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IS THERE ROOM FOR FOOD SOVEREIGNTY CONSIDERATIONS IN EU COMPETITION POLICY? A THEORETICAL FRAMEWORK

Martin Milán Csirszki*

Abstract: So far, the notion of food sovereignty has not claimed a place at the table of competition law. Although competition law developments in the last four decades have promoted the exclusive dominance of efficiency considerations, the next few years may bring a turning point through the recognition that in the long term economic efficiency also requires social and environmental sustainability, especially in a sector like agriculture. Although family farming has always been dominant in Europe, recent trends of concentration and consolidation in the agricultural and food supply chain as well as globalisation itself have shaken European agricultural producers who face several competition-related problems. This article aims to shed light on whether the theoretical framework of EU competition law and policy are appropriate for the notion of food sovereignty to join the discourse. In order to do so, the article presents the main tenets of ordoliberalism, the prevailing school of thought in EU competition policy, in particular the findings of those ordoliberal scholars who deal with the issues of agriculture. Moreover, the article aims to theorise sovereignty in food sovereignty, in parallel with bringing it into line with ordoliberalism, in order to explore whether the concept of social market economy, one of the key concepts of ordoliberalism explicitly followed by the EU, and in particular ordoliberal competition policy to be realised within the framework of the social market economy, is suitable to take into account food sovereignty's core elements at least at a theoretical level. If it is, it may bring to the fore a viewpoint of EU competition policy which ensures appropriate protection for the agricultural sector to overcome the newly emerging anomalies faced by European agricultural producers as a consequence of globalising markets.

Keywords: food sovereignty, competition law, competition policy, ordoliberalism, agriculture, United States of America, European Union.

* PhD Candidate, Faculty of Law, University of Miskolc, martin.csirszki@uni-miskolc.hu, ORCID: 0000-0002-4339-7058. I am immensely grateful to the reviewers for their comments. I would also like to express my gratitude to the Bergen Center for Competition Law and Economics of the University of Bergen, in particular Ignacio Herrera Anchustegui, for letting me give a presentation in Bergen and for sharing insightful and fruitful remarks with me on the research underpinning this article.

1 Introduction

The article aims to place the notion of food sovereignty in the discourse of competition law and policy. In the literature, although the goals of competition law have been heavily debated in the last four decades, no scholarly works have dealt with these objectives from a sector-specific approach. This paper intends to fill this gap with regard to the agricultural and food supply chain, doing so through the prism of food sovereignty.

Though the conflicting paradigms of food security and food sovereignty mostly occur and are most delicate at the international level, in particular with regard to the issues of international trade in agri-food products, this does not mean that these notions cannot be interpreted within the framework of narrower territorial units. Since one of the strengths of food sovereignty lies in its multi-interpretability,[1] I aim to conceptualise and theorise it in the discourse of EU competition law and policy.

The article proceeds in seven parts. First, it provides a brief introduction to the elements of food sovereignty which present insights into its perceptions of competition and competition law. Second, I sketch the objectives of competition law from a comparative perspective. On the one hand, I deal with that of the United States of America, given that the United States has always played a pioneering role in competition law (antitrust law), and, on the other hand, I map the competition law goals of the European Union. These sections are necessary for me to choose the competition law regime that can consider the competition-related elements of food sovereignty. The dominant approach in the US in the last four decades indicates that framing food sovereignty in the US antitrust law discourse is not too 'profitable' because of the system's single-factor viewpoint of economic efficiency. In contrast, the EU has a much broader standpoint when it comes to the goals of competition law which enables me to take into account important elements of the food sovereignty paradigm. Although I choose the EU competition law regime for further analysis, as a benchmark tool the US antitrust regime is also presented in some cases, in particular in Part 4. Third, I present the findings of two ordoliberal thinkers who have turned to the problems and questions of agriculture. They were chosen because ordoliberalism has had a significant impact on EU competition policy since the very beginnings of European integration after World War II. Fourth, I aim to theorise sovereignty in food sovereignty, because this allows me to bring it into line with ordoliberalism. *Prima facie*, although all of the above, and in particular the US standpoint towards antitrust, could result in the conclusion that the US has no special antitrust laws applying to the agricultural sector and the food supply chain, the reality is different. Therefore, fifth, I list briefly those competition-related laws of both the EU and the US which provide special sectoral treatment for agriculture and the food supply chain, thereby leaving room for a more humane and non-efficiency-based approach to competition law in these economic sectors. Sixth, I conclude.

[1] Maarten A Hajer, *The Politics of Environmental Discourse: Ecological Modernisation and the Policy Process* (OUP 1995).

2 Food sovereignty and competition

In this article, similarly to Schanbacher,[2] Martínez-Torres and Rosset,[3] McMichael[4] and Wills,[5] I perceive and construe the paradigms of food security and food sovereignty as a global conflict. In this part, I aim to explore those elements of food sovereignty which may provide us with starting points for the way competition is perceived within its framework. In some aspects, I use the paradigm of food security as a conflicting basis for comparison.

Important findings on food sovereignty's approach to competition and trade can be collected from the 2002 food sovereignty definition which declares that it does not negate trade but aims to promote trade policies and practices serving the rights of peoples to food, hand in hand with safe, healthy and ecologically sustainable production.[6] In the multi-level food supply chain, worrisome concerns not only arise from anti-competitive cartels, abuse of dominance and mergers,[7] but also from unfair trading practices against suppliers of agri-food products falling outside the scope of conventional competition law instruments. In many cases, the latter remain hidden from the eyes of competition authorities, on one hand because of the lack of normative and prohibitive regulation, and, on the other hand, if there is some kind of regulation, because of the fear factor which discourages suppliers from making a formal complaint against offenders out of fear of commercial retaliation.[8] Both these market behaviours which can be assessed with traditional competition law instruments and the unfair trading practices emerging in contractual relations are unacceptable if one uses the food sovereignty definition as a benchmark tool.

Although it was mentioned that the paradigm of food sovereignty has emerged most significantly at the international level and aims to formulate suggestions with regard to international trade in agricultural and food products, it is apparent from its self-determination that it argues against completely free markets lacking the guardian role of state regulation.[9] In general, it defines the state as the protector of farmers,[10] and this need for protection is also to be interpreted regarding the agricultural markets and the role farmers should play therein. It not only refers to international markets but also to regional and national ones. Food security advocates argue for the liberalisation of markets as the one and only means to achieve their objectives. However, at the international level the proponents of food sovereignty

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[2] William Schanbacher, *The Politics of Food: The Global Conflict Between Food Security and Food Sovereignty* (Praeger Security International 2010).
[3] María Elena Martínez-Torres and Peter Rosset, 'Diálogo de saberes in La Vía Campesina: Food Sovereignty and Agroecology' (2014) 41 The Journal of Peasant Studies 979.
[4] Philip McMichael, 'Historicizing Food Sovereignty' (2014) 41 The Journal of Peasant Studies 933.
[5] Joe Wills, *Contesting World Order? Socioeconomic Rights and Global Justice Movements* (CUP 2017).
[6] Michael Windfuhr and Jennie Jonsén, *Food Sovereignty: Towards Democracy in Localized Food Systems* (ITDG Publishing 2005).
[7] Organisation for Economic Co-operation and Development, *Competition Issues in the Food Chain Industry* (OECD Publishing 2013).
[8] Till Göckler, *Angstfaktor und unlautere Handelspraktiken – Eine Untersuchung anlässlich des Grünbuchs der Europäischen Kommission über unlautere Handelspraktiken in der b2b-Lieferkette* (Mohr Siebeck 2017).
[9] Windfuhr and Jonsén (n 6).
[10] Alana Mann, *Global Activism in Food Politics: Power Shift* (Palgrave Macmillan 2014) 54.

