to move the food system away from the current socio-environmental unsustainability, it would be important to discuss areas such as horizontal agreements and state aid, often left at the margin of the analysis but particularly relevant when it comes to thinking of pro-actively improving the food system rather than reactively responding to its dynamics. In the following pages, we discuss a) concentration in the retail sector (4.1); b) acquisitions in the seeds and fertiliser sector (4.5); c) horizontal agreements (4.6); d) sugar taxes, state aid and dumping (4.4), as four areas of particular interest for the present and future of competition law.

## 4.1 Increasing Concentration in the Retail Sector

**Consolidation of food supply is increasing and more evident at every step of the food chain, from farm to fork. This impacts not only farmers and businesses, but also consumers in the form of reduced consumer choices and higher grocery prices.**

Of particular interest is the consolidation that is taking place at the level of supermarkets and retailers.<sup>75</sup> As a matter of fact, in Europe they tend to have a powerful position in the food supply chain because they are often the single most important food retail outlet.<sup>76</sup> In 11 different European countries, fewer than eight retail chains control the vast majority of the nation's food retail. For example, five retailers made up 85 percent of the German market in 2014 and 77 percent of the Dutch market in 2016. Retail is also continuously concentrating in most European countries. The merger between Sainsbury's and ASDA (owned by Wal-Mart) that was announced in late April is just the last in a long list of cases of concentration and consolidation of logistics and retail spaces (Box 5).<sup>77</sup>

Along with the possible abuse of dominant position that may lead to increasing prices, reduction of availability, unfair practices and reduction of consumers' well-being (sanctioned by Article 102 of the TFEU),<sup>78</sup> the concentrat-

ed status of the European retail sector and their increase in power trigger at least three kinds of concerns: a) accumulation and abuse of bargaining power deriving from mergers and acquisitions; b) establishment of international buying groups and contract-based concentrations; c) the redefinition of the whole food system, in particular upstream.

The increase in retailers' market share does not impact competition and contractual practices only. On the contrary, there is little doubt that consolidation, international and national buying groups and other forms of integration can have a significant impact on the structure of the overall food chain, including in terms of survival of small-scale farming, labour conditions, the foreclosure of local grocery stores and the environmental implications connected to a shift towards long value chains. These 'non-market' externalities have seldom been under the spotlight of competition authorities. On the contrary, they are often tagged as external to the scope of antitrust law and relegated into the sphere of the 'political'.

An interesting exception, although in our opinion still an incomplete solution that would have required the possibility for the court to assume a longer-term approach and embed socio-environmental considerations as an integral part of the decision rather than a justification for a mediation, is represented by the intervention of the South African Supreme Court in the case of Walmart's acquisition of Massmart in 2012.<sup>79</sup> Massmart was a national retailer with a market share of 25% that did not pose any direct threat in terms of substantially preventing or reducing competition. On the contrary, both the Tribunal and the Court of Appeal adopted a consumer-based approach and recognised that the acquisition would lower prices. However, the court proposed an innovative interpretation of Competition Act No. 89/1998 in order to expand its vision and consider the effects the merger would have had on Massmart's local suppliers, especially SMEs, which could have been substituted by Walmart's international suppliers.<sup>80</sup>

After having required the opinion of non-mainstream economists, the court leveraged Section 12A of the Act and the fact that it recognises public interest grounds as an obstacle to mergers and acquisition. Operating within a legal framework that resembles that of the TEU and TFEU, the Court decided to mitigate its pro-consumers decision with the introduction of a temporary pro-SMEs' fund to be financed by Walmart and to be disbursed in order to alleviate "the risks to micro, small and medium-sized producers of South African products caused, or which may be caused, by Massmart's merger with Wal-Mart."<sup>81</sup>

## 5 THE SAINSBURY/ASDA MERGER AND THE DISMISSAL OF NON-COMPETITION RELATED ISSUES

On 30 April 2018, J Sainsbury PLC and ASDA Group Limited announced that they had entered into an agreement to combine their operations. In the UK, it is the responsibility of the Competition and Markets Authority (CMA) to consider whether it is or may be the case that the Proposed Merger, if carried into effect, will result in the creation of a relevant merger situation under the merger provisions of the Enterprise Act 2002 and, if so, whether the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom (UK) for goods or services. The CMA issued a preliminary invitation to comment asking all interested parties to submit to them any initial views on the impact of the proposed merger. The responses to the inquiry raise interesting issues in terms of effects beyond the efficiency-framework of contemporary competition law. In particular, some submissions raised concerns about the effect that the proposed merger could have on employment or the effect that any store closures could have on the communities they serve (including making it more difficult for vulnerable members of society to do their shopping). Others raised concerns regarding the effect of the proposed merger on practices within the supply chain, including in relation to food provenance, labour conditions and environmental considerations. As a matter of fact, Sainsbury's has made it clear that if its proposed takeover of Asda is given the go-ahead from competition regulators, it will target its biggest suppliers for cost reductions by flexing its increased buying power.<sup>82</sup> However, the response of the CMA fully reproduced the dominant perspective. In its words, “[w]hen investigating a merger, the CMA’s mandate, by law, relates to assessing the potential impact of that merger on competition. This assessment is critical in ensuring that consumers are able to benefit from the lower prices, better service, or greater choice that effective competition is able to bring about. Assessing the other potential effects of a merger, such as the impact that a merger could have on employment, falls outside the CMA’s statutory powers.”<sup>83</sup> We consider the narrowness of the approach and the lack of any reference to increased bargaining power, public interest considerations and general economic well-being particularly worrisome. We hope this document may invite further and broader scrutiny on the implications of the merger.

A few years down the road, the jury is still out on the impact of the mergers on small-producers and the South African food system: however, the example represents one of the most progressive attempts by a competition authority to engage with material or potential changes in retail power. In particular, the court tried to use existing legal tools to redefine the boundaries between market and non-market considerations, although within the context of consumers’ well-being and the priority of price considerations.<sup>84</sup>

## 4.2 Abuse of Superior Bargaining Power and Unfair Trading Practices

Unsurprisingly, power is distributed unevenly in supply chains. But, this is not—per se—a reason for the law to intervene. To a certain extent, power imbalances are considered as normal factors in contract law, competition law, and the other regulatory tools dealing with unfair trading practices (UTPs). However, when the party enjoying a position of superior bargaining power uses this advantage to impose unconscionable or unfair conditions on other market participants, either of the regulatory solutions should be applied. It has been long discussed which law should be applied, as these abusive market behaviours have some characteristics (but not all) of contractual breaches for unconscionability or economic duress, and some characteristic (but again not fully) typical of abuses of dominance. The result being that—more often than not—such behaviours have been left unpunished and even unchecked.

At a scholarly level, this issue has been mainly addressed through the lens of contract law and consists in “regulating the contest between contracting parties and ensuring a relatively equalised landscape of bargaining capacity, bargaining power being interpreted as the interplay of the parties’ actual power relationship in an exchange transaction.”<sup>85</sup> The impact of buyer power on the structure of supply chains has been well documented<sup>86</sup>. For example, empirical studies have demonstrated that dominant UK grocery retailers pass on to Kenyan producers the cost of compliance with their private standards on hygiene, food safety and traceability and this has resulted in food production shifting from smallholders to large farms, often owned by the exporters, as well as the acquisition by such exporters of their own production capacity.<sup>87</sup> As already discussed by Olivier De Schutter back in 2010, “In short, small farmers are being kicked off global grocery supply chains, often leading to increased rural poverty.”<sup>88</sup> Within a context of transnational economic imbalances, some support may be provided by contract law.



Outside the bubble of competition law, something has been done. For example, the EU Commission in April 2018 advanced the proposal for a directive on unfair trading practices in the food chain that addresses some of the main concerns raised in terms of party autonomies, economic dependency, imposition of unfair conditions and the like.<sup>89</sup>

**From the point of view of competition law, however, there are only a few authors who have suggested that competition law should adopt a holistic approach to value chains and address the issue.<sup>90</sup>**

The holistic approach advocated by Lianos and Lombardi claims that the usual legal and economic analysis of firms' behaviour in the market should be integrated within contractual and socio-economic considerations that look at the whole food chain and at the long-term implications that a change in the distribution of power may have on all the actors (including those several tiers away from the retailer).<sup>91</sup> On the convergence between contract law and competition law, the Italian legislator introduced Article 62 of the law 27/2012 which defines unfair trading practices and also provides the Italian Antitrust Authority (ICA) with the power to punish conduct resulting in "an unwarranted exercise of bargaining power on the demand side at the expense of suppliers."<sup>92</sup> Therefore, in addition to its power to intervene in cases of abuses of dominant position, the ICA can now intervene in commercial relationships of a vertical nature in the agro-food industry, even in the absence of a dominant position, provided that the contract produces an appreciable adverse effect on the market. However, the effectiveness of the rule has yet to be proved and the list of unfair and illegal practices appears incapable of embracing all the ways in which power imbalances can be exercised within the context of bargaining and contracting.

### 4.3 International Buying Groups (IBG): Establishment, Practices and Implications

Throughout Europe, there is evidence of an increase in International Buying Groups (IBGs). These are groups of supermarket chains that coordinate procurement across borders to obtain the lowest possible prices for well-known brands and/or basic private label groceries. IBGs differ in size, membership and procedures: in addition, not all the top-ten EU retailers were members of an IBG in 2016.<sup>93</sup> More importantly, they differ in terms of legal arrangements and transparency. Some forms of cooperation are

## 6 TESCO AND CARREFOUR: A STRATEGIC ALLIANCE FOR WHOM?

At the beginning of July 2018, the British press reported the news that Tesco and Carrefour, Britain's biggest grocer and Europe's largest retailer, had concluded an agreement for a three-year purchasing alliance aimed at buying own-brand products together, putting more pressure on multinational producers like Nestlé and Unilever, and offering cheaper products to consumers. As reported in *The Guardian*, the Tesco chief executive and former Unilever executive, Dave Lewis, said: "By working together and making the most of our collective product expertise and sourcing capability, we will be able to serve our customers even better."<sup>94</sup> What is completely missing from the picture is the way in which the cut in costs will be obtained and the way in which stronger buying power will have ripple effects throughout the chain, all the way to farmers and producers. In particular, given the focus on Nestlé and Unilever, two multinational companies that are leaders in the production of processed food based on exotic products like coffee, cocoa and palm oil. As in the case of mergers and acquisitions, a narrow focus on economic efficiencies and consumer welfare appears incapable of grasping the socio-environmental externalities that will be generated. Similarly, a territorial approach that only considers the implications in terms of European consumers and European actors of the food chain would inherently dismiss the extra-European implications of a buying agreement between two companies that together hold 8% of the western European grocery market. As a matter of fact, the deal will not squeeze suppliers (as indicated by Reuters)<sup>95</sup> but the farmers that are at the origin of the food chain.

bilateral and informal. Others have their own legal and commercial identity and are funded through membership fees. Few are relatively transparent about their activities, others do not even have a website. Overall, arrangements tend to be confidential because of the strategic nature of the information that parties share and the way in which it can affect their buying power. What is clear is that, beside the consolidation that is taking place through mergers and acquisitions, there is a rise in the conclusion of bilateral or multilateral buying agreements that alters the distribution of bargaining power across the food chain. The recent case of a planned purchasing agreement between Tesco and Carrefour, Britain's biggest grocer and Europe's largest retailer, is self-evident (Box 6).

International and national buying alliances have not been completely off the radar of national competition authorities. On the contrary, they have been investigated in France, Italy and Germany. However, the role of IBGs in increasing supermarket buying power has not been the subject of systematic research or of clear political and legal interventions. As a matter of fact, they are conceived by competition authorities as an opportunity to increase accessibility by means of reduced price and, at least in the absence of unfair trading practices, the way in which buyer power may affect farmers and intermediaries upstream does not represent a political and economic priority. Similarly, the possibility to organise large-scale purchasing groups may be seen as a way of scaling up what consumers already do in order to obtain lower prices and avoid large-scale distribution. In the case of Carrefour and Tesco (Box 6), for example, Ian Wright, the chief executive of Britain's Food and Drink Federation, said the Tesco-Carrefour deal would increase concerns about the distribution of buyer power already impacted by the Sainsbury-Asda proposed merger. For him, the risks of these agreements would be imposed on suppliers, mostly smaller firms, and therefore it would be “imperative that these important changes to retailer/supplier market dynamics are properly examined by the competition authorities—in the round.”<sup>96</sup> However, analysts at Fitch Ratings do not expect the Tesco-Carrefour partnership to be subject to competition scrutiny as they have hardly any geographic overlap, which would eliminate one of the most important factors in the definition of ‘relevant market’ for the purposes of anti-competitive practices. As in other areas of competition law, a broad or narrow interpretation of the aim and objectives of its technical content would thus make the difference in the assessment and definition of policy responses to these horizontal buying agreements.

**The reason why it is important to talk about European and large-scale international buying groups is because of the alteration in power dynamics that they generate along the food chain and the implications that they may have both upstream and downstream.**

Firstly, groups tend to focus on products that cater to uniform and widespread consumers and to increase the standardisation of the market. Secondly, they generally agree on common standards and specifications that may require investments to be implemented, reducing the number of competitors and thereby determining a prejudice for the smallest producers. Thirdly, IBGs are often organising on-

line tenders that can be joined only by a selected number of providers, mainly those capable of providing sufficient quotas at competitive prices.

