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Competition law and policy and the food value chain

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ABSTRACT

This On-Topic revisits the complex issues rising in the food sector and its value chain. Both the European Union and the US competition authorities have scrutinized relationships between food chain actors. The increasing market concentration raises new challenges for competition enforcement authorities dealing with the creation of new powerful actors at the distribution but also at the factor of production (input) levels. The concept of superior bargaining power has played a key role, sometimes criticised, in order to assess these relationships. The papers also discuss the critical intersection of competition law with public policy, with the aim to preserve sustainability, food safety and the stability of agricultural markets.

Introduction

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Concentration, contracting, and competition policy in U.S. agribusiness

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Introduction

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1. The food supply chain is generally depicted as composed by three main levels: agricultural production, industrial processing and wholesale or retail distribution. At a close look, the food supply chain becomes more complex than this tri-partition, involving a number of other stages and links that add value to the chain either

Ce dossier revient sur la complexité du secteur alimentaire. Les relations entre les acteurs de la chaîne alimentaire font l'objet d'une attention particulière de la part des autorités de concurrence aussi bien aux Etats-Unis qu'au sein de l'Union européenne. La concentration du marché soulève des difficultés nouvelles dans la mise en œuvre du droit de la concurrence en faisant apparaître de nouveaux rapports de force aussi bien au stade de la production que de la distribution. Le concept de pouvoir d'achat occupe une place centrale, parfois discutée. Dans ce secteur, le droit de la concurrence doit également faire face aux politiques publiques, désireuses d'assurer la viabilité, la sécurité et la stabilité d'un secteur au cœur des habitudes des consommateurs.

The mixed record of the Obama administration in food competition policy leaves many unresolved issues: "Talking the talk, but not walking the walk"

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Superior bargaining power and the global food value chain: The wuthering heights of holistic competition law?

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in the form of goods or services inputs¹. At each level of the supply chain, undertakings perform specific activities supplying goods or services. The food supply chain, as a

¹ On global value chains, see Gary Gereffi, John Humphrey and Timothy Sturgeon, 'The Governance of Global Value Chains' (2005) 12 Review of International Political Economy 78.

whole, originates therefore even before farming², with the factors of production market (e.g. seed providers) and ends with the final consumer. The agricultural commodities generally undergo a processing stage before being distributed. However, in some cases they are sold directly to consumers (direct chain) or through the sole mediation of the wholesale industry (short supply chain). The length of the supply chain depends on how many passages the good undergoes before reaching the consumer.

2. The relations between the various segments of the food value chain are characterized by various governance arrangements. Typically, the relationship between market actors spans from a spot market exchange to a full ownership integration, passing by a variety of contractual arrangements³. Empirical studies on agro-related businesses indicate that contracts (and networks), instead of markets, constitute the most prevalent mechanism of governance observed in this sector.⁴ These sophisticated contractual networks operate as private governance regimes, establishing usually long-term relations between the various market actors so as to address the multiple sources of risks in food production and distribution, including events related to climate and weather conditions, animal diseases, changes in agriculture commodities prices, changes in fertilizer and other input prices, financial uncertainties to policy and various regulatory risks⁵. One should also note the considerable amount of M&A activity, as well as other forms of long-term cooperation between the various segments of the food value chain, but also between undertakings situated at the same level of the value chain (e.g. buying alliances, cross-licensing agreements between seed platforms, agricultural cooperatives). This consolidation raises important public policy issues, beyond competition law and policy. The existence of various market actors (at the wholesale, retail or other level), global retail chains, different forms of commerce competing with each other (modern and more traditional), different means of self-regulation including standard setting and certification, various groups of consumers, various forms of suppliers (e.g. industrial, farmers), presents a complex web of societal relations built in order to guarantee the distribution of food, which because of the societal importance of the sector is intrinsically linked with politics, either at the national (democracy, political stability) or the global level (the new geopolitics of food).

2 The agricultural sector comprises both crop production and the raising of livestock.

3 J Michael Harris and others, 'The US Food Marketing System: Competition, Coordination, and Technological Innovations Into the 21st Century' [2002] USDA Economic Research Service 1.