represent the view that the World Trade Organization should get out of agriculture because free trade policies and their foundation in the form of neoclassical economics are not suitable to meet the needs of agriculture and the food sector.[11] Neoclassical economics is also the basis for those competition law regimes which consider the goal of economic efficiency as the exclusive aim of antitrust, as in the US in the last four decades with the dominance of the Chicago School. The core principle of neoclassical economics is to maximise allocative efficiency,[12] which – in antitrust terms – is understood as consumer welfare.[13] Consumer welfare is no other than the guiding principle of the Chicago School of antitrust dominating the US antitrust regime from the appearance of Robert Bork's *The Antitrust Paradox*.[14]

Neoclassical economics and its political philosophy background in the form of neoliberalism are condemned by food sovereignty which cannot accept, and argues against, the trait of neoliberalism based on which separate economic, social and political spheres are evaluated according to a single economic logic.[15] With regard to competition law, this single-mindedness lies in the approach that considers consumer welfare as the one and only legitimate objective of competition law. From the perspective of food sovereignty, with regard to agricultural and food products, this can be best described as the commodification of food products. From a neoliberal and a food security standpoint, regarding the notions of competition and of food, the only considerations to be taken into account are economic ones, which are against the immanent features of food sovereignty. By challenging the dominance of agribusiness and the unjust trade system[16] and by not negating trade,[17] food sovereignty – on the contrary – puts significant emphasis on social considerations and aims to contribute to a humane market economy which intends to surpass the neoliberal market economy strictly operating with economic terms.

In summary, the paradigm of food sovereignty builds upon a mode of competition and a way of market functioning which require the guardian role of the state in the form of legal regulation aiming to protect the interests of agricultural producers and farmers as well as those of small and medium-sized enterprises. It craves extensive and strong competition law legislation and enforcement dominated not only by efficiency-based considerations but also non-efficiency-based ones.

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[11] Peter M Rosset, *Food is Different: Why We Must Get the WTO Out of Agriculture* (Zed Books 2006).

[12] Robert D Atkinson and David B Audretsch, 'Economic Doctrines and Approaches to Antitrust' (2011) Indiana University-Bloomington: School of Public & Environmental Affairs Research Paper Series No 2011-01-02, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1750259#> accessed 6 October 2021.

[13] Dina I Waked, 'Antitrust as Public Interest Law: Redistribution, Equity, and Social Justice' (2020) 65 The Antitrust Bulletin 87, 88.

[14] Robert Bork, *The Antitrust Paradox* (Free Press 1978).

[15] William Davies, *The Limits of Neoliberalism* (SAGE Publications 2014) 31–32.

[16] Mann (n 10).

[17] Windfuhr and Jonsén (n 6).

3 The objectives of competition law

The reason for briefly reviewing the objectives of competition law is that they have a crucial impact on the application and interpretation of competition laws,[18] and thus are also of paramount importance when speaking of sector-specific regulation. Debates on competition law/antitrust law goals are continuous, so much so that one must admit the arbitrary nature of the question of what competition law objectives should be. It would be more exact to pose the question as what we want from markets and antitrust, considering that the answer to the former question 'is typically given in terms of what the respondent – invariably an inside player who has already formed a normative view – believes the operational guiding principle should be'.[19] This means that most of the positions on the goals of competition law are prejudicial because they are preliminarily determined by the respective respondent's own perceptions of what we aim to strengthen with the help of functioning markets.

Although competition law objectives are rather dynamic and not static in nature,[20] in general and based on Akman's approach, two main groups of objectives can be identified: one group is connected to the notion of welfare, while the other to notions unrelated to efficiency.[21] While the former is dominated by economic considerations (in particular, by the considerations of welfare economics), the latter focuses also on considerations other than different types of welfare. For an even clearer clustering and simple terminology, one may group competition law objectives to efficiency-based and non-efficiency-based goals. However, non-efficiency-based goals do not necessarily mean that efficiency is not taken into account throughout the enforcement of competition laws. For example, the competition law goal of the protection of the competitive process or, in other words, the protection of competition as such does not imply that consumer welfare, understood as allocative efficiency,[22] is not and cannot be enhanced, given that '[p]rotecting the competitive process is economically efficient'.[23] Nonetheless, a complex assessment requires that not only the process but also the outcome be taken into account.[24]

In the last four decades, debates on the goals of competition law have taken a direction where voices echoing the triumph of enhancing efficiency prevail over fairness (and justice) concerns. Nowadays, however, it seems that we may be in an overlapping period. The now dominant efficiency-based approach is gradually ending, just as a new era is taking shape with more

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[18] Deborah Healey, 'The Ambit of Competition Law: Comments on Its Goals' in Deborah Healey, Michael Jacobs and Rhonda L Smith (eds), *Research Handbook on Methods and Models of Competition Law* (Edward Elgar Publishing 2020) 12.
[19] Eleanor M Fox, 'Against Goals' (2013) 81 Fordham Law Review 2157, 2159.
[20] Roger Van den Bergh, 'The Goals of Competition Law' in Roger Van den Bergh, Peter Camesasca and Andrea Giannaccari (eds) *Comparative Competition Law and Economics* (Edward Elgar Publishing 2017) 86, 88.
[21] Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart Publishing 2012) 25; see also the dichotomy of competition law goals: Martin Meier, 'Pleading for a "Multiple Goal Approach" in European Competition Law: Outline of a Conciliatory Path Between the "Freedom to Compete Approach" and the "More Economic Approach"' in Klaus Mathis and Avishalom Tor (eds), *New Developments in Competition Law and Economics* (Springer 2019) 51, 51–52.
[22] Waked (n 13).
[23] Ignacio Herrera Anchustegui, *Buyer Power in EU Competition Law* (Concurrences 2017) 89.
[24] Akman (n 21) 47.

emphasis on non-efficiency-based objectives.[25] The common question which – according to Nihoul – always arises as to the notion of efficiency is how to measure it: '[s]hould we aim at maximising consumer welfare? Producer welfare? Total welfare?'[26] The adoption of any of these economic welfare standards by enforcement authorities is of particular importance regarding the outcome of decisions.[27] Nevertheless, not all scholars share the view that these standards are of paramount relevance to enforcement. The picture is nuanced by, for example, Motta: 'consumer and total welfare standards would not often imply very different decisions by anti-trust agencies and courts'.[28]

It is worth standing back here for a moment. Though scholars and practitioners speak of consumer or total welfare, and there is debate as to which should be applied in law enforcement, some confusion may emerge in terminological aspects. The so-called 'Chicago trap' refers to Bork's misleading terminology which used the expression 'consumer welfare' but by this the 'total welfare' standard was actually meant.[29] In this sense, one must mention that the Chicago School has propagated total welfare rather than consumer welfare,[30] but the idea remains in history as the antitrust consumer welfare paradigm. Subsequently, to avoid any misunderstanding, I will use the term 'consumer welfare (paradigm)' to refer to the inherent feature of the school of thought which supports pure efficiency-based competition law. For the arguments raised by this article, it is not really relevant whether we are talking about 'true' consumer welfare as used by Salop,[31] or total welfare disguised as consumer welfare. What is pertinent is the limitation of any of these standards and objectives to efficiency-based considerations in competition law.