**With less competition among sellers and buyers and with the need to provide higher volumes and homogenised demands, international buying groups may create a situation where only large producers have access to market.**

In addition, the risk is all with the producers. Those who have the possibility to sell their products through retail stores, in fact, have everything to lose if they become incapable of adopting the requirements of the buyer or if they were to fail in granting the homogeneous product that is required by the network of buyers. In addition, the few arrangements discussed in a 2017 SOMO report<sup>97</sup> seem to aim at reducing the purchasing price (even in the context of possible socio-environmental standards) by leveraging coordination and power: no example is known of international buying groups where the mechanism has been used to require higher socio-environmental standards without being detrimental to small-scale producers, or guarantee remunerative prices leading to a living income to farmers or to improve the overall ecological and social impact of the value chain.

#### 4.4 Sugar Taxes to Protect Health: the Legality of State Interventions in the Market

Art. 107 of the TFEU inhibits any form of transfer of state resources that selectively favours certain undertakings. Although there are exceptions with regards to minimum threshold, development of regions and depressed areas, and guidelines that specifically concern states' interventions in support of farming, there is the risk that direct support to small-scale farmers to the exclusion of large-scale undertakings; public procurement measures oriented towards local producers; and other forms of public intervention envisaged in the scoreboards, may be deemed anti-competitive. One interesting connection between the discipline of state aid and the food chain is represented by the decision of local or national authorities to proactively favour healthy diets or oppose the excessive consumption of sugar, fat, salt, etc. This may assume the form of mandatory labelling, subsidies, prohibition and taxes: each of these regulatory interventions may fall within the scope of articles 107 and 108 of the TFEU, which has been broadly

interpreted by the European Court of Justice so that state aid does not only encompass direct contributions to national undertakings. Whether it is a Member State's right to decide on the objective of different taxes and levies, in order to comply with EU State aid rules, Member States must design taxes in a non-discriminatory manner.

A recent example originates from the decision of the Irish government to introduce a sugar tax on sweetened drinks containing 5 grams or more of sugar (Box 7). Such an example, along with other examples where the Commission recognised that state intervention can be directed to supporting the rural economy, facilitate the adoption of more sustainable products and production processes (such as greener cars or engines), and show that state aid could be an important area to be considered when it comes to greening food chains and embracing ecological and social considerations. As discussed by Julian Nowag, state aid discipline and jurisprudence have been addressing the integration of public interests (environment, health, rural development, etc.) since the mid-1990s<sup>98</sup> and are less narrow in their implementation of balancing and acceptance of limits to market fundamentalism than competition law is.<sup>99</sup>

## 7 THE IRISH SUGAR TAX AND ITS COMPATIBILITY WITH EU STATE AID LAW

In February 2018, Ireland notified the European Commission of its plans with the aim of obtaining legal certainty that the measure introducing a sugar tax on sweetened drinks containing 5 grams or more of sugar (sodas and juices) did not involve any state aid within the meaning of EU rules. The Commission in its assessment found that soft drinks can be treated differently to other sugary products in view of health objectives. In the formulation of its position, the Commission took into account the fact that soft drinks are the main source of calories devoid of any nutritional value and thereby raise particular health issues. Furthermore, soft drinks were considered to be particularly liable to lead to overconsumption and represent a higher risk of obesity, also when compared to other sugary drinks and solid food. On this basis, the Commission concluded that the scope of the Irish sugar sweetened drinks tax and its overall design are consistent with the health objectives pursued and does not unduly distort competition.

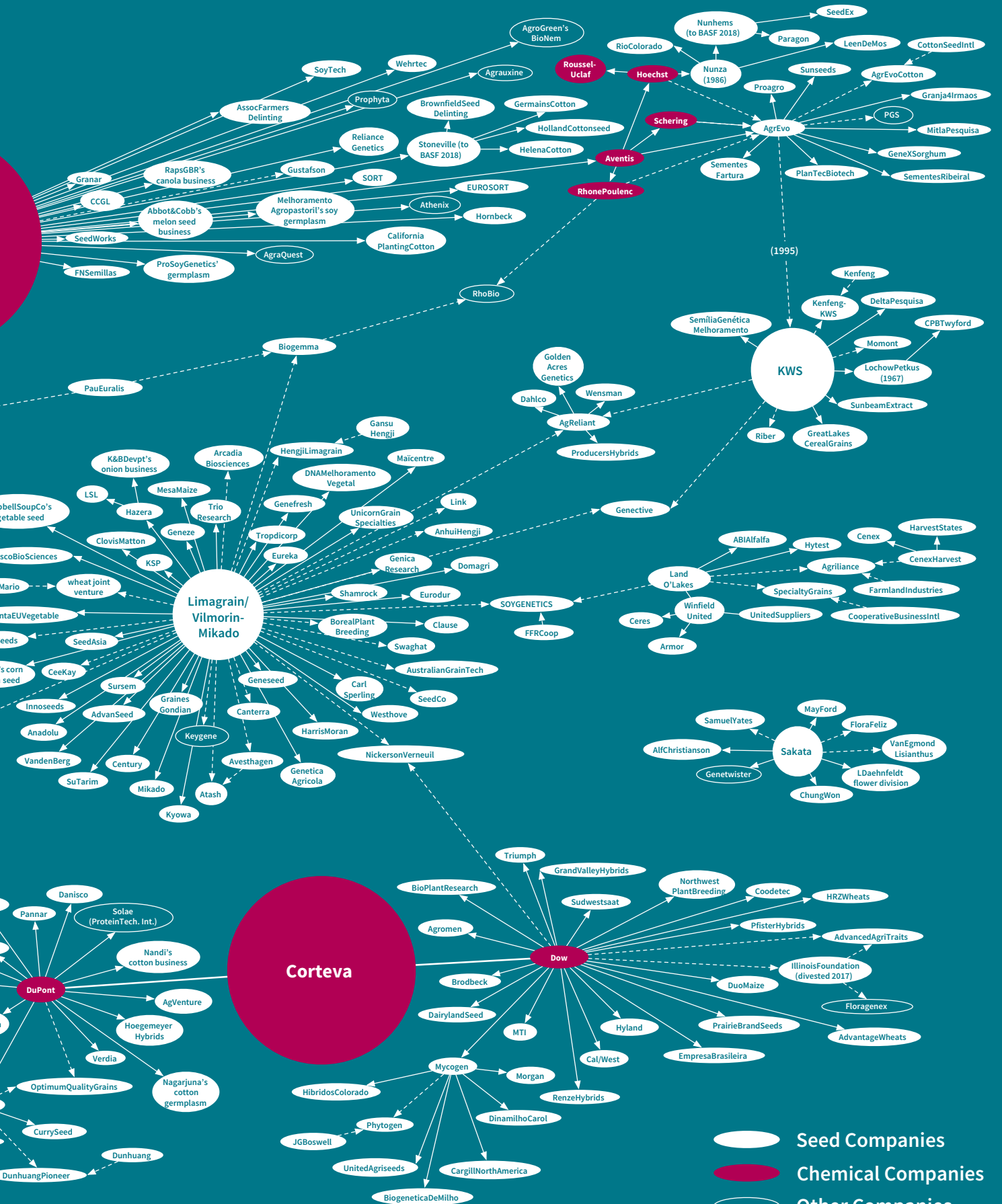
## 4.5 Concentration in the Seeds and Fertiliser Sector: Unsustainability of Mergers Regulation

2018 began with decisions by the European Commission's and United States' antitrust authorities clearing the acquisition of Monsanto by Bayer AG (Box 8).<sup>100</sup> However, the acquisition of Monsanto by the German-based multinational enterprise and the 'disappearance' of the American company represent only one of the multiple large-scale consolidations that have been taking place in this sector. As a matter of fact, the rise of agribusiness transnational enterprises has been favoured and has contributed to the consolidation of industrialised input-intensive agriculture, of which fertilisers, pesticides and seed manipulation are the main outcomes.

There is no doubt that agriculture, the ecological balance of the planet, the preservation of soil and biodiversity, the production of, and protection from, climate change and the distribution of power along the food chain are intimately interlinked. The growing adoption of intensive 'conventional' farming methods has been widely recognised as directly connected with ecological unsustainability. It would thus be myopic to think about the impact on price and yields of agricultural production without considering the consequences for the environment and the way in which technological solutions redefine agriculture, and the socio-economic implications of concentrated markets for inputs. However, the tendency of competition authorities is to avoid such complex understandings of the link between inputs, production and the socio-environmental equilibrium of the planet, with the result that mega-mergers are the norm.<sup>101</sup>

Before Bayer and Monsanto, in fact, there was the \$130 billion merger between US agro-chemical giants, Dow and DuPont, ChemChina's acquisition of Syngenta for \$43 billion and the planned merger with Sinochem. Overall, these deals alone will place as much as 70% of the agrochemical industry in the hands of only three merged companies.<sup>102</sup> In addition, mergers are also affecting the fertiliser market and are determined by the companies' desire to integrate their value chains and have direct access to market. This is the case, for example, of the Saskatoon-based Potash-Corp, which was one of the world's leading suppliers of potash and a major producer of other fertilising minerals. In January 2018, Potash announced its merger with the Calgary-based Agrium, which was a leader in other commodities and had an extensive network of retail operations. The two united to form Nutrien, a name that may generate trust from the consumers but that may not immediately reveal the main source of income for the company.<sup>103</sup>





- Seed Companies
- Chemical Companies
- Other Companies
- Full Ownership
- Partial Ownership

If we want to talk about the seeds and fertiliser sector from a competition law perspective, we thus have to adopt a value chain (holistic) approach and realise not only that concentration and large-scale mergers are taking place in different geographies and across sectors (fertilisers with chemicals, fertilisers with retailers, fertilisers with seeds and plant genome) but also that they have consequences that go beyond price, innovation and availability. To start with, we need to assess the fact that the proprietary seed industry is increasingly interlinked with the world's largest agrochemical corporations. Syngenta (Switzerland), Bayer (Germany), BASF (Germany) and DuPont (USA), Monsanto (USA), and Dow (USA), which used to be the 'Big Six' and are now the 'Big Four' currently controlling both 60 % of the global seed market and 75% of the global pesticides market. However, a holistic application of competition law to mergers and acquisition, based on the double bottom line of planetary boundaries and social foundations, would not rest at a mere description and would certainly not be satisfied with an investigation of the possible impacts on prices, availability and innovation.

A doughnut approach to mergers and acquisitions in the seed and fertiliser system would question the consequences in terms of permanence of alternative practices (not only competing products), the repercussions on non-conventional agriculture, the impact on non-patented seeds and their use, the implications for biodiversity, the modification of the incentives to shift towards ecological production or conventional agriculture, and the link between concentration, monoculture, use of fertilisers and the health conditions of both farmworkers and consumers. In addition, it would also question if the merger was having positive or negative effects on job creation and working conditions (in November 2018, Bayer announced its intention to cut 12,000 jobs)<sup>104</sup> and would look at it through the lens of big data and agri-tech innovation. As a matter of fact, conventional and mechanised agriculture is increasingly dependent on the access and management of information that is obtained from farmers and farmland. As stressed by a recent IPES report on concentration in the food system, "big data connects inputs— seeds, fertilisers and chemicals—to farm equipment and F&B processors and retailers to consumers in an unprecedented way, and in the process, data has become a major driver of consolidation."<sup>105</sup> The market for digital-based agricultural services is expected to reach US\$4.55 billion by 2020.<sup>106</sup>

In the case of Bayer-Monsanto (Box 8), IPES-food raised both the issue that farmers as intermediate consumers would be negatively affected by lower offers and higher prices and that the acquisition would produce an unprecedented concentration of agricultural data, all in the hands of one company. The point was supported with the evidence that Monsanto had perfected the practice of creating platforms that lock farmers into using specific products and that the use of this information could lead to differences in prices amongst farmers and the reduction of options to farmers.<sup>107</sup> However, the control of big agricultural data can also intensify power asymmetries between farmers and large agribusinesses.<sup>108</sup> As a matter of fact, "Big Data supports and pushes industrialised farming. Most agroecological small farmers have little use for precision farming or smart farming in their current incarnations, as these technologies are mostly tailored to monoculture industrial farms."<sup>109</sup> In addition, "[f]armers might or might not own the raw data generated from their fields, but they have no control over the information products generated from it. That information could potentially be used to affect prices, insurance rates, and perhaps even to inform investors interested in land grabs in the global North and South."<sup>110</sup>

**Whereas mainstream competition law may grasp the notion that the reduction of products and the increase in prices may affect farmers, it is currently ill-equipped to engage with the loss of practices and biodiversity that may occur.**

## 4.6 Horizontal Agreements, Prices and Standards in the Food Sector

One of the pillars of the contemporary EU competition law framework is the prohibition of horizontal agreements. As clearly established by Article 101 of the TFEU, the idea is that coordination between competitors is inherently detrimental to the consumers, because it goes against the notion itself of competition. When it comes to the food system, the existence of Article 101 can be particularly precious for small-scale farmers and consumers who may suffer from cartels and agreements concluded between intermediaries, buyers and retailers. Throughout the history of competition law, there has been an abundance of cases where competitors coordinated practices that increased