4 See, James MacDonald et al, *Contracts, Markets, and Prices: Organizing the Production and Use of Agricultural Commodities*, USDA, Agriculture and Economic Report, No. 837 (2004) (finding that traditional spot markets, though they still govern nearly 60 percent of the value of agricultural production, have difficulty providing accurate price signals for products geared to new consumer demands (such as produce raised and certified as organic or identity-preserved crops modified for special attributes).= and predicting a continuing shift to more explicit forms of vertical coordination, through contracts and processor ownership, as a means to ensure more consistent product quantity and quality).

5 OECD, *Managing Risk in Agriculture- A Holistic Approach* (OECD, Paris, 2009).

3. The food sector is not only of particular social importance but has also witnessed major developments in the way it is organised. For instance, development of new technologies has led to the emergence of a diverse group of players: biotech seed and chemical crop protection companies; equipment and fertilizers suppliers; as well as digital start-ups – all of which are seeking to develop an integrated offering of all-inclusive solutions for farmers enabling them to gradually set standards and build technological platforms of food production that will allow such providers to compete for the lion's share of the market. A lot of competition authorities around the world have also focused on the retail sector and the development of platforms by multi-brand retailers having superior bargaining power vis-à-vis processors/suppliers and other intermediaries.

4. This special issue aims to disentangle the various dimensions of competition law and policy in the food value chain. The first three papers of this special issue (MacDonald, Carstensen, Moss) focus on the factors of production and agricultural markets, exploring in particular their consolidation, the interpretation of possible exemptions from the scope of antitrust law for agricultural cooperatives and the effects of such consolidation for consumers but also the development of competition in this economic sector. Although the authors explore these questions from the perspective of US law, one may draw useful insights for any other competition law regime as the issues raised are typically the same even if the approaches followed are not always similar. The last paper in this special issue (Lianos & Lombardi) explores bargaining power at the distribution but also production levels. Although the concept of "bargaining power" has provided a powerful narrative for competition law's intervention in this area, there have been considerable doubts and criticisms in the way this concept may be operationalised and the availability of other tools than competition law to deal with it. The special issue will be completed by a study, which will appear in the next issue of *Concurrences* (*Concurrences* 2-2016) exploring the intersection between competition law and IP rights in this area and focusing on the upper segment of the value chain that of the factors of production and in particular seed players, and their relations with the other segments of the value chain – i.e. farmers (Lianos, Katalovsky, Ivanov). Exploring this dimension is essential in view of the recent M&A activity in the seed market, in particular following the announcement in December 2015 of the merger between DuPont and Dow, the merged company then splitting spawning three independent publicly traded companies in agrichemicals, materials science and speciality products and the announcement in February 2016 of the takeover of Syngenta by China National Chemical Corp (ChemChina).

Concentration, contracting, and competition policy in U.S. agribusiness

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I. Introduction

1. Competition in agribusiness has been a recurring topic of policy debate and action over the last two decades. Widespread attention has been focused on mergers among competing firms in food processing, food retailing, agricultural input industries; Federal antitrust enforcers have opposed some, but chose not to oppose others. Over the same period, antitrust agencies have discovered and prosecuted several international price-fixing cartels in livestock feed ingredients, as well as local price-fixing cartels in the provision of milk to school districts.

2. Two agencies share primary responsibility for enforcement of U.S. antitrust laws. The Antitrust Division of the U.S. Department of Justice (DOJ) has the power to file criminal suits leading to fines and jail terms (in price-fixing cases), as well as civil actions forbidding future violations of the laws and requiring steps to remedy anticompetitive effects of past violations. An independent regulatory agency, the Federal Trade Commission (FTC), can file civil actions in antitrust cases, and also has responsibility for enforcement of other consumer protection statutes. The two agencies share responsibility for merger policy, sorting merger probes according to developed agency expertise in the relevant industries.