Since the 1978 publication of Bork's *The Antitrust Paradox*, consumer welfare in the US has become 'the only articulated goal of antitrust law' and 'the governing standard',[32] and later, commencing with the statements of the European Commission in the late 1990s and appearing in a legally binding form in the 2004 Merger Regulation,[33] it has strongly infiltrated discourse on the goals of EU competition law as the more economic approach to European competition law. Though the years have passed, the clear-cut breakthrough has fallen short of consumer welfare and the more economic approach expected in the aspect of legal certainty and clarity, and this has been voiced

[25] Barak Orbach, 'The Present New Antitrust Era' (2018) 60 William & Mary Law Review 1439.
[26] Paul Nihoul, 'Choice vs Efficiency?' (2012) 3 Journal of European Competition Law & Practice 315.
[27] Pieter Kalbfleisch, 'Aiming for Alliance: Competition Law and Consumer Welfare' (2011) 2 Journal of European Competition Law & Practice 108. For more, see Louis Kaplow, 'On the Choice of Welfare Standards in Competition Law' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar Publishing 2012) 3.
[28] Massimo Motta, *Competition Policy: Theory and Practice* (CUP 2004) 19.
[29] KJ Cseres, *Competition Law and Consumer Protection* (Wolters Kluwer 2005) 331.
[30] Pinar Akman, '"Consumer" versus "Costumer": The Devil in the Detail' (2010) 37 Journal of Law and Society 322.
[31] Steven C Salop, 'Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard' (2010) 22 Loyola Consumer Law Review 336.
[32] Barak Y Orbach, 'The Antitrust Consumer Welfare Paradox' (2010) 7 Journal of Competition Law & Economics 133.
[33] Christian Kirchner, 'Goals of Antitrust and Competition Law Revisited' in Dieter Schmidtchen, Max Albert and Stefan Voigt (eds), *The More Economic Approach to European Competition Law* (Mohr Siebeck 2007) 7.

in both Europe[34] and the US.[35] Recently, four decades after its introduction, critics of consumer welfare have become increasingly vocal, and in the words of Mark Glick, 'the winds of change are blowing',[36] meaning that 'the relative stability of the antitrust consensus has yielded to a sharp rupture'.[37] As Crane put it: '[i]n the last two years, the self-styled neo-Brandeis movement has emerged out of virtually nowhere to claim a position at the bargaining table over antitrust reform and the future of the antitrust enterprise'.[38] The premonition is best exemplified in the US by the appointment of Lina Khan as the chairperson of the Federal Trade Commission. Of course, the appearance of the Neo-Brandeisians – the emerging school of thought which intensively criticises the consumer welfare paradigm – has not been without reaction, and these new 'hipster antitrust' proponents are criticised because of their provocative proposals for changes to the antitrust regime directed by the sole objective of consumer welfare, arguing that the proposals lack little to no empirical evidence.[39] At the same time, neither have consumer welfare advocates escaped strong criticism. Some have even called competition law based on consumer welfare profound nonsense by arguing that it is built upon 'false history, false concepts and false economics'.[40]

Although the more economic approach has infiltrated EU competition law, the dominant school of thought, the ordoliberal competition policy still prevails in the European Union, as the comprehensive empirical research of Stylianou and Iacovides clearly indicates the polythematic nature of EU competition law.[41] One of the main concepts of ordoliberalism, the model of social market economy, has even found its place in the text of Article 3 of the Treaty on European Union. Though the literature is not consistent on this issue, according to Behrens, the ordoliberal approach had a dominant influence on the drafting of the European notion of the abuse of dominance.[42] Anchustegui even finds generally that ordoliberalism has shaped and continues to influence EU competition policy.[43] Nedergaard also posits that the greatest correspondence among EU policies and the ordoliberal school of

[34] Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) 11 The Competition Law Review 131.
[35] See, for example, Orbach (n 32).
[36] Mark Glick, 'American Gothic: How Chicago Economics Distorts "Consumer Welfare" in Antitrust' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3423081> accessed 16 August 2021.
[37] Lina Khan, 'The End of Antitrust History Revisited' (2020) 133 Harvard Law Review 1655.
[38] Daniel A Crane, 'How Much Brandeis Do the Neo-Brandeisians Want?' (2019) 64 The Antitrust Bulletin 531.
[39] Joshua D Wright and others, 'Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust' (2019) 51 Arizona State Law Journal 293; Christopher S Yoo, 'Hipster Antitrust: New Bottles, Same Old W(h)ine?' (2018) Faculty Scholarship at Penn Law <https://scholarship.law.upenn.edu/faculty_scholarship/2168/> accessed 16 August 2021.
[40] Sandeep Vaheesan, 'The Profound Nonsense of Consumer Welfare Antitrust' (2019) 64 The Antitrust Bulletin 479.
[41] Konstantinos Stylianou and Marios C Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2019) <https://ssrn.com/abstract=3735795> accessed 23 December 2021.
[42] Peter Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and Its Impact on Article 102 TFEU' (2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658045> accessed 23 July 2021.
[43] Ignacio Herrera Anchustegui, 'Competition Law through an Ordoliberal Lens' (2015) 2 Oslo Law Review 139.

thought can be found between the competition policy of the EU and ordoliberalism.[44]

A recent empirical study has found that EU competition law follows a multitude of goals and all seven objectives examined have existed from the 1960s until now. The authors call it a risky but not unsubstantiated finding that the competition law goals connected to the ordoliberal school of thought are continuously present; they also conclude that the protection of competition as such, that is, the protection of the competitive process, takes precedence over outcome considerations.[45] The most emphasised ordoliberal competition law goals are the protection of individual economic freedom and of the competitive process[46] which – as a consequence of the above – play a crucial role in EU competition law.

As a significant difference one can mention that the single-factor economic efficiency approach towards competition law in the form of formulating consumer welfare as the exclusive goal takes into account only short-term results resulting in consumer surplus which, simply put, means lower prices to consumers. At the same time, constructing a competition law regime with a broader variety of goals, such as the ordoliberal notions of the protection of the competitive process and of individual economic freedom, goes hand in hand with a more far-reaching standpoint which also respects middle and long-term results. The dominant US antitrust approach over the past forty years belongs to the former, while the EU's broader, multi-purpose approach belongs to the latter, at least at a theoretical level. This is why I aim to conceptualise and theorise food sovereignty within the EU competition law discourse. This choice is in line with Patel's not too favourable finding that the European Union 'is not a place characterised by food sovereignty', although it is still better off than the US despite the heavy criticism of food sovereignty advocates raining down on the Common Agricultural Policy. Patel finds this because the EU provides 'better prospects for small-scale farmers' than the US.[47] It is also true for the interface between food sovereignty and competition law.