## 8 THE BAYER-MONSANTO MERGER<sup>111</sup>

At the beginning of 2018 both the EU Commission and the United States antitrust authority authorised the acquisition of Monsanto by Bayer. In the case of Europe, the purchase was subordinated to the adoption of some structural conditionalities such as Bayer's sale to BASF of a 'Bayer Divestment Business' to address the competition concerns on overlaps between Bayer and Monsanto in seeds, pesticides and digital agriculture. This choice has been criticised by several lawyers and academics, who have stressed that "replacing the process of organic competition that would have developed between Bayer and Monsanto, had the merger not been approved, with an 'artificially' engineered new competitor, put together through a competition authority, mandated 'bricolage' of various assets from the merging parties, without proper analysis of how these could fit the existing assets and competitive strategies of BASF, seems to be a rather risky and, certainly not market-friendly, approach to organise the competitive interactions in this industry."<sup>112</sup> Despite the critiques, an orthodox approach to competition law suggests that the choice of the European Commission appears fully in line with a narrow consideration of competition law as primarily based on prices and consumer well-being. In particular, it fails to assess the intimate connection between methods of production, the environment and the socio-economic construction of the food system. On the contrary, the competition Commissioner recognised that: "During its investigation, the Commission has been petitioned through emails, postcards, letters and tweets expressing concerns about the proposed acquisition" but that the "Commission's mandate under the European merger control rules is to assess the merger solely from a competition perspective. This assessment must be impartial and is subject to the scrutiny of the European Courts. Other concerns raised by the petitioners relate to European and national rules to protect food safety, consumers, the environment and the climate. While these concerns are of great importance, they cannot form the basis of a merger assessment."<sup>113</sup> Even in that context, several arguments were advanced against the compatibility of the acquisition with the EU mergers' regulation (Regulation 139/2004). As discussed in a letter that IPES-food sent to the Commissioner before the decision was made,<sup>114</sup> an increased concentration in the seeds and fertiliser sector (already particularly concentrated) may not only be detrimental to farmers (as intermediate consumers of the products sold by Bayer and

Monsanto) but also to final consumers in terms of availability, innovation and research and development. For example, two studies cited in the letter looked at the seed industry in different European countries showing that private plant breeding has narrowed its focus to fewer species and that the diversity within species may also have declined. Similarly, research conducted at the University of Illinois in 2016 concluded that not a single new species has been introduced into the European food system since the era of large-scale mergers began. On the contrary, numbers show that the dominant companies in this highly concentrated sector devote at least 40% of their R&D expenditures to just one crop—maize. Outside of the categories that are usually considered by competition authorities, a push towards a more chemicals-based agriculture would also have significant consequences with regards to the preservation of biodiversity, the protection of the environment and the health conditions of both farmworkers and consumers.

Within the context of the EU Treaties, a further argument was recently raised that the Bayer merger should have been read through the lens of article 42 of the Treaty on the Functioning of the European Union, which requires the European institutions to subordinate the application of EU competition law to the implementation of the Common Agricultural Policy, in particular to the achievement of the goals of stabilising the market, assuring the availability of supplies and assuring that supplies reach consumers at a reasonable price (Art. 39, see Section 5.7).<sup>115</sup>

In addition, Lianos noticed "[a]lthough public interest considerations do not explicitly form part of the substantive test of EU merger control, Article 21(4) EUMR includes a legitimate interest clause, which provides that Member States may take appropriate measures to protect three specified legitimate interests: public security, plurality of the media and prudential rules, and other unspecified public interests that are recognised by the Commission after notification by the Member State."<sup>116</sup>

If a Member State wishes to claim an additional legitimate interest, such as the protection of small-scale farming as a structural element of the national economy, →

→ employment, biodiversity, the right to food or socio-environmental sustainability of the food chain, it shall communicate this to the Commission, which must decide within 25 working days whether the additional interest is a) compatible with EU law; and b) qualifies as a legitimate interest under article 21(4). This opportunity, so far not explored, should thus be taken seriously by Member States, civil society organisations and political actors.

Shifting geography, it is noteworthy that the merger has also been cleared by the Competition Commission of South Africa, which specifically focused on the cotton market and the fact that “over 90% of seed used in South Africa’s cotton production uses GM seeds”. As a consequence, they imposed a condition for the merger that the merged entity would have to “divest and sell the entire global Liberty Link trait technology and the associated Liberty branded agro-chemicals business of Bayer”. Given the mandatory analysis of the impact on public interest, the Commission took into consideration the effects on employment and concluded that the merged entity could fire 20 workers, but must create at least another 20 jobs over 3 years to maintain existing employment levels.

According to Mariam Mayet, Director of the African Center for Biodiversity (ACB), “the CCSA’s condition for the disposal of Bayer’s GM cotton assets and its sale to another entity that will produce the seed and chemicals commercially in South Africa is still locked into the dominant technological paradigm. It does not go further than attempting to ensure competition in the production and distribution of GM technologies. No other farming alternatives are considered. The key drivers remain the same: increasing

economies of scale, uniformity and standardisation in the food system. Small farmers face higher input prices, fewer choices in seed or crop protection, and lower output prices. Consumers are offered products that are small variations of standardised processed industrial foods built on cheap carbohydrates.”<sup>117</sup>

A final point to notice is that, as opposed to the Dow/Du Pont merger, in the case of Bayer and Monsanto there is little (if any) evidence that the Commission carried out a thorough analysis of the financial ownership of the two companies and the possibility of reduced competition and effects on innovation due to common ownership. In the case of Dow/Du Pont, “the Commission took this into account as an element of context in the appreciation of any significant impediment to effective competition, noting that in the context of innovation competition, such findings provide indications that innovation competition in crop protection should be less intense as compared with an industry with no common shareholding.”<sup>118</sup> If we also consider that the main shareholders in BASF are the same of both Bayer and Monsanto, the need for a structural reform of the European Union Merger Regulation appears inevitable and urgently needed. It will have to require, at least, full disclosure and an in-depth scrutiny of financial ties between merging companies, and introduce a refined concept of *de jure* and *de facto* control so as to grasp the current trends in financial investments;<sup>119</sup> and shift on to the undertakings the responsibility to prove that common ownership would not have negative effects in terms of competitiveness, research, development and socio-environmental impacts of production.

prices, limited availability or negatively affected the quality of production. In most cases, the aim is to be able to extract value that would otherwise not be available in case of competitive practices. This may also happen along the chain, with undertakings operating at different levels colluding to fix prices that are then imposed down the chain. One of the most recent European cases of this kind in the food sector concerns Böhmer and Kuhn, which were found guilty of collaborating to fix prices for potatoes and onions in their contracts with retail group Metro (Box 9).

In its interpretation and application, Article 101 has often been considered with rigidity by competition authorities and courts: especially if competitors converge around prices.

**Thus, Article 101 has been historically used by European companies to reject any possibility of adopting a common purchasing price for goods.**

As some of the people interviewed for this report stated, the fear of being sanctioned, led companies and associations to establish clear protocols of conduct during meetings among competitors and that they interrupted conversations that concerned the adoption of a common price for farmers capable of guaranteeing them decent living conditions. Similarly, the adoption of binding sustainability sectorial standards of production is often opposed by companies due to the risk of a legal infringement.



Because of this, the content of Article 101 has increasingly been considered by some lawyers, companies and civil society organisations as an obstacle to the adoption of higher environmental and social standards by market actors than those required by national and international authorities.

Courts and market actors have thus attempted to act against the rigidity of the prohibition by expanding the possibility of exceptions to its application. Section 5 below engages with some of the proposals that may legally justify horizontal coordination between competitors, and offers some critical considerations of the possible limits of such change in the interpretation of Article 101.

## 9 VERTICAL AGREEMENTS IN THE EU POTATO AND ONION MARKET

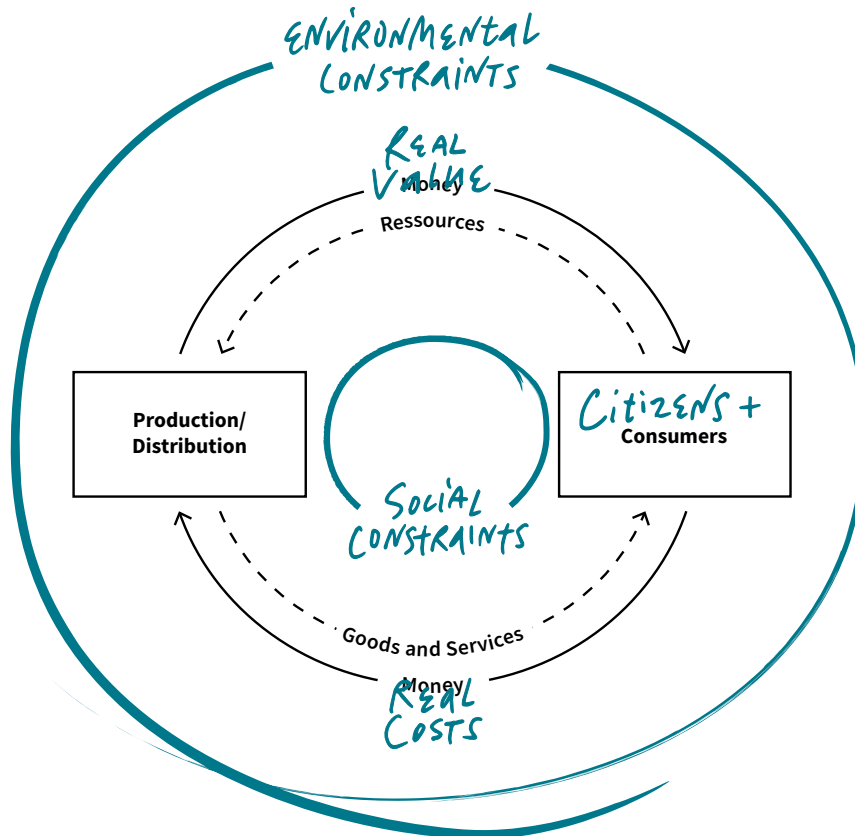
The concept of vertical agreements covers the purchase or supply of intermediate goods (e.g. raw materials or goods subjected to further processing by the buyer); finished goods (e.g. for resale by a retailer) or services. Vertical agreements may be structured in different ways and have very diverse substantive effects on competition. Article 101(1) applies to vertical agreements and similarly to horizontal agreements, although vertical restraints tend to be considered less harmful than horizontal restraints. After a procedure that lasted almost five years, on May 2018, the German authority sanctioned Hans-Willi Böhmer Verpackung and Vertrieb GmbH & Co. KG and Kartoffel-Kuhn GmbH for a total of €13.2m. The two enterprises are not direct competitors but operate at different levels of potato and onion packaging (Böhmer) and supply packed potatoes and onions to the Metro group. According to the President of the German competition authority, the two firms had “agreed on an important parameter in the calculation of their weekly offers to Metro. By aligning their purchase prices used in the calculation, the two major suppliers of the Metro group virtually eliminated any price competition between them”.<sup>120</sup> This case contains the classic elements of anti-competitive agreements, which force a higher price on buyers without any other justification than extra-profit and has a negative impact on competition. As we discuss in this report, this case must be kept separate and distinct from the introduction of standards and coordinated practices that increase the environmental and social sustainability of production.

It is important to stress that vertical integration is raising less concern and a lower level of scrutiny than horizontal mergers. This is particularly true in the case of common

ownership by the same financial actors who operate as shareholders in different undertakings along the same value chain. However, the commonality of interest at different steps of the chain (for example between suppliers and retailers) should immediately raise concerns in terms of the possibility of coordinating prices and squeezing value away from any other level of the chain (producers, consumers and other intermediaries). A reform of the Merger Regulation should thus specifically address the issue of vertical integration through common ownership and introduce ad hoc procedural and substantive rules.

Finally, it is noteworthy that the European Commission and some national authorities have introduced vertical agreement block exemption rules with regards to specific agreements that take place along the value chain and which satisfy specific requirements, for example that the market share of each of the parties to the agreement must not exceed 30% and that there are no hardcore restrictions in the agreement. The vertical exemption block is based on the idea of ‘safe harbours’ that should provide business and legal certainty to undertakings. Price fixing is always excluded from the exemption because it is considered a hardcore restriction.<sup>121</sup> Another form of avoiding the intervention of the EU competition authority in the case of vertical agreements, is the submission of a De Minimis notice, which will be accepted by the EC when the parties have a combined market share of less than 15% if the undertakings are not competitors (10 % in cases where they are competing) or the agreement is concluded between small and medium-sized enterprises with fewer than 250 employees or an annual turnover not exceeding 50 million Euro.