3. Two laws, the 1890 Sherman Act and the 1914 Clayton Act, provide the basis for most antitrust enforcement, which focuses on three broad areas: 1) multilateral horizontal restrictions on competition, including price-fixing and mergers; 2) unilateral horizontal practices aimed at facilitating the exercise of market power or excluding competitors; and 3) vertical practices, unilateral or multilateral, that do the same (Hovenkamp, 2005). Another law, the 1921 Packers and Stockyards Act (PSA), includes several sections that have been interpreted by Federal Courts as antitrust laws focused on unilateral

horizontal practices and vertical practices. The PSA applies to livestock industries and is enforced by an agency of the U.S. Department of Agriculture (USDA), the Grain Inspection, Packers, and Stockyards Administration (GIPSA).

4. GIPSA enforcement has become an issue in debates over competition in agribusiness, which feature a major focus on livestock. In debates leading up to the 2002 farm bill, Congress considered proposals to limit the use of certain types of contracts in livestock production, and after intense debate ultimately included competition provisions in a new livestock title in the 2008 farm bill, the Food, Conservation and Energy Act of 2008 (the Act).⁶ One provision directed the Secretary of Agriculture to establish more precise criteria for determining when an “*undue or unreasonable preference or advantage*” had occurred under the PSA; another specifically directed the Secretary to determine whether a common feature of contract extensions—requiring additional capital investments by contract hog or poultry growers—constituted a violation of the PSA.⁷

5. GIPSA, the relevant enforcement agency, carried out a rule-making procedure in response to the 2008 Act. The rule-making focused on certain practices used by meatpackers in procuring livestock, such as: inter-packer sales of animals; sales brokers acting on behalf of multiple packers; offering marketing contracts to some but not all potential sellers; and requiring contract poultry and swine growers to invest in new capital as a condition of contract renewal. An initial proposed set of rules generated considerable controversy, and elicited

6 The farm bill, the primary agricultural and food policy tool of the federal government, is a large and comprehensive omnibus bill passed every 5 to 6 years, under different specific names, such as the Agricultural Act of 2014 (the most recent). The farm bill’s primary focus is on the commodity and conservation programs administered by USDA, but other sections cover such topics as agricultural research support, agricultural trade policies, nutrition programs, and rural development.

7 U.S. antitrust laws commonly feature very broad and imprecise language, like that in the PSA holding meatpacker actions that give meatpackers or livestock sellers an “*undue or unreasonable preference of advantage*” to be illegal, while leaving it to enforcement agencies and courts to provide specificity.

* The views expressed herein are those of the author, and not necessarily those of the U.S. Department of Agriculture or the Economic Research Service.

over 60,000 comments (Greene, 2015). The agency then issued a narrower set of final rules, which have not been implemented as Congress has prohibited the expenditure of funds to enforce those rules.

6. While the GIPSA rule-making was proceeding, the DOJ and USDA hosted a series of workshops on competition in the agricultural sector in 2010, attracting widespread media attention and large crowds at five locations around the country. While DOJ has frequently organized expert workshops to provide guidance on particular topics in antitrust, these were different. Interest in them carried over from the political debates surrounding the competition proposals in 2002 and 2008 farm bills and the GIPSA rule-making, and the hearings engaged senior political appointees at USDA and DOJ.⁸ The Secretary of Agriculture and the Attorney General spoke at each and participated along with other DOJ and USDA leaders in panel discussions on competition, agricultural contracts, antitrust policy, and related topics with farmers, processors, elected officials, and academics.

7. Several common themes arose (U.S. Department of Justice, 2012). Participants expressed concern with high levels of concentration in agricultural markets, and with merger enforcement by antitrust agencies. Critiques focused on features of the production contracts under which most swine and poultry are produced; alleged bid-rigging and market manipulation in other types of contracts and in cash markets; and pricing in markets for genetically engineered seeds and seed traits, where the traits often were still under patent protection.

8. I discuss the background for the issues raised above—increasing concentration in agribusiness and important structural changes in agriculture—and then review the evidence regarding concentration, agricultural contracting, and the exercise of market power in the sector, while tying those findings to recent policy actions. I emphasize livestock, where most of the debate lies, but avoid discussing political details of the GIPSA rule-making controversy (an excellent review can be found in Greene, 2015).