4 Ordoliberalism and agriculture

Although it is a common mistake to consider that ordoliberalism is strictly associated with the first generation of ordoliberal thinkers who are from the Freiburg School,[48] it may nevertheless be an appropriate starting point when one aims to analyse an issue from an ordoliberal viewpoint. Obviously, ordoliberalism is constantly changing and evolving, that is, one cannot ignore looking at it using a dynamic approach, but core concepts represented by first-generation ordoliberals are useful benchmark tools. The mainstream and most famous ordoliberal thinkers did not pay particular attention to agricultural issues, but there was one economist whose writings

[44] Peter Nedergaard, 'The Ordoliberalisation of the European Union?' (2019) 42 Journal of European Integration 213.
[45] Konstantinos Stylianou and Marios C Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2019) <https://ssrn.com/abstract=3735795> accessed 23 December 2021.
[46] Anchustegui (n 43).
[47] Raj Patel, 'What Does Food Sovereignty Look Like?' (2009) 36 The Journal of Peasant Studies 663.
[48] Behrens (n 42).

include far-sighted considerations for agriculture. This is Wilhelm Röpke who was called 'something of an agrarian' by Milton Friedman.[49] Röpke was not only an economist but also a prominent philosophical thinker who wanted to adopt a systemic approach. I do not claim that the thoughts of Röpke on agriculture can be wholly equated with those of mainstream ordoliberals or, in general, with the basic and insurmountable findings and assumptions of ordoliberalism, but these may be considered when trying to provide an image of such a peripheral issue as agriculture from an ordoliberal standpoint.

Wilhelm Röpke, in his book *International Economic Disintegration*, acknowledges the special features of agriculture. The 'singular character' of agriculture comes from its strong interrelations with nature. The processes of agricultural production are embedded in a system where natural factors are decisive. Röpke lists several distinctive characteristics of agriculture which contribute to its peculiar nature in contrast with industrial production. He emphasises and lists why agriculture is a special sector of economic life:

> the limits set to mechanization, division of labour and use of machinery; the constant need of soil preservation by a complex combination of measures; the everpresent tendency toward diminishing returns; the irregularity and precariousness of its output; the unchangeable rhythm of seasonal or longer production periods; the difficulties of storage; the usefulness of combining different lines of agricultural production horizontally or vertically; and the tendency toward a lower optimum size of the unit of production than exists generally in industry.[50]

Besides Wilhelm Röpke, one can also mention an internationally less known ordoliberal thinker who is quite a polymath: Constantin von Dietze. He was an agronomist, lawyer, economist, and theologian, and thus he represented a rich and holistic viewpoint. The translated title of one of his most relevant works is Agriculture and Competition Order.[51]

After presenting the differences between agriculture and industry, von Dietze submits that farmers are also overwhelmingly driven by profit maximisation.[52] Nevertheless, antedating the EU's approach which provides exemption from the general cartel prohibition for the agricultural sector and harmonising his thoughts with those of Röpke, he finds with regard to horizontal agreements that the completeness of the competition cannot be ruled out even by agreements between dozens or hundreds of agricultural suppliers because of the great number of competing farmers. He also considers the entire agricultural sector as a prime example of the realisation of the conditions of complete competition.[53] In von Dietze's opinion, and I must add that these are timeless anomalies related to agricultural production and that is why I mention them, after the prosperous decades from the 1820s to

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[49] Amity Shlaes, 'The Foreigners Buchanan Calls His Own' *Wall Street Journal* (New York, 29 February 1996) cited by Samuel Gregg, *Wilhelm Röpke's Political Economy* (Edward Elgar 2010) 2.

[50] Wilhelm Röpke, *International Economic Disintegration* (William Hodge and Company 1942) 111–112.

[51] Constantin von Dietze, 'Landwirtschaft und Wettbewerbsordnung' (1942) 66 Schmollers Jahrbuch 129.

[52] ibid 132.

[53] ibid 133.

the 1870s, several problems arose which carried negative effects on the agricultural sector: the rural exodus causing fewer and fewer agricultural workers, urbanisation, price fluctuations, as well as monopolisation. The agricultural sector felt that the monopolisation that was taking place in other sectors of the economy through powerful mergers was disadvantageous for its profession, which remained in complete competition. Thus, towards the end of the 19th century, plans were made and efforts exerted almost all over the world to oppose the traders or industrial monopolies with equally strong associations, ie to monopolise the supply of important agricultural products as well.[54] What von Dietze established 80 years ago is still true today: market actors downstream in the supply chain, such as market operators of the processing industry and the retail chains, have a negative impact on the pricing of raw materials to the disadvantage of primary agricultural producers. Or, conversely, suppliers of agricultural products face serious challenges because of the significant imbalances in bargaining power, and, as a result, unfair trading practices against them are a common occurrence.[55] Von Dietze saw the future of family farming (and, in general, that of agriculture), as well as the preservation of its rural character, in adopting an economic policy according to the constituting and regulating principles of the ordoliberal notion of competitive order (*Wettbewerbsordnung*).[56] For my analysis, the most important of the constituting principles is freedom of contract which, nevertheless, can be limited for the sake of well-functioning competition; besides, with regard to the regulating principles, I must emphasise the containment of market power.[57] The principle of freedom of contract is of high relevance when speaking of unfair trading practices in the agricultural and food supply chain, while the containment of market power is relevant because, in most cases, a certain degree of (relative or absolute) market power is necessary to perform unfair trading practices against suppliers. At least a certain degree of relative market power is needed to conduct unfair trading practice, which – from the supplier's (the abused party's) perspective – in many cases results in the restriction of the principle of freedom of contract, more exactly in the restriction of the freedom to determine the content of the contract. That is, the respective supplier has no choice in determining the terms of the contract, of which he is one of the contracting parties. This comes from the fact that the buyer has relative market power vis-à-vis, and is in a superior bargaining position over, its supplier. This means that the realisation of a competitive order goes not only against the monopolistic and oligopolistic trends taking place downstream in the food supply chain at the level of processing and retailing but also stands up for freedom of contract which should not be used in the competitive order to create dependencies between market players because these dependencies may result in unfair trading practices against agricultural producers.

[54] ibid 140.
[55] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain [2019] OJ L111/59, Recital (1).
[56] von Dietze (n 51) 147.
[57] Christian Ahlborn and Carsten Grave, 'Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective' (2006) 2 Competition Policy International 197, 203.

5 Conceptualising food sovereignty with ordoliberalism in the EU

This part of the paper aims to provide a possible interpretation of 'sovereignty' in 'food sovereignty'. While doing so, in parallel I bring to the fore the tenets of ordoliberalism and ordoliberal competition policy which may serve as potential interfaces between them and food sovereignty.