# 5 The Unsustainability of Competition Law: Problems, Challenges and Solutions



Price and consumer-centred competition, that is driven by the idea of market efficiency, tends to ignore all the other public policy concerns that may arise in the case of a horizontal agreement, or a merger or a power differential between actors along the food chain. In particular, pure environmental and social issues lose significance before antitrust authorities because they are not actually part of the efficiency equation that is applied, unless they can be presented in narrow economic terms based on a cost-benefit analysis. The only way in which these kinds of benefits and negative externalities, generated by an anti-competitive practice can be considered, is if they are translated into the vocabulary of the consumers' economic welfare. Only when the reduction of biodiversity or the adoption of a living price for farmers are read through the lens of price, availability and innovation, can they be compared with the positive or negative impacts that the anti-compet-

itive practice is deemed to produce. As clearly exemplified by the Guidelines of the Commission on Article 101(3), an agreement between undertakings is pro-competitive and compatible with the objectives of the Community competition rules only "[w]hen the pro-competitive effects of an agreement outweigh its anti-competitive effects."<sup>122</sup>

Although not totally impossible, the traditional way for integrating environmental and social sustainability considerations in competition law requires their redefinition into data and figures that competition law can process and compare. It is important to think of possible leverages that could be used to favour (or mandate) the integration of public concerns and, in other cases, to remove the issue from the area of competition and competition law, so that other institutions deal with it.

Within the context of an economic system that is increasingly exploiting both people and the planet, it is important to go beyond translation/integration and imagine a new system of competition law that is disengaged from consumer centrism and fully embedded in the double limit of planetary boundaries and of social foundations as external to competition law.

As exemplified by figure 1 above, the idea is to abandon the neoliberal understanding of competition as a neutral and inevitable mechanism based on price and think of rules of competition that fit within the idea of doughnut economics proposed by Kate Raworth.<sup>123</sup> In order to achieve this, the ideology, institutions and people that make competition law possible should be organised and act in a way that is: a) informed by a sophisticated understanding of the real value of goods and services that takes into consideration socio-environmental externalities and is not only defined by the price tag; b) compatible with the need to respect the planet and to improve the conditions of every person on this planet.

In this section we identify some instances in which the European legal framework already considers public interest concerns and we make some suggestions of what could be done to go even further. In particular, this section focuses on the public interest concerns and other non-economic concerns, such as environmental sustainability, social sustainability, the right to food, and fairness, that should be considered—to some extent—by competition laws, according to EU law.

## 5.1 Public Interest Considerations

There is no specific definition of ‘public interest’ in EU law, but this is a concept that often finds application by the courts.<sup>124</sup> Public interest has been described as having a three-dimensional form whereby it “reflects a constitutional reality that often places judicial review at the intersection of national, supranational and international legal norms.”<sup>125</sup> Thus, public interest is a dynamic concept that changes over time with the adaptation of public values, morals, and laws of a society.<sup>126</sup> Public interest concerns generally find application in courts either vertically or horizontally. The former implies that the application of a ‘lower law’ would bring about the violation of the constitution or any other ‘higher law’ encapsulating the public interest

concern<sup>127</sup>. The horizontal application of public interest is instead a matter of balancing between two or more public interest concerns, which in theory have the same status in the hierarchy of the sources of law. It might be possible to delineate three different types of conflicts between public interest concerns:

- a) competition among different subjects in the enjoyment of the same right (as, for example, in the case in which it is not possible to guarantee a certain social benefit to all those who have the right).
- b) competition of non-homogeneous individual interests (such as, for example, freedom of expression and protection of privacy).
- c) competition between individual interests and other interests (as, for example, in the case of the conflict between the right to news and state secrets).

As a matter of fact, competition authorities have considered public interest concerns in the enforcement of their prerogative powers.<sup>128</sup>

Consumer welfare is certainly one of the guiding principles for the EU Authorities, but it is not the only one.<sup>129</sup> By law and by facts, for instance, the ‘internal market’ objective has always played a central role in the enforcement of EU laws, including competition law. In the *Glaxo* saga, the ECJ had to establish whether the prohibition of parallel trade alone was enough to justify the infringement of competition laws, or whether it was necessary to also find a reduction in the welfare of the final consumer. The ECJ held that the prevention of parallel imports was unlawful, as it divided the internal market. In the context of an economic system that is increasingly affecting people and the planet, authorities and judges are increasingly asked to weigh public interest in enforcing competition law<sup>130</sup>.

A possibility of introducing public policy considerations as an external limit to competition is offered by Article 101(3). In one important reading of the Article, the EC used paragraph 3 to balance other policy objectives, such as investment, regional development, social agenda or transportation.<sup>131</sup> For instance, in the *Ford-Volkswagen* case<sup>132</sup> the EC observed: “In the assessment of this case, the Commission also takes note of the fact that the project constitutes the largest ever single foreign investment in Portugal. It is estimated to lead, inter alia, to the creation of about 5,000 jobs and indirectly create up to another 10,000 jobs, as well as attracting other investments in the supply industry. It therefore contributes to the promotion of the harmonious

## 10 PUBLIC INTEREST CONCERNS ARE ALREADY PART OF THE EU FRAMEWORK

Statements are sometime made that public interest concerns have no role in competition law. However, the opposite is true: a number of examples demonstrate that the EU framework states the opposite and that enforcement practices have also followed from these concerns.

**Article 3(3) TFEU:** introducing the concept of “a highly competitive social market economy.”

**Article 9 TFEU:** states that “(i)n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”.

**Article 11 TFEU:** “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”

**Article 12 TFEU:** consumer protection stating that: “consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities”.

**Article 168 TFEU:** considers human health and states that “A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities”.

**Article 175 TFEU:** refers to the objectives of economic, social and territorial cohesion set out by Article 174 and affirms that: “Member States shall conduct their econom-

ic policies and shall coordinate them in such a way as, in addition, to attain the objectives set out in Article 174. The formulation and implementation of the Union’s policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement.”

**Article 208(1):** introduces the idea of policy coherence for development and affirms that the objectives of development cooperation shall be taken into account in the policies which are likely to affect developing countries.

In addition, the Commission’s Guidelines on the application of article 101(3) [2004] OJ C 101/7 at para. 43 state that “The assessment under Article [101] (3) of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates. The Community competition rules have as their objective the protection of competition on the market and cannot be detached from this objective. Moreover, the condition that consumers must receive a fair share of the benefits implies in general that efficiencies generated by the restrictive agreement within a relevant market must be sufficient to outweigh the anti-competitive effects produced by the agreement within that same relevant market. Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same”.

development of the Community and the reduction of regional disparities which is one of the basic aims of the Treaty”<sup>133</sup>. The EC therefore exempted the agreement, under Article 101(3), thanks to its “extremely positive effects on the infrastructure ad employment in one of the poorest regions in the Community.”<sup>134</sup>

**However, the EC approach to art. 101(3) generates several shortcomings from the perspective of recognising and respecting the socio-environmental needs of a truly sustainable world.**

Firstly, everything must be monetised in order to be visible to the competition authorities. Trees, human rights, labour conditions, etc., have to be translated into data and figures, a process that it is inherently limited and reductionist. Secondly, a consumer-based vision of socio-environmental considerations only considers consumers’ benefit, and in particular the benefit that is experienced by those consumers who are directly or indirectly affected by the agreement or anti-competitive practice. According to para 85 of the EC guidelines on Article 81 (now Article 101), “The concept of ‘fair share’ implies that the pass-on of benefits must at least

compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1)". Additionally, Article 101 (3) TFEU refers only to efficiencies created within the specific market, in the EU, where the anticompetitive distortion takes place. Hence, improvements in connected markets, perhaps even outside the EU, would not count for the purpose of Article 101(3).

## 5.2 Integrating Socio-Environmental Sustainability but Beyond Monetary Representations of Society and Nature

At the end of 2018, the International Panel on Climate Change (IPCC) reminded us of the necessity to change production methods if we want to keep the increase in global temperature below 1.5 degrees above pre-industrial levels. This is closely related to the food system both as a large contributor to greenhouse gases and as one of the most vulnerable sectors. Moving in this direction, the 2015 Paris agreement, adopted by consensus by 196 Countries on 12 December 2015, aims at low greenhouse gas emissions and climate-resilient development. The Paris agreement is the last of many national and international legal instruments adopted to reach this objective. Yet, the recent history of the EU agricultural system has gone in the opposite direction, fanning flames on the fire of specialisation, industrialisation and financialised agriculture and food production.<sup>135</sup> Coupled with the already observed increasing levels of concentration, the industry has embraced a production model which is mainly export oriented. According to many experts and empirical studies, including the Food and Agriculture Organization<sup>136</sup> and the Union of Concerned Scientists,<sup>137</sup> this way of producing food is largely unsustainable for the environment and responsible for hidden costs that are experienced daily by people on the ground.

In this context, competition law can play a role in supporting a U-turn of the EU food and agricultural system. Of course, if coupled with other legal and non-legal interventions. In our opinion, for example, the scope and vocabulary of the Maastricht Treaty (and the Lisbon Treaty afterwards) have opened interesting cracks in a technocratic area of law otherwise ruled by the principles of perfect competition, equilibrium, marginal utility and consumer well-being. The introduction of Article 11 of the Treaty on

## 11 THE HISTORY OF ARTICLE 11 TFEU<sup>138</sup>

When it comes to the relationship between the single market and non-financial interests, one of the most interesting elements of the Treaty on the Functioning of the European Union (TFEU) is represented by Article 11.<sup>139</sup> Whereas the substance and application of the article are discussed below, it is important to mention its historical evolution from the origin of the European Economic Community to Lisbon. In the absence of a specific provision, as long ago as 1973, Member States and the Council of the European Communities had already recognised that the fight against pollution could justify a reduction in the freedom of movement of goods and coordinated action. A few years later, in 1985, the European Court of Justice recognised that the protection of the environment represented "one of the community's essential objectives". In 1986 the Single European Act was signed as the basis of the European Community, and Article 130r (2) was introduced to require that 'environmental protection requirements shall be a component of the Union's other policies'. It was the beginning of the dialogue (someone would say integration) between free market, competition and environmental considerations. The Maastricht Treaty of 1992 reinforced such provisions by replacing "shall be a component" with "must be integrated", therefore adopting a version with stronger legal teeth.<sup>140</sup> The Amsterdam Treaty that amended Maastricht in 1997 made it even more relevant by explicitly making the provision applicable in all areas of EU law and of EC action (including policy-making, regulations, directives and decisions) and by introducing the linkage between environmental protection and sustainable development.<sup>141</sup> The Lisbon Treaty did not alter the formula, which in principle requires EU institutions and Member States to take the environmental impact of any measure into account. As discussed below, the principle and ideas behind EU competition law are such that the integration of environmental and sustainable concerns within the context of competition law significantly differs from the way in which similar considerations are introduced in the consideration of free movement and state aid. One of the aims of this report is to highlight this discrepancy and provide food for alternative thoughts.

## 12 CASE C-343/95 DIEGO CALI & FIGLI V SERVIZI ECOLOGICI PORTI DO GENOVA [1997] ECR I-1547

Cali operated transportation services, for third parties, for petrochemical products at sea in tankers and it used the oil port of Genoa-Multedo for the purpose of loading and unloading products, including acetone. For the operations in the Genoa port, Cali used a subcontractor Porto Petroli di Genova SpA ('SEPG'). The contract involved the loading and unloading of the products against the payment of a fee. However, by the end of the contract period, SEPG also invoiced Cali for the antipollution surveillance services performed on Cali's behalf. The latter refused to pay on the grounds that it had never requested, nor had recourse, to services of that type during the operations carried out in the oil port of Genoa. Cali claimed that this was an abuse of dominant position on the side of SEPG. The ECJ recognised that "[t]he anti-pollution surveillance for which SEPG was responsible in the oil port of Genoa is a task in the public interest which forms part of the essential functions of the state as regards protection of the environment in maritime areas"<sup>142</sup>. However, it also observed that SEPG was entrusted with the exercise of a public service by the public authority, against the payment of fees approved by public authorities, thus Article 102 (article 86) could not find application<sup>143</sup>.

the Functioning of the EU and its subsequent transformation (Box 11) represent the legislative recognition of the need to consider the social function of the market, the integration of environmental protection, the goal of sustainability and the notion of policy coherence for development. The EU Treaties assign to environmental protection a position of prominence, Article 11 TFEU establishing that "[e]nvironmental protection requirements *must* be integrated into the definition and implementation of the Union's policies and activities."<sup>144</sup>

The Treaties fail to give guidance on the implementation of these policies, but the letter of the law is clear on the results to achieve, which is the integration and implementation of environmental protection in all the other sectors of EU's policies. Competition law should not be an exception. The elements contained in the treaties and discussed

in Section 3 above invite considerations that go beyond EU orthodoxy and offer legal and political opportunities that may have not been evident before. They nudge policy-makers, lawyers, academics, civil society and the private sector to question the premises and function of competition law within the context of the contemporary European Union. They are an invitation to look at the roots of the current legal and ideological framework, its mechanisms, outcomes and holistic shortcomings.

### 5.3 The Exception for Public Undertakings

A second example of the possibility for states and competition authorities to consider and integrate public interests that differ from the achievement of a perfectly efficient market is offered by Article 106 of the TFEU (ex Article 86 EC) on public undertakings, according to which:

- 1 In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
- 2 Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

While this provision seems to be of clear application, it has been demonstrated that it is often difficult to discern between undertakings "entrusted with operation of services of general economic interest" and undertakings performing tasks for public authorities.