II. Concentration and structural change in U.S. agribusiness

9. U.S. agribusiness has undergone far-reaching change in the last 30 years. In general, processors, input and service suppliers, and commercial farmers have become fewer but much larger. Agricultural transactions are more likely to be carried out under contracts, which can be quite complex. These structural changes spurred

⁸ USDA's participation followed from its responsibility for PSA enforcement as well as a long history of providing expertise to DOJ and FTC in cases related to the food system.

productivity growth, but they also created winners and losers and altered the nature of competition in some markets.

Table 1: Four-Firm Concentration Ratios in Selected U.S. Agribusinesses

Four largest firms' share of:	Beginning year	Ending year
Manufacturing shipments	Year=1977	Year=2012
Fluid milk processing	18	46
Flour milling	33	50
Wet corn milling	63	86
Soybean processing	54	79
Rice milling	51	47
Cane sugar refining	63	95
Beet sugar	67	78
Nitrogenous fertilizer manufacturing	34	69
Phosphatic fertilizer manufacturing	35	88
Pesticide manufacturing	44	57
Farm machinery	46	61
	Year=1980	Year=2007
Railroad grain shipments	53	84
	Year=2000	Year=2007
Seed shipments		
Corn seed	60	72
Cotton seed	95	95
Soybean seed	51	55
	Year=1980	Year=2012
Livestock procurement		
Steer and heifer slaughter	36	85
Hog slaughter	34	64
	Year=1995	Year=2012
Broiler processing	50	51
Turkey processing	41	53

Sources: Manufacturing shipments: U.S. Census Bureau; Railroad grain: USDA, Agricultural Marketing Service. *Study of Rural Transportation Issues*, April, 2010; Seed shipments: provided courtesy of Professor Kyle Stiegert, University of Wisconsin; Livestock procurement: USDA Grain Inspection, Packers and Stockyards Administration.

10. Table 1 provides summary data, for U.S. industries close to agriculture, on a widely used measure of industry concentration, the four-firm concentration ratio (CR4), which is the share of industry shipments or procurement held by the four largest firms in the industry. CR4 has increased in 17 of the 19 industries, mostly by substantial amounts, and now exceeds 70 in 9. In particular, CR4 in steer and heifer slaughter rose from 36 to 80 during the 1980s, and by 2012 stood at 85, while hog CR4 nearly doubled, from 34 to 64. Broiler and turkey processing, for which the measures only extend back to 1995, are moderately concentrated, and concentration has increased over time.

11. Many markets are local, and these national measures may substantially underestimate concentration in relevant procurement markets. It is not uncommon for livestock producers to face a monopsony, and quite common to have 2, 3, or 4 buyers. Producers of storable crops face more options, but producers of perishable crops often face one or few buyers at harvest.

12. Farming has also changed: production has shifted to larger but fewer farms that frequently produce under contracts with agribusinesses rather than for cash markets.

13. The nature of farm consolidation can be obscured in U.S. farm statistics, which include many very small farms with little production. The largest 7% of farms (about 155,000) account for 80% of production value, while 980,000 farms have less than \$5,000 in sales.⁹

14. Because the distribution of farm sizes is highly skewed, common measures of average size are not very meaningful. I track farm consolidation with a midpoint measure—the size of farm at which half of all crop acres (or animals) are on larger farms, and half are on smaller.¹⁰ The midpoint for farms with cropland was 1,234 acres of cropland in 2012, compared to 589 acres in 1982. This consolidation, persistent over time and covering almost all field, fruit, and vegetable crops, was driven by the development of mechanical, biological, and chemical technologies that allow a single farmer or farm family to manage more acres (MacDonald, Korb, and Hoppe, 2013).

Table 2: Structural Change in U.S. Livestock Production

Item	1987	2012
Midpoint farm sizes		
Broilers (annual sales/removals)	300,000	680,000
Cattle feeding (annual sales/removals)	17,532	38,369
Hogs (annual sales/removals)	1,200	40,000
Milk cows (herd size)	80	900
Number of farms with		
Contract broiler production	22,000	15,830
Cattle feeding	112,109	77,120
Hogs	243,398	63,246
Milk cows	202,068	64,098

Note: the midpoint is the size of farm at which half of all removals (or milk cows) are on larger farms, and half are on smaller.