One of the main goals of ordoliberalism, ie ensuring autonomy for citizens against private and public monopoly powers through a constitutional economic framework, can be raised to the level of collective autonomy within the framework of the agriculture and food supply chain if one accepts Raf Geenens' interpretation of sovereignty. He uses the term 'sovereignty' as 'the name for the perspective a community adopts when it sees itself as collectively autonomous'.[58] Within the domain of the agriculture and food supply chain, food sovereignty can be perceived as the perspective of a collectively autonomous community making a stand for defining their agricultural and food policy. To mention one example, most agricultural producers share the vision that trade in agri-food products and the food chain in general should be fairer, more balanced and transparent. This demand is one of the most emphasised and important topics in agricultural policy-making processes. Agricultural producers appear as collectively autonomous in fighting for their common goal: by making a stand for certain demands, they aim to define their own agricultural and food policy.[59]

With this conceptualisation, one has to give up neither the ordoliberal approach of competition, ie the claim for setting up the rules of the game through state regulation, nor the concept of food sovereignty. Furthermore, one can seize food sovereignty as a kind of collective autonomy which can be traced back to the notion of individual autonomy as a value to be protected by ordoliberalism. If one accepts the ordoliberal viewpoint and thus the necessity of regulating competition through general rules, and if one also accepts Röpke's ordoliberal thoughts on agriculture which hold that 'in this sector […] a particularly high degree of far-sighted, protective, directive, regulating and balancing intervention is not only defensible, but even mandatory',[60] the concept of food sovereignty can be easily reconciled with the ordoliberal approach protecting individual autonomy against public and private constraints of competition. It is one step from the individual to the collective level, from the individual autonomy protected by ordoliberalism to the concept of food sovereignty perceived as a collective autonomy of a community with the emphasised aim of challenging the restrictions of competition exercised by agribusiness, ie giant food enterprises, be it a processor, wholesaler, or retail chain.

Raf Geenens pronouncedly builds his theory of sovereignty as autonomy upon the works of Jürgen Habermas. He emphasises that Habermas provides 'the most elaborate account of sovereignty as autonomy'.[61] If one scrutinises the works of Habermas, one may find a thought that can be drawn as an exact parallel to the viewpoint of ordoliberalism. In one of his books, he says that 'basic rights must now do more than just protect private citizens from

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[58] Raf Geenens, 'Sovereignty as Autonomy' (2017) 36 Law and Philosophy 495.
[59] See, for example, the agricultural lobby groups in the EU <https://copa-cogeca.eu/food_chain#b435> accessed 1 April 2022.
[60] Wilhelm Röpke, *The Social Crisis of Our Time* (University of Chicago Press 1950) 205.
[61] Geenens (n 58) 524.

encroachment by the state apparatus, [p]rivate autonomy is endangered today at least as much by positions of economic and social power'.[62] Ordoliberalism has the same approach: it cannot imagine a mode of economy other than the market economy but wants to set up the rules of the game within the framework of which market actors will perform their economic activities. It is coherent with the view of Habermas: 'it has become impossible to break out of the universe of capitalism; the only remaining option is to civilise and tame the capitalist dynamic from within'.[63] The instrument for civilising and taming the capitalist dynamic is none other than creating competition rules within an economic constitutional framework which highlights economic liberties and individual autonomy. Ironically, the aim of competition law is to save capitalism from itself.[64]

Although it seems paradoxical to support individual autonomy and collective autonomy at the same time, these two types of autonomy are understood as categories in two different spheres. Individual autonomy (individual economic freedom) as protected by ordoliberalism refers to the capacity to live one's life according to reasons and motives that are taken as one's own and not according to manipulative and/or distorting external forces, that is to say, it refers to being economically independent. In its ordoliberal sense, it is economic capacity and one of the most important principles of the economic constitutional framework. At the same time, food sovereignty perceived as a type of collective autonomy is a political term.[65] Individuals can have individual autonomy, that is, they can be independent from an economic point of view, but when stepping up to the political arena, these individuals can determine themselves as collectively autonomous who all fight for their individual autonomy and for remaining independent. They become collectively autonomous through trying to achieve the same goal: maintaining their independence in and by determining their own agricultural and food policy. These notions, thus, have the same legal implications and can be connected to each other with a mutual legal objective: protecting agricultural producers, farmers, small and medium-scale enterprises by creating effective competition and trade law rules and enforcing them in the same manner.

Ordoliberalism and food sovereignty have another common feature: they both intend to re-introduce and re-emphasise social issues in pursuance of their goals. In general, ordoliberalism aims to combine economic efficiency with a just and stable social order.[66] The fact that ordoliberalism is also known as German neoliberalism should not mislead anyone:[67] '[a]s a matter of legal

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[62] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996) 263.
[63] Jürgen Habermas, *The Crisis of the European Union: A Response* (Polity Press 2012) 106.
[64] Richard Whish, 'Do Competition Lawyers Harm Welfare?' (Concurrentialiste – Journal of Antitrust Law, 11 May 2020) <https://leconcurrentialiste.com/richard-whish-welfare/> accessed 23 December 2021.
[65] Windfuhr and Jonsén (n 6).
[66] Brigitte Young, 'Ordoliberalism as an 'Irritating German Idea' in Thorsten Beck and Hans-Helmut Kotz (eds), *Ordoliberalism: A German Oddity?* (CEPR Press 2017) 31, 35.
[67] The reason behind this is that ordoliberalism and neoliberalism 'happened to be very much on the same page with regard to the exact matters that now set them apart from each other – after all, both are widely and correctly considered to be subcurrents or variations of the same neoliberal tradition'. See Thomas Biebricher, 'Freiburg and Chicago: How the Two Worlds of Neoliberalism Drifted Apart Over Market Power and Monopolies' (2021) ProMarket <https://promarket.org/2021/06/27/freiburg-and-chicago-how-the-two-worlds-of-neoliberalism-drifted-apart-over-market-power-and-monopolies/> accessed 31 March 2022.

and political form, ordoliberalism and neoliberalism are often in tension with each other, as ordoliberalism's rule-based commitments come up against neoliberal discretionary politics'.[68] The feature that distinguishes ordoliberalism from neoliberalism is that the latter views the world as a market and tries to govern it as if it were a market, and it refuses the separation of economic, social and political spheres, 'evaluating all three according to a single economic logic'.[69] In contrast, even the name of one of the most significant notions of ordoliberalism carries its socially focused nature: social market economy.[70] The concept of social market economy brought to the fore by Müller-Armack has at least three core concepts: (a) the preservation of the market economy as a dynamic order; (b) social equilibrium, which is subject to the observance of the first sentence; and (c) securing stability and growth through monetary and competition policy.[71] The social market economy is a normative system based on values such as dignity, well-being, self-determination, encouragement, freedom and responsibility of all individuals; it is fully committed to a humane society in which 'economic growth and social sustainability are compatible notions'.[72]

Contrary to ordoliberalism, neoliberalism lacks the desire to achieve social equilibrium and takes into account no concerns other than economic ones. This is the ground for us to be able to reconcile food sovereignty with ordoliberalism. At the same time, this is the reason which establishes the impossibility for neoliberalism to be in line with food sovereignty. In all its aspects, food sovereignty – as it has emerged as a social movement – pursues the aim of having social considerations taken into account during policy-making processes. The trait of ordoliberalism that it does not just consider economic efficiency as the exclusive objective of competition law means that other (non-economic) considerations may be taken into account when adopting and enforcing competition laws in a broad sense. Therefore, in an ordoliberal concept of competition law, which – as mentioned – does not limit itself to achieving one and only one objective, ie consumer welfare through economic efficiency, non-economic aspects may also appear when deciding whether or not a conduct is harmful to competition. This means that food sovereignty with its social aims is not contrary to ordoliberalism. As the definition provides, food sovereignty does not negate trade but aims to create trade practices which are able to break the dominance of agribusiness. Doing so is motivated by social considerations which also appear in the ordoliberal line of thinking. The ordoliberal approach of adopting the rules of the game through legislation which direct the behaviour of market participants is in accordance with food sovereignty, since the latter also wants a level playing