## THE PITFALLS OF A RESTRICTIVE INTERPRETATION OF COMPETITION LAW



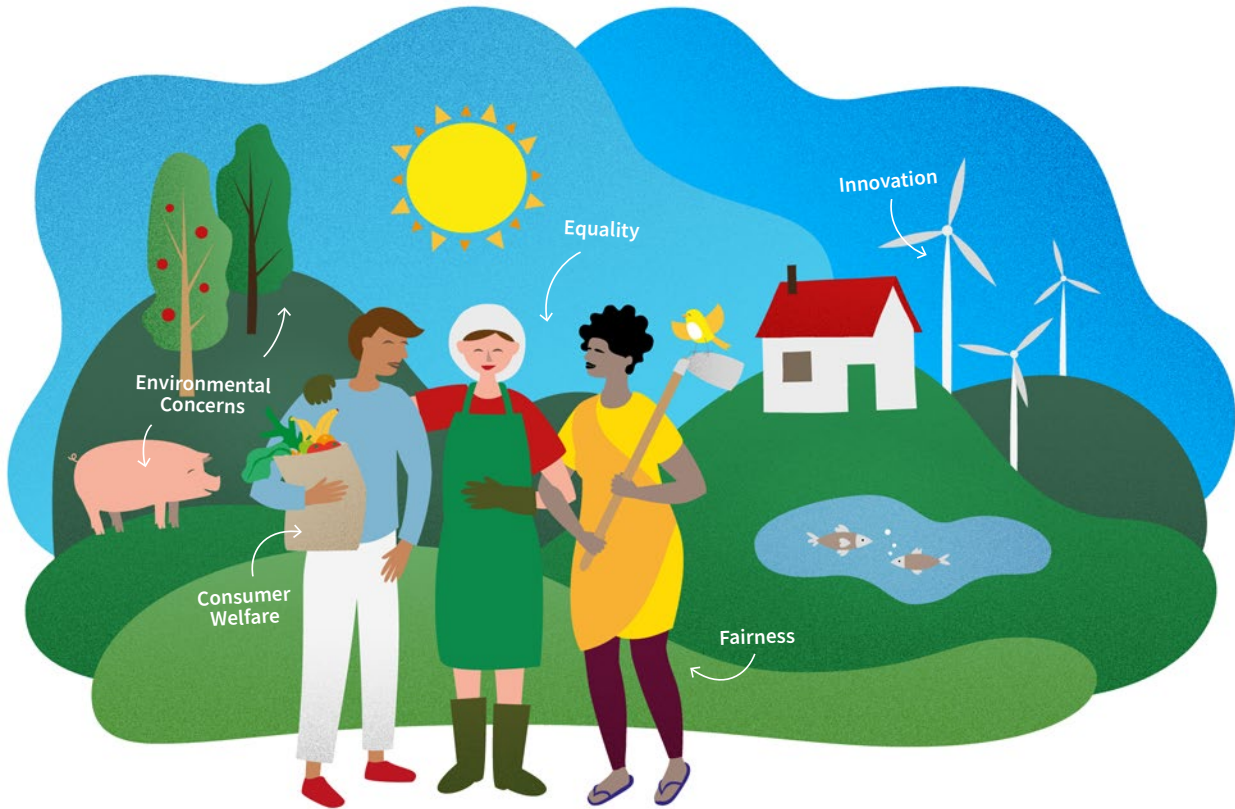
The European Commission has been reluctant to gauge the efficiencies created outside of the relevant market<sup>145</sup> and has in more than one occasion excluded the premise that competition might be balanced with other public interest concerns<sup>146</sup>. Some national authorities have instead been more open in considering other public policy interests, although rarely concluding that any balancing was possible. The ECJ has been generally more open to considering the application of other public interest concerns<sup>147</sup>, sometimes including effects taking place outside of the relevant market.<sup>148</sup> In the landmark *Wouters* case, the ECJ pointed out that, public interest concerns may become an exception to the enforcement of EU competition laws.

In this case, the Bar of the Netherlands tried to regulate the legal profession by passing an internal regulation prohibiting partnerships between Bar members and accountants, based on overriding reasons of public interest. Mr Wouters, a member of the Amsterdam Bar, claimed that this Regulation was anticompetitive, since it had the object or effect of restricting competition among service providers in the common market. The ECJ concluded that, despite being a public professional body, the Bar of the Netherlands was subject to the application of competition laws when

adopting the 1993 Regulation, and that the same Regulation was indeed restricting competition in the provision of legal services. However, the Court also observed that: “[a] regulation such as the 1993 Regulation could therefore reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned.”<sup>149</sup> The ECJ has, in other words, balanced the public policy concerns encapsulated by the 1993 Regulation against the application of competition laws, ultimately deciding in favour of the former.

In another case, *Meca-Medina*,<sup>150</sup> the ECJ established that, although the decision taken by the International Olympic Committee was anticompetitive in nature, in the ‘overall context’ the objective that the decision intended to achieve deserved to prevail over the application of competition laws. In the words of the Court, in the “overall context in which the rules at issue were adopted, the Commission could rightly take the view that the general objective of the rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes’ health, the integrity and objectivity of competitive sport and ethical values in sport.”<sup>151</sup>

## THE SUSTAINABLE OBJECTIVES OF COMPETITION LAW



The consequences of integrating public interest concerns within the framework of competition law is undoubtedly significant.

First of all, it forces competition authorities and courts to recognise that competition does not operate in a vacuum and that the market is not separated from other elements of society, in particular people and the planet. Secondly, it breaks with the binomial individual-market that is represented by the dominant theory of consumer welfare. Finally, it contributes to the change in paradigm: the construction of a competitive market would cease being the main force that determines and affects other values and utilities (like equality, environmental protection, animal welfare, etc): competition would only be one of the tools that facilitate the coexistence and thriving of these interests. As exemplified by the two figures below, the relocation of competition law would not mean the end of competitiveness, but the rebalancing of priorities and finalities. Public authority exercised by means of the legislative, executive and judiciary can achieve this goal: however, political will and a change in the vision of economics are required.

### 5.4 Art. 101 and Standard Setting – Quality, Price and the Excuse of Competition Law

As we discussed in Section 4.6, Article 101 of the TFEU has been interpreted by courts and national authorities in such a way that when competitors adopt a common standard of production or a process, they end up on the radar of competition authorities. Anecdotes from throughout the food sector report that firms in a number of other industry sectors have complained about the impossibility of reaching industry-wide agreements for the betterment of the environment or other social concerns. The banana sector has been at the forefront of this discussion, with the World Banana Forum establishing a working group aimed at taking into consideration the cost of producing sustainably and what measures could be undertaken collectively by the stakeholders throughout the chain to guarantee remunerative prices leading to a living income to farmers who are at the origin of the whole production.



Lately, a group of NGOs interrogated the major world chocolate producers about the difficult situation in which many farmers are left and the environmental impact of their way of sourcing cocoa.<sup>152</sup> Aware of this, many cocoa buyers and processors are said to be amenable to agreeing on higher supply prices, but also admitted being extremely wary of falling foul of competition laws and therefore could not see any way to proceed with formal or informal talks. The industry indeed laments that the boundaries of Article 101 are unclear and do not seem to support a reading that favours dialogue among competitors, even when such efficiencies might be created. Whereas, to a certain extent, the 2010 horizontal guidelines<sup>153</sup> provide some indications, more clarity on the quality and breath of sustainable collaborations would encourage positive behaviours in the market. However, as solutions for a living income, the authors would propose also exploring unilateral increases in contributions; a more attentive approach to violations of socio-economic rights (also to the establishment of industry standards), and the possibility to sanction unfair competitive advantage that derives from placing on the market products obtained in violation of international and national laws.

The current EU legal framework offers some opportunities to make the case that agreements on a common living income price for farmers could pass the guillotine of national and EU competition authorities. The 2010 horizontal guidelines,<sup>154</sup> for example, expressly mention non-economic and environmental concerns in the application of Article 101 (3), although they adopt a relatively narrow approach to the gauging of such non-economic effects. Another attempt to elude the rigid prohibition of horizontal agreements has been proposed by the Dutch Authority for Consumers and Markets, which in 2014 released a Vision Document on the issue of ‘Competition and Sustainability’ where it engages with the possibility of justifying cases of horizontal coordination aimed at improving the (environmental and social) sustainability of the supply chain. This expanded use of Art.101 and the integration of public interest concerns through agreed process-based measures (PPMs) were tested in the so-called case of the ‘Chicken of Tomorrow’. Retailers agreed to only display chickens on their shelves that had been produced respecting a common minimum standard of chicken welfare and stop selling chickens that were raised in worse conditions (Box 13). Although the Dutch Authority for Consumers and Markets recognised that the agreement could have been approved if deemed compatible with consumers’ willingness to pay more, it would not

### 13 THE CHICKEN OF (WHICH?) TOMORROW

In 2013, Dutch poultry producers began the negotiation of an agreement—the *Kip van Morgen* (‘Chicken of Tomorrow’)—aiming to make poultry production and consumption more sustainable. The agreement intended to regulate the following:

- re-normalising growth rates to decrease health issues and antibiotic usage
- reduction of the concentration of chicken in facilities (less chickens per m<sup>2</sup>)
- adoption of different measures to decrease injuries
- use of sustainable soy in feed
- environmental requirements such as lowering carbon footprint, sustainable energy use and decreasing emissions.

The agreement was submitted to the Dutch Authority for Consumers and Markets, although without in-depth and sophisticated research capable of demonstrating that the increase in price was justified by the improvement in the chickens’ conditions or that consumers were willing to pay the higher amount. In its decision, the competition authority determined the potential anticompetitiveness of the common standards and concluded that the efficiencies created by this agreement would not be reflected at consumer level, and therefore would not outweigh the inefficiencies, thus failing to fulfil the conditions for the application of Article 101 (3) TFEU.

allow the convergence between competitors as it would be contrary to Article 101 and this proved to be the end of the ‘Chicken of Tomorrow’ experiment.

The decision of the Dutch Authority for Consumers and Markets in the ‘Chicken of Tomorrow’ case does not represent the natural and inevitable outcome. On the contrary, suggestions have been made that “the case would have been decided very differently had the parties framed the agreement as a standardisation agreement in line with the Horizontal Guidance in Art. 101, as the conditions for exemption seemed to comply with this.” In the Guidelines, the EC lays down an overarching principle on the process of the creation of a standard:

*“Where participation in standard-setting is unrestricted and the procedure for adopting the standard in question is transparent, standardisation agreements which contain no obligation to comply with the standard and provide access to the standard on fair, reasonable and non-discriminatory terms will normally not restrict competition within the meaning of Article 101(1)”<sup>155</sup>*

In other words, the standard setting process should be:

- a Unrestricted: in the sense of giving access to all competitors in the markets affected by the standard.
- b Transparent: especially in the case of the creation of a standard setting organisation, the governance procedures of this organisation should be clear to all stakeholders.
- c Fair access: access to the standard on fair, reasonable and non-discriminatory terms (FRAND).

Obviously, following this procedure does not ensure that the substance of the agreement is pro-competitive. Similarly, the lack of an obligation to comply significantly weakens the potential of any agreement.

However, the EC observes that when environmental and social standards bring about an improvement in the quality and innovation of the product, reducing at the same time operative costs, they may well outweigh the inefficiencies created by the standardisation agreement.

Moreover, it is accepted in literature and jurisprudence that labels that make reference to processes and signal specific attributes to consumers (including the payment of remunerative prices leading to a living income for farmers, or the fact that tuna has been obtained without killing dolphins) may not be restrictive of competition at all.

As Laurens Ankersmit points out: “As long as such an agreement does not require producers to only sell products adhering to the underlying production standard, but is of a voluntary nature, it is unlikely that the agreement will be considered to restrict competition.”<sup>156</sup> Certainly, since there is little precedent in the case law, undertakings partaking to such agreements have to face high uncertainty as for their legality. The current rigidity in the reading of article 101 and the fact that companies (and their counsellors) reproduce this fear may discourage the conclusion of potentially useful agreements benefiting environmental and social standards. From this perspective, more guidance from the EC would definitely help undertakings that have serious intentions when entering into these agreements, at the same time as discouraging those who mean to use them as mere excuses to distort competition to their advantage.

## CAN WE MONETISE EVERYTHING?



This is different in the case of the restriction to competition by object. In this scenario, where the agreement is objectively affecting the participation to market by forcing specific behaviours, the attitude of the European Commission and the European Court of Justice has been particularly strict. The term of reference is represented by para 273 of the Horizontal Guidelines stating that:

*“Agreements that use a standard as part of a broader restrictive agreement aimed at excluding actual or potential competitors restrict competition by object. For instance, an agreement whereby a national association of manufacturers sets a standard and puts pressure on third parties not to market products that do not comply with the standard or where the producers of the incumbent product collude to exclude new technology from an already existing standard (3) would fall into this category.”<sup>157</sup>*

**According to the current discipline, standardisation and horizontal agreements that are not directly aimed at restricting competition, but have such an impact, could thus be sanctioned by the competition authority because of their objective effect despite the parties’ intention.**

This is exemplified by a case concerning the Irish beef industry (BIDS case, see Box 14), where the European Court of Justice contradicted the Irish High Court and concluded that “an object restriction can be found even if the agreement does not have the restriction of competition as its sole aim but also pursues other legitimate objectives”.