Source: U.S. Department of Agriculture, National Agricultural Statistics Service, Census of Agriculture.

⁹ U.S. statistics define a farm as any place with at least \$1,000 of agricultural sales in a year, or the animal and cropland assets to normally produce \$1,000 in sales. The definition, in place since 1974, is not adjusted for inflation, and defines more places as farms as commodity prices rise.

¹⁰ The midpoint is a median, of the distribution of animals or acres by farm size, as distinct from the more commonly used median of the distribution of farms by farm size.

15. Consolidation has been particularly pronounced in livestock sectors (table 2). The midpoint dairy farm had 80 cows in 1987 but 900 by 2012, while the increase for hogs was even larger—from 1,200 head sold to 40,000. Hog production also became more specialized, moving from a model in which farms raised hogs from birth to marketing (called “farrow to finish”) to one with farms specializing in stages (birth, or farrowing, to wean; wean to feeder; feeder to finish).

16. Fed cattle production also shifted to larger operations, from a midpoint of about 17,500 head sold in 1987 to over 38,000 in 2012.¹¹ Most (75,000 of 77,120) feedlots have capacities of fewer than 1,000 cattle, and are often sideline businesses for people with other farming activities or off-farm jobs. However, such “farmer-feedlots” account for just 11% of all cattle marketed while about 275 large feedlots, with capacities of 16,000 to 100,000 head, marketed most (64%) fed cattle in 2012.¹²

17. Almost all broiler production is carried out by growers under production contracts with one of 20 firms, called integrators, which own and operate processing plants, feed mills, and hatcheries. Production has steadily shifted to larger farms, and by 2012 the midpoint farm produced 680,000 broilers, compared to 300,000 in 1987.

18. Structural change in agriculture—to larger farms, greater specialization in some cases, and greater reliance on contracts—has contributed to increased industry productivity and lower real costs of production (MacDonald and McBride, 2009; McBride and Key, 2013). Particularly in livestock, it has also upended traditional ways of doing business and has forced many producers out of business. Over 25 years, the number of farms with milk cows or hogs fell by about 70%, while those with fed cattle or contracts for broiler production fell by 30% (table 2). While increased agribusiness concentration created new antitrust issues regarding mergers and the potential use of contracts to facilitate the exercise of market power, the concurrent wave of structural change in agriculture created turmoil and antitrust complaints, but few grounds for antitrust enforcement actions.

Contractual relationships in livestock production

19. The broiler and hog industries rely heavily on production contracts between farmers and integrators. Under a production contract, an integrator provides a farmer with

¹¹ Cattle production is carried out in three stages. Calves are born and weaned on cow-calf operations (728,000 in 2012), which have not undergone major consolidation. Weaned calves then move to stocker operations which emphasize the development of frame and muscle, usually on forage-based feeding systems. Finally, cattle move to feedlots where they are confined in pens and fattened for slaughter on grain-based diets.

¹² The larger feedlots realize advantages from scale economies in on-site feed milling and the ability to use full-time nutritionists, veterinarians, and marketing specialists to purchase and adjust rations, manage animal health, and acquire and market cattle.

feed, veterinary services, and young livestock (chicks or feeder pigs) and collects the mature animals at the end of a production cycle. The farmer provides housing, equipment, utilities, labor, and management.

20. Farmers are paid a fee for services, rather than a price reflecting the animal's market value. Hog farmers usually receive a fee per animal or per animal space, and may receive premiums or deductions tied to performance, based on mortality and feed conversion. Fees in broiler contracts combine a base payment with significant premiums or deductions tied to the grower's performance, which is measured relative to the average of other growers delivering birds to a processor during a particular week.