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[68] Michael A Wilkinson, 'Authoritarian Liberalism in Europe: A Common Critique of Neoliberalism and Ordoliberalism' (2019) 45 Critical Sociology 1023, 1024.
[69] Davies (n 15).
[70] For more, see Viktor J Vanberg, 'The Freiburg School: Walter Eucken and Ordoliberalism' (2004) Freiburger Diskussionspapiere zur Ordnungsökonomik No 04/11 <https://www.eucken.de/wp-content/uploads/04_11bw.pdf?x34410> accessed 23 December 2021.
[71] Ralf Ptak, *Vom Ordoliberalismus zur Sozialen Marktwirtschaft – Stationen des Neoliberalismus in Deutschland* (Springer Fachmedien 2004) 227.
[72] Doris Hildebrand, 'The Equality and Social Fairness Objectives in EU Competition Law: The European School of Thought' (2017) Concurrences <https://www.concurrences.com/en/review/issues/no-1-2017/law-economics/the-equality-and-social-fairness-objectives-in-eu-competition-law-the-european> accessed 18 December 2021.

field. 'Food sovereignty promotes the role of the state as protector of farmers' interests',[73] which can only be realised through legislation. This does not mean that inefficient undertakings and market actors will be prioritised, but all operators on the respective market will have equal opportunities as a result of the aim to reach social equilibrium. In the broadest context, the ultimate goal is that all market participants be part of a humane economy.[74] Criticism may be made that this links competition law with redistributive objectives, and redistribution is not an aspect with which competition law should deal. Still, it is worth reconceptualising and perceiving redistribution from another approach. Adopting the thoughts of Eleanor Fox, if we refuse to accept that competition law can and should contribute to redistribution[75] and if we view competition law as something that should only deal with economic efficiency, we may also acknowledge that redistribution is taken over from the state by and positioned in the hands of giant undertakings.[76] Food sovereignty also emphasises the problem of decreasing state regulatory power.[77]

The strength of food sovereignty is that it may provide us with answers at different levels,[78] as well as that it has the feature of multi-interpretability.[79] This allows us to identify two trends from different directions but leading to the same result. Ordoliberalism emphasises the role of the state in setting the rules of competition in the market (at national and/or EU level), while food sovereignty seeks to restore the leading role of the state as protector of the agricultural community (at the international level). The result and the conclusion are the same in both cases: the state must take an active role in shaping competition and trade rules. This does not mean direct intervention into the relationship of market participants but signifies establishing those competition and trade rules according to which these market participants operate in the marketplace.

By adopting the approach of ordoliberalism which goes beyond a single-purpose viewpoint towards competition law and by choosing the political category of food sovereignty as a possible conceptual framework in policy-making processes, I step on the path of prosocial antitrust/competition law.[80] By prosocial competition law I mean a mode of competition law legislation and enforcement in a broad sense which is sensitive to social issues and does not limit itself to achieving economic efficiency. By looking at the primary law of the European Union, Article 9 TFEU includes the horizontal social clause[81]

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[73] Mann (n 10).
[74] Wilhelm Röpke, *A Humane Economy: The Social Framework of the Free Market* (Intercollegiate Studies Institute 2014).
[75] See also: Ioannis Lianos, 'Competition Law as a Form of Social Regulation' (2020) 65 The Antitrust Bulletin 3, 9.
2020)
[76] See the keynote speech: Eleanor M Fox, Antitrust and Inequality: The History of (In)equality in Competition Law and Its Guide to the Future (Online conference titled Should Wealth and Income Inequality Be a Competition Law Concern? 20 May 2021).
[77] Windfuhr and Jonsén (n 6) 29.
[78] José Bové and Francois Dufour, *The World Is Not for Sale: Farmers Against Junk Food* (Verso 2001) 168.
[79] Hajer (n 1).
[80] The term has been taken over from *Miazad*. See: Amelia Miazad, 'Prosocial Antitrust' (2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802194> accessed 14 July 2021).
[81] Maria Eugenia Bartoloni, 'The Horizontal Social Clause in a Legal Dimension' in Francesca Ippolito, Maria Eugenia Bartoloni and Massimo Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2018) 83.

which requires that 'social values have to be respected in all policy fields of the EU'.[82] Of the few *expressis verbis* provisions on resolving the conflicts between competition and another policy, the subject of my article, ie agriculture, is one which establishes the specific social objectives to be considered when adopting and enforcing competition laws in the form of the provision formulated in Article 42 TFEU.[83] As described later, Article 42 TFEU paves the way for the precedence of Common Agricultural Policy objectives over general competition rules.

The ordoliberal competition law objectives such as the protection of the competitive process and of individual freedom[84] are in themselves appropriate to consider non-economic factors when deciding whether a conduct is harmful to competition. The notion of prosocial competition law does not argue against the economic efficiency to be achieved by competition laws. The market reforms advocated by food sovereignty not only aim to address the problems of small farmers, but also of food consumers, 'especially low-income consumers'.[85]

As a consequence of adopting a food sovereignty approach, one rejects that food be purely commodified,[86] and as a consequence of a socially responsive ordoliberal competition policy positioned in the framework of a social market economy, one can take into account those dimensions of competition and trade in agricultural products and food which would remain invisible from a more economic approach limited to the objective of enhancing consumer welfare. 'The commodification of food […] has resulted in the vertical integration and the concentration of power in a few very large firms with national governments increasingly tailoring food regulation to the demands of agribusiness'.[87]

The food sovereignty movement's demand to break the control and growing power of corporations over the food system[88] is fully in accordance with the thoughts of ordoliberalism's mainstream economist, Walter Eucken. As explained in one of his major works, the state's policy should be directed toward dissolving economic power groups or limiting their function.[89] It is not the only parallel which can be drawn between the key ordoliberal economist Eucken and food sovereignty: an overlap may also be found with regard to the requirement of contractual freedom. In Eucken's view, freedom of contract should not be used in the competitive order to create dependencies between market players, that is, freedom of contract may not be granted for the

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[82] Andreas Heinemann, 'Social Considerations in EU Competition Law: The Protection of Competition as a Cornerstone of the Social Market Economy' in Delia Ferri and Fulvio Cortese (eds), *The EU Social Market Economy and the Law: Theoretical Perspectives and Practical Challenges for the EU* (Routledge 2019) 123.
[83] ibid.
[84] Anchustegui (n 43) 139.
[85] Henry Bernstein, 'Food Sovereignty Via the "Peasant Way": A Sceptical View' (2014) 41 The Journal of Peasant Studies 1031, 1054.
[86] Using this term in the sense as adopted by Jeffrey R Oliver and Lindon J Robison, 'Rationalizing Inconsistent Definitions of Commodification: A Social Exchange Perspective' (2017) 8 Modern Economy 1314.
[87] Amy Trauger, 'Toward a Political Geography of Food Sovereignty: Transforming Territory, Exchange and Power in the Liberal Sovereign State' (2014) 41 The Journal of Peasant Studies 1131.
[88] William D Schanbacher, *Food as a Human Right: Combatting Global Hunger and Forging a Path to Food Sovereignty* (Praeger Security International 2019) 91.
[89] Walter Eucken, *Grundsätze der Wirtschaftspolitik* (JCB Mohr 1952) 334.

purpose of concluding contracts that restrict or eliminate freedom of contract.[90] This tenet of Eucken may be a basis for regulating unfair trading practices in the food supply chain from an ordoliberal point of view, given that the UTPs, in most cases, constitute certain types of exploitative abuse which restrict the freedom of contract of that contracting party which is vis-à-vis the party having superior bargaining power. To be more exact, the weaker contracting party's freedom to determine the terms of the contract is restricted due to economic dependence, and so this party is put in a position which – from a food sovereignty approach – is unacceptable because of the economic exploitation.[91] As put by Akman, the ordoliberal concept of efficiency also includes 'the continuing possibility of choice for the individual',[92] of which the above-mentioned behaviours deprive the agricultural producers, who are vulnerable in cases of bargaining with buyers being in a superior bargaining position.