While a standard setting agreement may generate improvements outside the EU, competition law will require the production of efficiencies (most likely at consumer level) within the EU. As one of the interviewees pointed out “[i]mprovement taking place outside the EU—such as social improvements experienced by Fairtrade producers in developing countries—must at least bear a connection with national consumers and their possibility to enjoy some indirect benefit. For example, clearly and objectively defined Fair Trade standards (or other ‘responsible value chain’ standards) may improve downstream competition and increase efficiency”.<sup>158</sup>

## 14 STANDARDS AS LIMITS TO COMPETITION—THE CASE OF THE BEEF INDUSTRY DEVELOPMENT SOCIETY

In 1998 a report concluded that the Irish beef processing industry was in a dire state because of low demand and overcapacity. In response to the consultancy, the 10 biggest meat processors in Ireland launched the Beef Industry Development Society (BIDS) with the aim to address the main concerns and collectively contribute to the financial improvement of the sector. According to the rules of the Society, plants processing up to 25 per cent of all cattle per year would leave the industry by agreement. The rules of the Society involved an overall capacity reduction by a voluntary abandonment of the industry by small players, the imposition of a levy on the processors who were going to remain in business, compensation for those who had left and restrictive covenants on those who decided to leave the Society (such as an agreement not to compete in the beef and veal processing market in Ireland for a period of two years). The Irish High Court focused on the fact that undertakings were implementing the McKinsey report and on the lack of any obligation for the remaining players to reduce outputs. According to the Court, “[...] there is no injunction on those who might remain in the industry to reduce output or indeed even to freeze it at a certain level. [...] Such players and each one of them, would be entirely free to increase production within their plants if they so wished. Unless therefore, a reduction per se in capacity must necessarily be equated with a limitation on output, which in my view is unlikely, [...] then I cannot see how the arrangement is objectionable in this regard; which is of course the major suggested violation by object restriction”.<sup>159</sup> However, the case was picked up by the Advocate General who reached the opposite conclusion and dismissed the relevance of the critical state of the industry then confirmed by the ECJ. More importantly, both the Advocate General and the Court reached the conclusion that “the fact that their sector is experiencing a cyclical or structural crisis does not mean [...] that Article 81(1) does not apply”.<sup>160</sup>

As discussed at the beginning of this section, some attempts to expand the scope of Article 101 in combination with Article 101(3) have also been made by academics, civil society organisations and policymakers<sup>161</sup>. In all these cases, the proposals were to reinterpret cartels and the use of horizontal agreements as an efficient and coordinated way to limit externalities and redress market failures. These suggestions have been increasingly elaborated and discussed with regards to ‘commodities’ like cocoa and palm oil and they try to engage with the existing legal framework in order to push for the integration of different priorities and interests that are not currently considered or sufficiently taken into account. The proponents of this approach are thus adopting a heterodox approach to sustainability and competition law, but still operating within the framework of efficiency, cost and well-being.

**The banana sector can be considered as a front-runner in the attempt by the stakeholders to collectively redefine the existing constraints to horizontal and vertical agreements so as to improve the living conditions of farmers.**

In the last nine years, the World Banana Forum has provided the space for a permanent working group on the distribution of value along the value chain, whose main attention has been the analysis of current practices and the identification of ways in which the price paid by consumers could be more fairly distributed all along the chain.

In this context, three main issues have been raised: a) that competitors operate with very slim margins, so that if there were an increase in the economic conditions of participants in the chain it would require an increase in the final price or a redistribution of resources from other actors; b) that the focus on margins and competition diverts attention from the way in which the value produced within the food sector is accumulated by large firms and actors that are currently exploring the possibility of more horizontal agreements; c) that the focus on competition law and horizontal agreements may divert attention from the fact that companies could unilaterally act or that governments could impose mandatory requirements, and that the low prices paid to farmers may lead to practices that exploit both nature and people.

To provide a structured answer to the first two concerns one would need to have access to data and information expressing the way in which the price of a banana (or any other good or service) is distributed across the food chain. This would allow verification of the statement that “value is not available” and provide suggestions on better ways of allocating resources across the chain. Yet, this is undoubtedly hard to obtain because of the complexity of the food chain. By gathering information concerning traders and processors, for example, companies may have access to sensitive data concerning competitors. Similarly, information sharing may lead to the finding of a potential infringement of competition law, as competitors may align their strategies to those of the transparent company. Allowing a level of coordination in the direction of higher transparency and a better understanding of the distribution of value along the food chain seems, therefore, a relevant step that could be taken under the control and coordination of national competition authorities. This would dispel doubts about potential anticompetitive behaviours and improve the distribution of resources within the value chain.

Considering the banana sector, a recent survey by Oxfam (with the support of the French think tank Le Basic) demonstrates that workers in the Ecuadorian banana sector only receive 1% of the final price and that small-scale farmers whose land is essential to the food chain can only seize 4.4% of the final price paid by consumers.<sup>162</sup> Although the document does not contain clear evidence of how the 94.6% of the price is distributed, the report is clear in suggesting that the largest share of the price is internalised by intermediaries that are operating outside of the farm. The lack of available value, if such, is thus determined by decisions made by traders and retailers and their remuneration. In this context, a critical eye would be interested in looking at the annual revenues of intermediaries and at the remuneration of shareholders and the expenses realised for marketing and promotion. More coordination and more information sharing should thus be promoted primarily in order to improve the transparency of the chain, the accountability of the actors and the possibility to achieve an equitable and just distribution of resources. A 2018 report from *Éthique sur l'étiquette* and the Clean Clothes Campaign, ‘Foul Play’, revealed, for example, that “while Nike and Adidas pay record-breaking amounts to footballers, they do not pay living wages to the female garment workers making their shirts.”<sup>163</sup> Similar considerations could be made with regards to the food chain and on-going research

on the cocoa sector carried out by Le Basic which could provide useful tools for engaging not only with competition law but with governance and strategic decisions made by the intermediaries.

The third concern is: do we risk paying too much attention to the benefit of coordination rather than focusing on the anti-competitive nature of existing practices? Although we recognise that the final objective is the improvement in conditions for producers at the origin of the food chains, we also recognise that such an agenda may leave out important considerations that emerge from the vicious circle of low prices already advanced by Olivier De Schutter in 2011.<sup>164</sup> low wages impact the life of farmers, their children (who often end up working in agricultural production) and the environment (which is often over-exploited in order to increase harvests).

We accept that no company wants to be the first to make a move and that there are financial and market arguments for firms not to be the first one to raise their purchase prices. However, this should not lead to neglecting the fact that public authorities also have the power and authority to impose specific behaviours, for example by mandating and enforcing higher standards, as is increasingly done with regards to international trade and sustainability.<sup>165</sup> Moreover, close attention must be paid to the fact that guidelines or indications always run the risk of that undertakings involved in horizontal dialogues on prices end up in coordinated practices that have nothing to do with the remuneration of producers. Finally, an imaginative approach to competition law should also adopt the opposite perspective that is proposed by firms that the role of competition law should also be sanctioning those actors who are inputting in the market products that are obtained at the expense of people and the planet.

This last point appears to be not sufficiently integrated in the debates and discussions between food enterprises, civil society and public authorities. However, the argument appears pretty straightforward and in line with the European approach to socio-environmental dumping and favourable tax provisions: products that are obtained at a lower cost due to violations of international standards (like labour conditions) are benefitting from an artificial advantage vis-à-vis enterprises that respect the standards. Similar to those companies that are paying less taxes and therefore are more competitive, undertakings that generate

socio-environmental externalities could be asked to compensate the unfair advantage that they obtain by operating in the way in which they operate. If a low purchasing price may not be considered a form of dumping per se, the existence of child labour, environmental degradation and violations of human rights could be considered as distortions of the market to be redressed by means of competition law.

In general, encouraging horizontal cooperation in the industry may be a double-edged sword.

Leaving aside the comments on the intrinsic limits of an approach that does not challenge the market dynamics but tries to adapt its logic to reach socio-environmental sustainability, the main risks that we envisage in an expansionist interpretation of article 101 that favours horizontal cooperation in the name of development are twofold: the possibility that parties agree on a narrow interpretation of sustainability (for example exclusively environmental and not social) and dismisses the interconnectedness between people and planet; secondly, the acceptance of anti-competitive behaviours that improve certain features of the food chain but can have negative effects on the balance of power along the chain and the long-term resilience of small-scale food actors. The growing enthusiasm around a judicial or legislative reform of 101 should thus be contextualised and seen in perspective. The risk is to identify a short-term fix, for example a living price for all farmers who are selling to competitors in a specific area, but that deepens long-term problems such as dependency, power imbalances and concentration of the food system.

On the other hand, cooperation may generate, as described above, positive redistributive outcomes. However, the strict limit imposed by competition laws might be of a hindrance also to the cooperation of industry players generating such kinds of public utility. This is due to the fact that, as seen in Section 2, competition law adopts as its guiding principle the pursuit of allocative efficiency. Hence, horizontal cooperation that brings about higher prices is assumed to be anticompetitive because it creates inefficiencies in the market. In the face of it, Article 101 (3) TFEU could be reinterpreted in order to encompass distributive justice issues and not solely allocative efficiency<sup>166</sup>. However, this would entail a complete reconceptualisation of competition laws to consider issues of distributive justice, economic inequality, and fair distribution.



Female producers husking cocoa; SCINPA COOP-CA © Sean Hawkey

## 5.5 Fairness in Competition Law

Lately, competition law and competition lawyers have re-discovered the concept of fairness. This has ignited a very lively discussion, both in the United States and in the EU, on the feasibility of its application in competition law enforcement. In the EU, Commissioner Vestager has certainly earned the merit of having revived fairness in competition law through many of her declarations and public speeches<sup>167</sup>. However, fairness has been a guiding principle of antitrust enforcement for a long time, way before competition laws were reconceived to pursue only economic efficiency (See Section 1).

In general, the language of fairness is not new to law, as it is applied across the legal spectrum of civil and public law, from contracts to criminal procedures. A clear confirmation of this is the TFEU, where we find that fairness is applied in both Article 101 and 102. However, the critics of such a concept in competition law oppose it stating that it is too vague and its application would drastically reduce legal certainty<sup>168</sup>.

The concept of fairness is mentioned in the competition law of the EU, in the context of fair trade conditions (Article 102 TFEU) and to allow consumers a fair share of the benefits (Article 101(3) TFEU). It is also a general guiding principle, which allows the consideration of broader public interests than just allocative efficiency alone. Hence, from an operational perspective, and to reduce legal uncertainty, fairness may first find application in order, for instance, to solve issues related to the unconscionability of trade conditions which, even beyond their efficiency impact, distort the market by imposing excessively unfair conditions. This is, certainly, not an incentive to trigger the application

of competition laws anytime a ‘morally unfair’ behaviour takes place in the market. Too often this concept is confused with the much more detailed concept of unfairness in the law, which presents much more stringent characteristics, although granted in need of better definition for competition law purposes.

Secondly, fairness may be operationalised and become one of the legal basis for the consideration and application of broader public interest concerns<sup>169</sup>. This because, as has been observed in academia, the current price-centred approach of competition law is prone to yield unfair distributive results and negative spill-over effects<sup>170</sup>. But since, especially in the EU, there may be no other institutions that could solve these issues, such as common fiscal policies or environmental authorities with appropriate powers, the antitrust authority may intervene to tackle the unfairness of an anti-competitive conduct which brought about a welfare loss.

Thus, the concept of fairness could be used to punish unfair behaviours restricting competition in the market and as a conceptual basis to embed non-economic concerns in the antitrust enforcement mechanisms.

## 5.6 The Right to Food as an External Limit to Competition Law

The European Union is—relatively to other areas of the world—a region having access to many of the world’s food resources. Despite this situation, EU Members are largely failing to ensure access to healthy diets for their citizens<sup>171</sup>.

In this regard, the recently released IPES report observes that “[c]urrent food systems are characterised by an over-production of energy-dense but low-nutrient processed foods. This has contributed to unhealthy and imbalanced diets across the EU.”<sup>172</sup>

A number of legal instruments, including international agreements, national laws and constitutions, consider the right to food as a fundamental right. Article 25(1) of the Universal Declaration of Human Rights establishes that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food”<sup>173</sup>. The right to food includes therefore the right to access food sources which are adequate in general, and relevant to what is possible taking into account the surrounding environment.

In the mainstream vision of the right to food, food is not only a tradable commodity but also a fundamental human right<sup>174</sup>. Thus, we should ask whether trading a good that is also a fundamental human right changes the application of EU competition laws? Based on past decisions the EC apparently, rejects this as it has not considered the adoption of a different approach based on this argument. However recent research shows that a commodity-based food market that does not take into consideration the rights of consumers has failed to achieve—in the EU and in most countries worldwide—the creation of a socially and environmentally sustainable food chain. In particular, the 2017 IPES-food report *Too Big to Feed* has identified five areas of action: consumption-related health risks; environmental challenges; environmental health risks; socio-economic challenges for farmers; and poor working condition in supply chains.