21. Production contracts reduce some risks that an independent farmer would face, such as the risks of price fluctuations for feed or livestock. Relative performance contracts also shift some production risks (those that affect all growers in common, like weather- or disease-related risks) to integrators. However, production contracts introduce several new risks, related to the substantial long-lived investments that growers must make in housing. Because contracts often are written for very short durations, farmers can face hold-up risks when contracts expire, if integrators require new investments as a condition of contract extension. Growers also face placement risks if they do not receive new flocks/herds on the schedule that they expected, as well as a "league composition" risk arising from the small groups that they are usually compared to; they can be disadvantaged if that group happens to feature some exceptional growers, and advantaged if it does not, regardless of their own performance (Levy and Vukina, 2004).

22. Broiler integrators own processing facilities, and there are virtually no cash or contract sales of live broilers between production and processing stages. While some hog integrators and cattle feeders own processing plants, most hogs and cattle are sold to packers under marketing contracts (as is most milk). Marketing contracts typically specify a quantity or quantity range of animals to be delivered to packing plants over various intervals, and they specify a fixed price or a pricing formula linking deductions or premiums to quality attributes. Marketing contracts may be for short durations—a few months—but some have terms of years.

III. Concentration and market power: Research and policy

23. The DOJ and the FTC promulgate merger guidelines to acquaint interested parties with the standards currently being applied in determining whether a merger would be challenged on antitrust grounds. The initial guidelines, in place from 1968 to 1982, placed heavy

emphasis on market structure, by specifying the combinations of market shares in mergers that would "ordinarily" lead to challenges (Kwoka, 2015).¹³ The emphasis on market structure as a sufficient indicator of market power reflected the thinking of economists and lawyers at the time, and still features prominently in media and political commentary.¹⁴

24. That issue—whether concentration is a sufficient indicator of the exercise of market power—received intense scrutiny in economic analyses in the 1970s and 1980s. Concentration does appear to be generally correlated with prices; the effects are quite large in some markets, indicating a considerable amount of market power, but small in many cases and nonexistent in some (Bresnahan, 1989; Schmalensee, 1989; Weiss, 1989). The findings for agricultural markets mirror the findings for the broader economy: concentration matters in general, but the precise effects on prices vary widely, and depend on a host of other factors. Some highly concentrated markets even appear to yield competitive outcomes (Sexton, 2013).

25. In subsequent editions of the merger guidelines (most recently, 2010), the levels of concentration, and the merging firms' market shares, that would likely to lead to challenges have been increased. The guidelines now place more weight on entry conditions, the sophistication of customers of the merged firms, efficiency gains from mergers, and other market attributes (U.S. Department of Justice and U.S. Federal Trade Commission, 2010). In short, empirical evidence does not support the use of concentration as a sufficient indicator of market power, or even nearly so, and policy has followed suit.

26. The effects of concentration appear to be weak in livestock markets, some of which are highly concentrated. For example, one study focused on broilers, where production is vertically integrated with processing, and the relevant markets are local labor markets for contract growers (MacDonald and Key, 2012). The markets are often highly concentrated, with half of contract growers reporting that they face just one or two integrators in their area. Concentration does matter: fees paid to growers are about 8% lower in markets with one integrator, and 4% lower in markets with two or three integrators, compared to markets with four or more. However, it is surprising that the effect is not larger, because growers have substantial sunk costs in houses, and few alternatives if integrators reduce fees. Integrators do have to attract new growers, who have more options because they have not yet invested in houses, and those new grower options may limit the market power of integrators.

¹³ For example, in an industry with CR4 exceeding 74, mergers between firms with market shares of at least 4% would ordinarily be challenged, while in less concentrated markets, an acquisition of a firm with a market share of at least 4% by one with at least 10% would draw a challenge. Tighter thresholds applied where concentration had been rising.

¹⁴ "Sufficient" implies that increases in concentration beyond some threshold could be expected, with a high degree of confidence, to lead to price changes (increases for monopoly, decreases for monopsony), irrespective of other market factors.

27. The effects of concentration in markets for contract broiler growers, while modest, is substantially greater than that found in markets for fed cattle and hogs, where detailed data are available because Congress allocated funds to support research on competition in those markets (see USDA, 1996b; and RTI International, 2007).