The characteristic of food sovereignty that it can be interpreted at all levels means that the movement's demand for ceasing unequal trading rules at the international level can be projected at the national and EU levels.[93] Ordoliberal competition policy and the social market economy constitute an appropriate framework to set up those competition and trade rules which take into account non-economic (social) factors to provide protection for the weakest actors of the food supply chain, the farmers as well as small and medium-size enterprises. The food sovereignty movement promoting social justice[94] may find a useful partner in ordoliberal competition policy to establish the set of rules necessary to provide protection for the most vulnerable of the food supply chain. On the one hand, this 'partner-in-crime' role of ordoliberalism comes from the view of ordoliberal thinkers who dealt with agriculture, and, on the other hand, even from the general constituting principles drawn up by Eucken.

6 Special competition-related laws of the agricultural and food sector

In this part I aim to take stock of, if there are any, those competition-related laws which provide for specific or exemption norms with regard to competition and trade in the agricultural and food sector. Exception norms are those provisions which deviate from the general norms because of the particular circumstances of agriculture, while specific norms are those provisions which are separately adopted for agriculture.[95]

The reason for enumerating these laws is of paramount importance to my study. If there are agriculture-specific competition rules, it strengthens my standpoint that it is possible for competition policy to take into account sectoral characteristics. This would mean that other public policies, such as agricultural policy, may affect competition provisions and their enforcement. Of course, the aim of agricultural policy is not to achieve the highest possible economic efficiency but primarily to ensure a fair standard of living for those

[90] ibid.
[91] Windfuhr and Jonsén (n 6).
[92] Akman (n 21).
[93] Bernstein (n 85).
[94] David M Kaplan (ed), *Encyclopedia of Food and Agricultural Ethics* (Springer 2019) 99.
[95] Christian Grimm, *Agrarrecht* (CH Beck 2004).

who are engaged in agricultural production. That is to say, if other public policies may play a role in adopting and enforcing competition rules applying to certain sectors, these public policies may hijack competition law from its narrow efficiency-based approach.

Reasonably, the differences between EU (polythematic as a consequence of ordoliberalism) and US (monothematic concentrating on consumer welfare) competition law goals would mean that the former jurisdiction has, while the latter jurisdiction has no, special competition-related laws applying to the agricultural and food sector. Nonetheless, the reality shows otherwise.

First, let us take a look at the EU, in particular the Treaty on the Functioning of the European Union (hereinafter: TFEU).[96] In principle, the EU defines its common agricultural and fisheries policy, which – according to Whish and Bailey – has its own philosophy.[97] The internal market extends to agriculture, fisheries and trade in agricultural products. Therefore, the common agricultural and fisheries policy is part of the internal market. Save as otherwise provided in Articles 39 to 44 TFEU, the rules laid down for the establishment and functioning of the internal market also apply to agricultural products. Rules on competition, being positioned from Article 101 to 109, form a part of the internal market. However, even since the beginning of European integration, European agricultural markets have not been fully exposed to free competition. Schweizer explains that the introduction of common competition rules for agricultural markets has a negative and a positive component. The negative component relates to the application of the competition rules of Articles 101 et seq TFEU to agriculture. The positive component opens the way for the European Parliament and the Council to independently regulate competition issues in the agricultural sector.[98]

The basic system and derogation are provided by Article 42 TFEU which declares that the provisions of the Chapter relating to rules on competition apply to the production of and trade in agricultural products only to the extent determined by the European Parliament and the Council, account being taken of the objectives set out in Article 39. This provision establishes the primacy of agricultural policy over general competition law. Article 39 TFEU comprises the objectives of the Common Agricultural Policy, which have to be taken into consideration when deciding on the extent of the application of competition rules to production and trade in agricultural products. The two key objectives for our topic are ensuring a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture, and the stabilisation of markets.

The possibility for derogations established by the TFEU is realised through Council Regulation (EC) No 1184/2006[99] and Regulation (EU) No 1308/2013, in particular through its Part IV on competition rules.[100] The

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[96] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/57.

[97] Richard Whish and David Bailey, *Competition Law* (OUP 2012) 963.

[98] Dieter Schweizer, 'Art 42 AEUV' in Torsten Körber, Heike Schweitzer and Daniel Zimmer (eds), *Wettbewerbsrecht,* vol 1 (CH Beck 2000).

[99] Consolidated text: Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of and trade in certain agricultural products [2014] OJ L214/7.

[100] Consolidated text: Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79,

former's scope *ratione materiae* covers those Annex-I products which are not covered by the latter. That is, these two secondary legal acts complement each other in terms of their material scope.

Let us take a look at the former. The two main derogations in relation to Article 101(1) TFEU, which provides for the general cartel prohibition, may be called upon when agreements, decisions and practices (a) form an integral part of a national market organisation; or (b) are necessary to attain the objectives set out in Article 39 TFEU.

Sentence 2 of Article 2(1) of Regulation (EC) No 1184/2006 also includes an example. The wording 'in particular' reflects the indicative/illustrative nature of the provision: in particular, Article 101(1) TFEU does not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products. Nevertheless, there are also negative criteria determined as regards this provision. On the one hand, there is the absolute requirement that under the agreement, decision or practice of farmers, farmers' associations, or associations of such associations, there must be no obligation to charge identical prices, and, on the other hand, there are two further requirements formulated in an alternative relation to each other, and individually in a cumulative relation to the prohibition of charging identical prices. These two requirements are the following: (a) competition shall not be excluded, or (b) the objectives of the Common Agricultural Policy shall not be jeopardised. This means that for an agreement, decision or practice to be exempted from Article 101(1) TFEU, the following prohibitions shall be respected cumulatively: (a) the prohibition on charging identical prices; (b) the prohibition on the exclusion of competition; and (c) the prohibition of jeopardising CAP objectives. From a reversed point of view, it is sufficient to return to the application of Article 101(1) if any of the three above-mentioned prohibitions is violated. The Council Regulation does not affect the prohibition of abuse of a dominant position under 102 TFEU; this therefore applies in full in the agricultural sector.[101]

First and foremost, it is worth mentioning that the provisions of Regulation No 1184/2006 and Regulation No 1308/2013 are – in most aspects – identical. Although the core meaning of the exceptions formulated in these two regulations is the same, there are two small differences between the provisions. Pursuant to Article 2(1) of Regulation No 1184/2006, the cartel prohibition does not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State. Regulation No 1308/2013 complements this list with producer organisations recognised under its Article 152 or Article 161, or associations of producer organisations recognised under its Article 156, but with regard to the associations of farmers' associations it does not mention the feature 'belonging to a single Member State'. This latter difference is hard to explain; however, the expansion of the list with producer organisations can be perceived as the concretisation of farmers' associations. Every producer

(EC) No 1037/2001 and (EC) No 1234/2007 [2020] OJ L347/671.