As discussed above, two of the main consequences of globalisation have been the dramatic increase in the concentration in food value chains and—partly also as a consequence of this trend—the creation of a widening gap in bargaining power along the supply chain.<sup>175</sup> In 2010, the then special rapporteur on the right to food, Olivier De Schutter, highlighted this connection between market concentration and the right to food, observing that there is a “direct link between the ability of competition regimes to address abuses of buyer power in supply chains and the enjoyment of the right to adequate food.”<sup>176</sup>

The right to food is also the right to safe food, environmental safety, and human health. Some of these concerns were considered in the Dow/DuPont merger<sup>177</sup> (See Box 8), with regards to which Commissioner Vestager said that

*“Pesticides are products that matter—to farmers, consumers and the environment. We need effective competition in this sector so companies are pushed to develop products that are ever safer for people and better for the environment. Our decision today ensures that the merger between Dow and DuPont does not reduce price competition for existing pesticides or innovation for safer and better products in the future.”*

However, the elements were considered through the perspective of innovation and competition rather than as public interests and public objectives per se.

From an EU law perspective, the right to food could be operationalised through the application of Articles 11 (environmental protection), 9 and 168 (human health), and Article 21(4) EUMR (legitimate interest clause)<sup>178</sup>. These integration clauses can become part of the competition law assessment through the balancing procedure advanced in this report, whereby the right to food as an expression of environmental and health concerns could be balanced against the economic concerns typical of the antitrust assessment.

## 5.7 Exemptions for the Implementation of the Common Agricultural Policy

Another opportunity to bend the rigidity of competition law is provided by Articles 42 and 43 of the TFEU, which give power to the EU Institutions to create exemptions and exceptions to the application of competition laws for the agricultural sector. Here, the main concern is to pursue the objectives and aims of the ‘Common Agricultural Policy’ while coming closer to the specific characteristics of this market. In particular, Article 39 TFEU defines five objectives of the Common Agricultural Policy (CAP) that need to be pursued: increasing productivity of agricultural production; ensuring a fair standard of living for agricultural communities; stabilising markets; assuring supplies and ensuring reasonable prices for the consumer.

The two articles introduce a first exemption from the application of competition laws (limited to Article 101 TFEU) which regards extreme cases of ‘severe market imbalances’ in periods of crisis. Other measures introduce market or sector specific derogations instead, independently from the period of crisis. For example, agricultural producers may be exempted from the application of Art. 101 TFEU if their agreement is “strictly necessary for the pursuit of one

or more of the objectives assigned to the Producers Organizations (PO) or Associations of Producers Organizations (APO) concerned in compliance with EU legislation.”

In its jurisprudence, the European Court of Justice has recognised that the competition principles contained in the Treaties must be refined and limited when there is a necessity to achieve the objectives of the Common Agricultural Policy.<sup>179</sup> In the most recent case, *President of the Autorité de la concurrence v Association des producteurs vendeurs d’endives (APVE) and Others*,<sup>180</sup> the Court reversed a decision by the French competition authority concluding that “in the fruit and vegetables sector, the necessary practices for POs and APOs to achieve one or more of the objectives assigned to them under EU law (namely, ensuring that production is planned and adjusted to demand, concentrating supply and placing the products produced on the market as well as optimising production costs and stabilising producer prices) may escape the prohibition of agreements, decisions and concerted practices laid down in the TFEU.”<sup>181</sup>

It is noteworthy that the French authority had not authorised the conducts of the PO and APO that consisted of an agreement on the price of endives through different mechanisms — such as disseminating a minimum price on a weekly basis; setting a ‘cours pivot’ (central rate); establishing a trading exchange; setting a ‘prix cliquet’ (reserve price) and thereby misusing the withdrawal price mechanism; — of collusion on the quantities of endives placed on the market and of a system for the exchange of strategic information used for the purpose of price maintenance. Those practices had been aimed at the collective fixing of a minimum producer price for endives and allowed producers and several professional POs to maintain minimum sale prices during a period.<sup>182</sup>

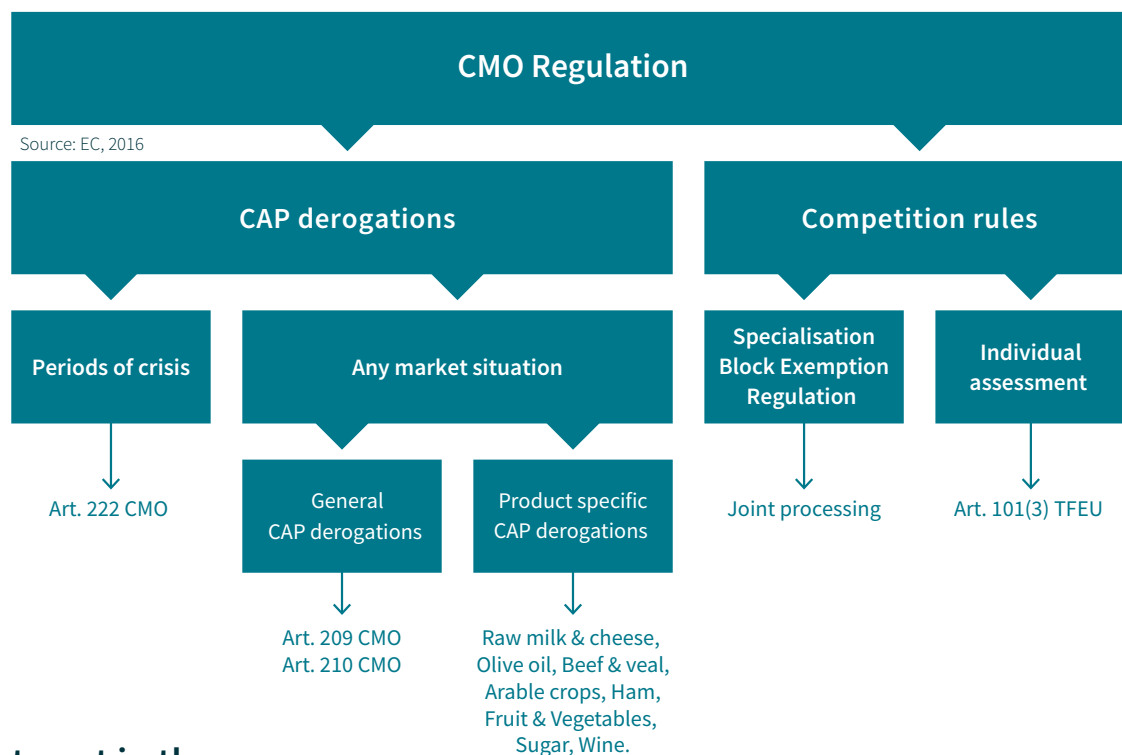
Against this position, the Court restated the primacy of the objectives of the Common Agricultural Policy and stated that the overall EU legal framework is structured in a way that creates exemptions to the application of Article 101 when certain practices are deemed necessary.<sup>183</sup> On the other hand, the 2017 judgment reinforces the idea that the scope of those exclusions is to be strictly interpreted and that the common organisations of the markets in agricultural products are not a competition-free zone<sup>184</sup> and that the application of the principle of proportionality requires that the anti-competitive practices may not go beyond

what is strictly necessary in order to achieve one or more of the objectives assigned to the PO or APO at issue, under the rules governing the common organisation of the market concerned.<sup>185</sup> Although it is far from being a blank exemption for associations and producers’ organisations, the combined interpretation of Articles 101 and 42 offer therefore some possibility of discussing prices and horizontally coordinating, demonstrating both the exceptionality of the agricultural market and the fact that EU competition law is not monolithic and contains spaces of (strictly regulated) exceptions.

Alongside the general exemption of art. 39-42, the broader EU legal framework introduces a number of sector specific derogations to the general rules of the Treaties that forbid horizontal agreements:

- a Raw milk: Article 149 and 150 in the CMO Regulation allows joint negotiations in the supply of milk by producers, provided that this negotiation does not exceed 33% of the total national production.
- b Olive oil, beef-and veal, arable crops: Articles 169-171 allows joint sales and agreements on quantities, provided that “1- producers integrate in producer organisations, 2- these producer organisations carry out activities other than joint-selling that creates efficiencies (such as joint procurement, joint distribution, joint storage, etc.) and 3- the sales of the producer organisations do not exceed some specified thresholds.”
- c Ham sector: Article 172 establishes that Member States can authorise exemptions on agreements on sale quantities and production between independent producers of ham with a protected designation of origin or protected geographical indication.
- d Fruit and vegetables: Article 33 allows ‘operational programmes’, which means the planning of production, agreements for the improvement of product quality, the promotion of products, environmental measures, crisis prevention and management. These operational programmes need to be submitted to MSs for their approval.
- e Sugar: a limited possibility to benefit from a partial exemption exists also for agreements between beet growers and sugar processors, according to Article 125.
- f Wine: Article 167 allows MSs to approve agreements limiting the marketing rules for regulating the supply.





## 5.8 Public Interest in the Exceptional Case of Mergers

A number of jurisdictions in the EU consider, directly or indirectly, public interest concerns in their assessment of mergers and acquisitions. One may wonder, what happened then to the ‘purity’ of competition economics in the sudden ‘urge’ to skip the conceptualisation of competition raised with a number of acquisitions which were deemed to impact ‘strategic’ industries? For instance, the acquisition of Alstom by General Electric was initially opposed by the French Government on the basis of protecting the national energy industry.<sup>186</sup> Similarly, when the U.S. pharmaceutical giant Pfizer made an offer to buy Astra Zeneca Plc, a UK pharma company, the British Government, the Authorities, and public opinion started a heated debate around the possible adverse impact of this acquisition of the UK’s science base.

At present, twelve EU Member States consider public interest concerns in their impact assessment of a proposed merger or acquisition.<sup>187</sup>

The OECD reports that: “[m]any OECD Members have clauses permitting the state to intervene in merger control on various public policy grounds, such as:

→ industrial development, protecting employment, promoting the competitiveness of the undertakings in international competition in France;

- benefits to the economy as a whole or an overriding public interest in Germany;
- relevant general interests of national economy, within the context of European integration in Italy;
- general interest reasons in the Netherlands;
- questions of principle or interest of major significance to society in Norway;
- the benefits to fundamental strategic interest of the national economy in Portugal;
- national defence and security, protection of public security and public health, free movement of goods and services within the national territory, protection of the environment, promotion of technical research and development and the maintenance of the sector regulation objectives in Spain;
- exceptional public interests, such as national security, media plurality, or the stability of the financial system in the United Kingdom.”<sup>188</sup> However, the case of Bayer and Monsanto discussed above (Box 8) demonstrates that these considerations have not trickled down to the area of pesticides, petrochemical products or the environmental and social sustainability of the food system.

The global food chain has been constructed around the Ricardian idea of comparative advantage and competition for market shares. Throughout the world, the global network of food production is characterised by access and the exploitation of natural resources; an interlocked series of bargaining actions that take place between actors operating at different tiers; investments that lead to horizontal and vertical integration and business choices that depend on the power to coordinate the chain and seize an increased share of market and value.

**Competitive practices and the struggle for consumers are considered to be inherent elements of this system which can improve the general well-being of society by pushing for lower prices, more innovation, and more choice.**

In a framework structured around price and consumers, the material condition of farmers, households, companies, etc. and the distribution of value throughout the chains are forgotten. However, competition authorities and private companies continuously take decisions—in the name of competition or to avoid it—that heavily affect the conditions of these other members of society. The behaviours and decisions of individual actors in the food system, their business strategies and the regulatory framework, not only impact on the competitive dimensions of the relevant markets (distribution of shares, prices, innovation, availability, etc), but have a direct consequence on other social or environmental aspects of the society in which they are active.

**Yet, mainstream economics and mainstream competition law often fail to see society, the planet, and the household as relevant components of the economy.**

Despite the idea that the market is self-regulated, behaviours and decisions do not operate in a legal vacuum or in a space that is exclusively defined by private agreements. Rather, law (including competition law and policy) brings about a number of spill-over effects in other sectors of the economy and in society. The current framework of EU competition law is not, therefore, a mere technical and neutral tool that solves disputes by applying objectives and inevita-

ble parameters that aim at ‘fixing a failure’. On the contrary, the substantive and procedural content of competition law is essential to the production, reproduction and dismantlement of power dynamics among market players and to the generation, distribution and appropriation of value within and across value chains. Yet, since the 1980s the ‘bubble’ of competition law has been filled with the idea that there is only one economics, only one set of market rules, and that competition law is only about making the ‘invisible hand’ work properly.

Within the context where competition law builds relationships and has an impact on the organisation of markets, society and the environment, this report suggests that the enforcement of competition law encroaches on other public policy considerations which the law explicitly protects. Thus, the question that animates this publication is not if competition law should consider them, but how and to what extent.

**As discussed throughout this report, there is not only one way in which competition law and competitiveness can impact on planetary boundaries and the social foundations of our world.**

For example, the lack of competition and the increased concentration in the seed production sector and the vertical integration between seeds, pesticides and pharmaceutical producers will negatively impact biodiversity, non-conventional farming, and the availability of jobs and people’s health. In complete contrast, a potentially anticompetitive agreement between competitors or undertakings operating vertically across the chain may be used to introduce a common minimum price for small-scale producers that are overburdened by the actual power imbalances vis-a-vis purchasers and retailers. How should we engage with these scenarios? Should legal and political institutions strike a balance—required by the law—between consumer welfare and other ‘economic’ concerns explicitly protected by competition law? Should the non-economic concerns have priority over competition as an end in itself? Which institutions should perform the balancing act between these different interests and what limitations would apply to this balancing process?