28. There have been many studies with these and with more aggregate data (Sexton, 2013). Some find no statistically significant relationship between concentration and prices, or no significant deviation of prices from those that would be predicted under perfect competition. More find some degree of market power—again either as a statistically significant association between price and concentration or gap between the observed price and the competitive price. However, those analyses uniformly find the gaps to be rather small, with prices of 1-5% below competitive markets. None found large departures from competition in cattle and hog markets, despite high levels of concentration.

29. Policy actions reflected the research findings. During the USDA/DOJ hearings, some commentators took the DOJ to task for not opposing meatpacking mergers in the 1980s that, it was argued, led to high concentration and that would have been opposed under the 1968 guidelines. For example, the 2nd largest packer (Cargill) acquired the 3rd largest (Spencer Beef) in 1985, when CR4 was 52, and Cargill and Spencer had market shares of 14.1 and 6.3%, respectively.¹⁵

30. Although meatpacking CR4 rose during the 1980s amid a series of mergers, one should not assume that mergers were the major cause of consolidation. MacDonald and Ollinger (2005) show that the four largest packers owned the same number of plants when CR4 was 80 as when it was 36; the plants were simply much larger. CR4 increased largely because some packers expanded the plants that they owned and acquired, and realized scale economies from doing so, while higher-cost small firms and plants closed, and closed precisely because the industry remained competitive, with revenues just covering costs.

31. In 2008, the DOJ successfully opposed a proposed merger between the third- and fourth-largest packers (JBS/Swift and National Beef). Even though pricing appeared to be competitive at a CR4 in excess of 80, the merger would have reduced the number of competitors from 4 to 3 in some regional markets, from 3 to 2 in others, and to 1 in one market. The action, focused on a merger between important competitors in a highly concentrated market, with an emphasis on the 3 to 2 and 2 to 1 markets, reflected empirical findings emphasizing the potential price impacts of going to a very few buyers.

¹⁵ Monfort, the fifth-largest packer, sued to stop the merger on grounds that the combined firm would drive cattle prices up and beef prices down, harming Monfort. The case (*Cargill, Inc. v. Monfort of Colorado, Inc.*) went to the U.S. Supreme Court, which overturned lower court rulings in favor of Monfort as part of a broad shift of antitrust away from earlier policy.

32. While merger policy has adjusted in the light of new empirical evidence, policy is not fully consistent with the current evidence on concentration and pricing. In an important recent book, Kwoka (2015) argues that actual merger policy is considerably more tolerant of horizontal mergers in concentrated industries than the guidelines would imply, and that borderline mergers that have not been opposed have led to price increases. While there is broad empirical and expert support for the shifts from the 1968 guidelines, Kwoka's (2015) evidence indicates that current enforcement is too tolerant at the margin, a finding that's quite relevant for agribusiness sectors that are already highly concentrated and in the borderline zone.

IV. Contracts, market power, and competition policy

33. Most cattle are sold by feedlots to packers under marketing contracts, while some are still sold in cash markets. Most poultry and some hogs are raised by farmers directly for processors under production contracts. Most hogs are raised by farmers for integrators under production contracts, and sold by those integrators to packers under marketing contracts, while a small number of hogs are still raised by farmers and sold directly to packers in cash markets.

34. Contracts limit certain price risks, to the benefit of most contract growers (Knoeber and Thurman, 1995). Contracts also clearly facilitate more consistent flows of more uniform animals to processing plants, thus reducing processing costs and increasing the derived demand for livestock (to farmers' benefit). They are used to elicit more animals with attributes that consumers want, by tying price premiums to livestock attributes and by imposing certain standards into production processes (see the GIPSA-sponsored studies in RTI International, 2007). The efficiency-enhancing attributes of agricultural contracts are well-known, with considerable empirical support, and have been an integral element of structural change.

35. Marketing contracts can be designed to facilitate the exercise of market power by packers and integrators (Xi and Sexton, 2004). For example, contract commitments to only bid in whole-dollar amounts, or to tie contract base prices to the highest cash market prices paid in a period, can commit a firm to refrain from aggressive pricing in cash markets while also signaling that commitment to rivals. Processors could also use production contracts to deter new entry in an area. However, there is little evidence on the prevalence of those specific contract attributes, and litigation has focused on other features of contracts with weaker theoretical links to the exercise of market power.