[101] Ines Härtel, 'AEUV Art 42' in Rudolf Streinz (ed), *EUV/AEUV – Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union* (CH Beck. 2018).

organisation is a farmers' association but not every farmers' association is a producer organisation. The dividing line is whether the entity in question is recognised by a Member State in accordance with EU law. If it is, it is called a producer organisation, if not, it is called a farmers' association. This shows us that 'calling up' the exemption does not require recognition in the legal sense. Regulation No 1308/2013 also consists of rules applying to interbranch organisations. Contrariwise, when speaking of interbranch organisations, in order for them to use the exemption under the general cartel prohibition, they must be recognised. Recognition not only has general rules but also special rules for the milk and milk products sector and for the olive oil and table olives and tobacco sectors. There are five conditions determined which lead to the incompatibility of the agreements of interbranch organisations with EU law. Three of them are quite similar to the previously mentioned case of exception: the respective agreement, decision or concerted practice must not create distortions of competition which are not essential to achieving the objectives of the CAP pursued by the interbranch organisation activity (similar to the jeopardisation of CAP objectives); they must not entail the fixing of prices or the fixing of quotas (similar to charging identical prices); they must not create discrimination or eliminate competition in respect of a substantial proportion of the products in question (similar to the exclusion of competition). Besides these, the agreements, decisions and concerted practices must also not lead to the partitioning of markets within the Union in any form, and must not affect the sound operation of the market organisation.

Outside the toolbox of conventional competition law, additional protection in the form of specific norms provided for the weaker market participants in the food supply chain is achieved by Directive (EU) 2019/633.[102] It prohibits certain unfair trading practices in business-to-business relationships in the agricultural and food supply chain through a minimum harmonisation obligation of the Member States. Although I mentioned that the regulation on the abuse of dominance fully applies to agriculture, this Directive can be perceived as a complementary instrument (although with a totally different assessment method) to catch those unfair unilateral conducts which do not reach the intervention threshold necessary to enforce the provision on the abuse of dominance.

Although my previous findings on the compatibility of food sovereignty and the US antitrust regime do not imply that the US would have special competition-related laws to the agricultural and food sector, the reality is somewhat different. First, I have to commence with Section 6 of the Clayton Act of 1914.[103] It declares that nothing contained in the antitrust laws should be construed to forbid the existence and operation of agricultural or horticultural organisations, instituted for the purposes of mutual help. Section 6 is extended by the Capper-Volstead Act of 1922.[104] These two statutes provide for an exemption for agricultural cooperatives under antitrust laws, as in the European Union. Second, the Packers and Stockyards Act of 1921 is also worth emphasising. It is designed to ensure effective competition and integrity in livestock, meat, and poultry markets. Third, I must also

[102] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain [2019] OJ L111/59.
[103] 15 US Code § 17.
[104] 7 US Code §§ 291–292.

mention the Perishable Agricultural Commodities Act of 1930[105] and the Unfair Trade Practices Affecting Producers of Agricultural Products Act of 1968.[106] Though all of these laws were passed long before the consumer welfare approach became dominant from the 1980s and diverge from a horizontal and unified approach towards antitrust law, none of them have been repealed following the paradigm shift brought about by the Chicago School, despite the fact that they bring to the fore non-efficiency-based considerations. What is more, they have been enforced to the same extent as before the appearance of the consumer welfare paradigm, about which I have found that it is, to a significant extent, incompatible with the considerations of food sovereignty.

7 Conclusion

The article has aimed to introduce the notion of food sovereignty into the discourse of competition law and policy, as well as to theorise and conceptualise them in parallel with ordoliberalism. The study finds that an ordoliberal competition policy followed by the EU is suitable to take into account the competition-related elements of the food sovereignty definition, while the dominant consumer welfare approach of the US in the last four decades is not. However, this does not mean that the latter does not treat the agricultural and food sector relatively separately from its general antitrust regime. Regardless of the prevailing approach towards general competition/antitrust law, the agricultural and food sectors have maintained their relative independence which is underpinned by the special competition and trade-related laws of these sectors in both the EU and the US. The agrarian antitrust[107] of the US and an *europäisches Agarwettbewerbsrecht*[108] can provide space for food sovereignty in the discourse of antitrust/competition law, which may bring with it the further protection of farmers and agricultural producers in an increasingly globalised market of agricultural and food products.

I agree with von Dietze's 80-year-old findings. The future of family farming (and, in general, that of agriculture) as well as the preservation of its rural character propagated by food sovereignty enthusiasts lies in consequently setting an economic policy according to the constituting and regulating principles of the competitive order. This order is not only against the monopolistic and oligopolistic trends taking place downstream in the food supply chain at the level of processing and retailing, but also stands up for freedom of contract which should not be used to create dependencies between market players, because these dependencies may result in unfair trading practices against agricultural producers. Although the theoretical foundations are given at the level of the European Union, the realisation of the competitive order fails in many cases. However, this can be achieved by improving the law

[105] 7 US Code §§ 499a–499t.
[106] 7 US Code §§ 2301–2306.
[107] Jon Lauck, 'Toward an Agrarian Antitrust: A New Direction for Agricultural Law' (1999) 75 North Dakota Law Review, 449.
[108] See the term: Walter Frenz, 'Agrarwettbewerbsrecht' (2010) 40 Agrar- und Umweltrecht 193; Ines Härtel, '§ 7 Agrarrecht' in Mathias Ruffert (ed), *Europäisches Sektorales Wirtschaftsrecht* (Nomos Verlag 2013) 437; Härtel (n 101); Ines Härtel, 'Agrarrecht' in Matthias Ruffert (ed), *Europäisches Sektorales Wirtschaftsrecht* (Nomos Verlag 2020) 463.

enforcement by taking a prosocial approach towards competition laws, which does not limit itself to economic considerations but is open to the core elements of food sovereignty. At a theoretical level, the notion of the social market economy propagated by ordoliberals and being part of the EU's primary law is suitable for this, thereby leaving room for a more humane competition law sensitive to the main considerations emphasised by food sovereignty enthusiasts. This may provide a level of protection for European agricultural producers to help them overcome problems arising from increasingly globalised markets and their symptoms coming to the fore in the form of increasing market concentration and consolidation. Preserving the character of European agriculture which has several precious functions beyond food production is a policy choice and value decision. At a theoretical level, the framework of a social market economy in general and that of an EU competition policy in particular is suitable and appropriate for this. Policy-makers should not even break with and disrupt the tradition of ordoliberal competition policy and European agriculture. The framework can be filled with such content which continues to be in accordance with our common past and understanding, both in terms of competition policy and of agriculture.