**This report has substantiated that there are cases where competition law is the only institution able to balance economic and non-economic factors related to competitive distortions in the agri-food sector.**

Or at least the best placed. However, there are circumstances where it might be more appropriate to abandon the rhetoric of efficiency and seek cooperation between different authorities and institutions. However, in the selection of which institution to leverage (which area of law, a legal or political intervention, which authority, etc.) consideration has to be given to the specific institutional design of each system, and therefore it may vary across countries. As already observed by the OECD, “the institutional design of the public bodies involved in this process would be key to understand if these institutions are alternative or complements.”<sup>189</sup> For instance, some national antitrust systems opted for a single-authority model, where the competition authority is also enabled to apply public interest concerns.<sup>190</sup> Others have chosen to create institutions with shared competences, for example in the case of media mergers. In some jurisdictions, problems are solved through a system of ‘external intervention’, where a minister or other policy-body intervenes when the decision involves the broader public interest. Finally, there might be concurrent competences between different authorities, in which case, the coordination between them, along with an interpretation of the law in accordance with the overarching (constitutional principle) becomes the key to a coherent legal system.

These multidimensional approaches share a common substructure that seeks the least imperfect solutions to issues that are generally left to unilateral solutions that consider only narrow definitions of efficiency and competitiveness.<sup>191</sup> At the EU level, this could be done even without the specific intervention of the legislator, but it would not take the form of a radical and systemic intervention. As discussed in Section 5.1, the EC already has an obligation to integrate other public interest concerns into its competition law decisions. If the final decision does not conform to the contrasting public interest concern, the ECJ has the power to annul it.<sup>192</sup> At present, European and national authorities enjoy wide discretionary powers in determining the balance between the different public policy aims, opening up a political space where legal interpretations and economic visions define the allocation of value and resources.<sup>193</sup> Whilst attempting a definition of public interest in EU law would be futile, given the dynamic and changeable nature of this concept, it would instead be desirable

to have official guidelines assisting the EC and other stakeholders in this process. The same guidelines, which could build on this report and on other literature also cited here, would help national authorities to build their own practice, which would need however, to adapt the EC’s approach to the specificities of the domestic legal environment and institutional design.

**The historical and contemporary analysis that we propose in this report suggests that EU competition law is anything but a static sector and that it is important to have a clear understanding of its legal pluralism.**

Treaties, secondary regulations, national competition authorities, the European Commission, the European Court of Justice and national courts all interact, along with lobbyists, civil society, academics and other private actors on the definition of principles, aims and procedures. The current outcome is the product of pushes and pulls, power and resistance to power, path dependency and the lack of alternative imagination.

What we have described in Section 2 and 3 of this report as the mainstream approach to EU competition law is neither inevitable nor natural. On the contrary, the Treaties and some precedent decisions of the European Commission and the European Court of Justice suggest that the route could change. In particular, public policy concerns and fundamental rights may be weighed in against competition law in different ways. The last part of this report is thus dedicated to a series of paradigmatic, regulatory, legal and policy solutions.<sup>194</sup> We do not offer a detailed analysis and we do not claim that the future of EU competition law must pass through these measures. On the contrary, our intention is to highlight spaces of possible legal intervention and legal chokeholds that can be leveraged by different actors so as to shape competition law in such a way that the short and long-term goal of a socially and environmentally just food system can be achieved.

This report urges reform of the current approach to competition law, which mainly relies on consumer welfare. It does so by considering the consumer as a citizen and the environment as part of the market. And it proposes solutions that can start the change in this direction.

These solutions range from direct legislative interventions to different enforcement strategies of current laws. Whereas there is not a one-size-fits-all panacea, it is possible to find tailored solutions to specific issues of competition and sustainability. Regulatory and interpretative solutions are indeed jurisdiction-specific, as they have to be harmonised with the rest of the regulatory environment in order to function properly. However, it is possible to trace a common direction that domestic jurisdictions can operationalise differently. Moreover, our final proposals only aim to trigger discussions and further engagement with the issue., they do not claim to be exhaustive or the best that can be conceptualised in order to change the status quo. Finally, the following solutions do not presuppose a reconceptualisation of competition law, proposing, for example, different objectives. They, instead, look at competition law as part of a regulatory environment responding to the ‘rule of law’, intended as “the principle whereby all members of a society (including those in government)” and—we would add—including all institutions “are considered equally subject to publicly disclosed legal codes and processes”.<sup>195</sup>

In this report we have repeated several times that competition law does not apply in a vacuum and is not an end in itself. It is instead a legal institution useful for combatting specific behaviours but one that has to find application within the rest of the legal environment. If a contract is illegal because it breaches an environmental law, the other party cannot sue for breach of contract, invoking the sanctity of contract law. By the same token, EU competition law needs to be applied in accordance with other EU laws. However, this solves only the ‘if’ and ‘why’ of the question of whether competition law should consider such environmental concerns. The ‘how’ is instead slightly more complex and needs adaptation from jurisdiction to jurisdiction. The following eight points recommend some practical solutions on how to embed sustainability concerns into competition law, from a regulatory and enforcement perspective, while the last two highlight the importance of cooperation between authorities to abet this process. For simplicity, we have gathered the proposals into three broad categories: a) interpretative changes and enforcement; b) institutional changes; c) regulatory changes.

## 6.a Interpretative Changes

- 1 **Interpretation in accordance with the overarching principles:** All competition authorities and judges should aim to interpret the law in accordance with the overarching principles of the legal system (constitutional laws, fundamental rights, and provisions overarching—by the letter of the law—the application of competition laws, such as Article 11 TFEU in the EU)<sup>196</sup>. This principle responds not only to the hierarchy of the sources of law, but also to a principle of good administration, which should aim at preventing conflicting decisions by different public bodies. For instance, in the case of the right to food, the decision of a competition authority authorising certain behaviours, may conflict with a decision on infringement of environmental protection or of trade authorities acting alongside the fundamental right to food and environmental protection.
- 2 **Extending the use of exemptions:** when the antitrust authorities are already engaged with a claim, they should read the Treaties in a holistic way and expand the use of exemptions like article 101(3), articles 39-42, and the discipline on mergers. In this way, the authorities would recognise the application of public interest and constitutional claims as objective justifications to an anticompetitive conduct, if they respond to the principles of proportionality and effectiveness. However, this expansionist approach to competition law should not be utilised to reduce the responsibilities that individual companies and individual states have in guaranteeing that both environmental and social limits are respected within the food system.
- 3 **Public interest balancing:** competition authorities may directly apply public interest concerns as part of their infringement decision. However, this decision should be part of a solid comparative institutional analysis aimed at finding the institution that is better placed (‘the least imperfect’) at giving application to the public interest concern.<sup>197</sup> In the case described, competition law may find application, depending on the specific characteristics of the legal system, for instance, along with contract law, property law, and the constitution or other fundamental rights’ provisions. Moreover, the adjudicative would only be an alternative institution to ‘market’ and ‘political’ institutions, as it may be better to leave the protection of such rights to the legislator (see below) or to the market itself, for instance.

## 6.b Institutional Changes

- 4 Reconsidering the institutional design of competition authorities:** the institutional design of the public bodies involved in this process would be key to understanding if these institutions are alternatives or complements<sup>198</sup>. For instance, some systems opted for a single-authority model, whereby the competition authority is also enabled to apply public interest concerns<sup>199</sup>. Others have chosen to create institutions with shared competences, for example in the case of mergers regarding markets of particular importance for the national economy or for democracy. Also used, is the system of ‘external intervention’, where a minister or other policy-body intervenes when the decision involves the broader public interest. As a matter of fact, there might be concurrent competences between different authorities, in which case, the coordination between them, along with an interpretation of the law in accordance with the overarching (constitutional principle) becomes the key to a coherent legal system. For instance, if a system of external intervention is in place, the competition authority would be required to suspend the antitrust procedures when it encounters a conflict between the application of competition laws and sustainability. The competition authority would then wait for the competent external authority (the government or an ad-hoc authority for instance) to release a comment, which might be binding or not. By contrast, in the single authority model, the competition authority would have the power to directly apply the sustainability concerns, as they become part of the enforcement powers of the authority.
- 5 International cooperation:** there are a number of international organisations, such as UNCTAD, the ICN, and the OECD, facilitating the interaction and communication between antitrust authorities all over the world. It would be particularly useful to have a set of case studies to build on, in order to test the existing framework and the possible breaches. Moreover, test cases and direct intervention in the area could nudge national authorities, the European Commission or international organisations, to draft guidelines detailing how competition laws could be adapted to include sustainability issues without subordinating them to the consumer-price constraint. While we do not believe that full harmonisation is a goal attainable in the medium to short term, given the existing striking differences between the different legal systems, their regulatory choices, and the institutional design of their authorities, we think that more and better information about the past, present,

and future transformations to competition laws and their enforcement would abet positive changes. Firstly, they would spread better knowledge about which regulatory solutions are available in each jurisdiction. And, secondly, it would create positive knowledge of possible alternative solutions.

- 6 Look around for examples:** Competition regulation has been increasingly adopted by countries around the world. Although the content of the legislations is often a replica of the US or EU models, some countries have been at the forefront of a more progressive understanding of competition law, one that is defined by other public interests, such as employment, economic stability, the protection of the environment. Regulators, courts and civil society should thus pay attention to what is happening in other geographies, including in each EU member state, and favour the creation of spaces for dialogue and horizontal teaching and learning.

## 6.c Regulatory Changes

- 7 Direct regulatory intervention:** when competition law fails to mend the distortion of competitiveness in a given market and interpretative and enforcement solutions are not sufficient, it may be possible to intervene through direct government intervention. For example, it is possible to subsidise a whole industry by providing direct or indirect support. However, this may discourage investments in innovation and market improvements as participants get subsidies irrespective of their success or prominence. Otherwise, policy makers may want to facilitate collaboration among market actors pursuing special objectives or deserving protection, because they are particularly valuable for preserving public interest concerns, by for instance creating block exemptions to antitrust enforcement. While the exemptions may pursue commendable social, economic, and political objectives, they may also paint everything with a broad brush, thus losing in enforcement precision. Hence, direct regulatory intervention is recommended only as an ‘extrema ratio’, that is when other types of intervention here described are unsuitable.

- 8 Case selection criterion:** competition authority action may also consider non-economic factors when deciding whether to take on a case. A competition authority may (and in some cases do) consider such kinds of non-economic aspects in order to prioritise a case over others.<sup>200</sup> Instead of becoming substantive elements of adjudication (therefore left to the participation and pressure of the parties), public interests such as human rights, the environment, and the right to food may be taken into consideration in the preliminary phase of the investigation.
- 9** Special laws on superior bargaining power could be introduced to tackle abuses, especially upstream against farmers. However, as these quasi-competition law remedies have been shown to be often difficult to enforce<sup>201</sup> due to their uncertain nature, the law should clarify the enforcement criteria. This would mean providing a definition of bargaining power and of abuse, as related to the enforcement of this specific legal tool.
- 10 Cheap food as an anti-competitive practice:** finally, we believe in the need to be creative in the interpretation and application of competition law. Usually, competition authorities intervene to sanction behaviours and conduct that increase prices or lower products' availability. However, we believe that the enforcement of competition law could also aim to achieve different goals, intersecting with other areas of national and international law. Let's take the example of modern slavery in the tomato chain or of the illegal use of chemicals in the production of coffee. Normally, human rights' violations and the degradation of the environment would be addressed through the lens of tort law and environmental law, sanctioning the parties who have a responsibility in the abuses. In a few occasions, like the

Modern Slavery Act in the United Kingdom and the California Transparency in Supply Chains Act of 2010 (SB-657), retailers, distributors and importers can be sanctioned for violations occurring across the chain in which they operate. In other circumstances, trade law can be used to impose constraints on the import of goods that are obtained in violation of national and/or international law: both Article XX of the General Agreement on Trade and Tariffs (GATT) and the European Treaties recognise the possibility of limiting trade (in a non-discriminatory way) in order to uphold environmental and social sustainability. Yet, competition law is seldom taken into consideration, as if its introduction into the market of products, that do not respect the legal standards in the country of origin or international law, was not a matter of unfair practices and artificial cheapness (i.e. the products are cheap because negative externalities are not internalised). We thus believe that, along with tort, trade, human rights and environmental law, competition law may have a role to play in addressing some of the unsustainable practices that occur in the food chain. For example, we believe there is space for anti-dumping proceedings (sanctioning countries that do not enforce legal standards so that products are cheaper to obtain); investigations for predatory pricing (putting products on the market at a price that is lower than the cost of production, given that the whole cost of production is not accounted for) and private actions against competitors that are benefitting from cheap production mechanisms. An expansionary use of competition law may not happen immediately, but it would contribute to the transition towards a market based on different premises and a legal framework where competition is not an end in itself but a mechanism to achieve public interest and broader goals.

Members of the cooperative ECOJAD  
sorting cocoa beans. Ivory Coast

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