36. Some contract attributes may impose damages on contract growers and lead to litigation and regulatory initiatives. For example, production contracts often cover very short durations, committing an integrator to a commitment of less than a year while requiring a farmer to invest in the long-lived assets of land preparation, houses, and equipment (MacDonald, 2014). Integrators frequently require additional capital investments, not known to the grower at the initial investment, as a condition of contract renewal. Further, production contracts frequently specify no animal placement or quantity commitment by an integrator, leaving the grower at risk from reduced integrator production. Contracts may introduce other poorly understood risks and, in the case of relative performance contracts, have compensation formulas that are quite difficult for growers to understand. Some litigation that has occurred under the PSA has focused on allegations of deceptive and unfair practices in contracting, like allegations of improper weighing of animals by integrators (reducing contract fees), and on claims that packers can manage the flow of contract cattle so as to reduce prices paid in cash markets, thereby damaging cash market producers.

37. In each example, contract designs might allow integrators or processors to impose damages on contract growers, by appropriating economic rents that would otherwise go to growers. This presents a regulatory challenge for the GIPSA rule-making effort, quite apart

from the political issues noted in Greene (2015). U.S. courts have consistently interpreted key sections of the Packers and Stockyards Act as antitrust statutes, and have therefore required evidence of harm to competition from alleged violations of the Act (Hovenkamp, 2011). Harm to competition is usually defined according to a market power standard—the exercise of monopoly or monopsony power by limiting market output so as to raise prices to consumers or reduce prices to growers. As a result, parties in litigation focus on evidence of competitive harm, which is costly to provide and often weak when provided, while devoting little attention to the facts of contract designs, incentives, and effects.

V. Conclusion

38. Structural upheavals have led to more concentrated markets for U.S. agricultural products and services, particularly for livestock products and services, with fewer but larger players in both agriculture and agribusiness. Markets remain competitive in most instances—even in spite of high concentration—while structural change has led to the realization of scale economies and improved efficiencies. Individual producers embedded in supply chains do face the potential for risks and damages that they did not recognize when they entered into agricultural contracts, but antitrust litigation may not be an effective tool for handling contractual claims. ■

VI. References

- Bresnahan, T.F. 1989. "Empirical Studies of Industries with Market Power", in R. Schmalensee and R.D. Willig, eds. *Handbook of Industrial Organization, volume II*. Amsterdam: North-Holland.
- Greene, J. L. 2015. *USDA's "GIPSA Rule" on Livestock and Poultry Marketing Practices*. Congressional Research Service, CRS Report for Congress 7-5700, January 12.
- Hovenkamp, H. J. 2005. *The Antitrust Enterprise: Principle and Execution*. Cambridge, MA. Harvard University Press.
- Hovenkamp, H. J. 2011. Does the Packers and Stockyards Act Require Antitrust Harm? University of Iowa – College of Law, January 9. Available at SSRN: <http://dx.doi.org/10.2139/ssrn.1737440>.
- Knoeber, C. R., and W. N. Thurman. 1995. "Don't Count Your Chickens"...Risk and Risk Shifting in the Broiler Industry. *American Journal of Agricultural Economics* 77: 486-96.
- Kwoka, J. 2015. *Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy*. Cambridge, MA. The MIT Press.
- Levy, A., and T. Vukina. 2004. The League Composition Effect in Tournaments with Heterogeneous Players: An Empirical Analysis of Broiler Contracts, *Journal of Labor Economics* 22 (April): 353-377.
- MacDonald, J., and N. Key. 2012. Market Power in Poultry Production Contracting? Evidence from a Farm Survey. *Journal of Agricultural and Applied Economics* 44: 477-490.
- MacDonald, J. M., and M. E. Ollinger. 2005. Technology, Labor Wars, and Producer Dynamics: Explaining Consolidation in Beefpacking. *American Journal of Agricultural Economics* 87: 1020-1033.
- MacDonald, J. M., and W. D. McBride. 2009. *The Transformation of U.S. Livestock Agriculture: Scale, Efficiency and Risks* (with William D. McBride). U.S. Department of Agriculture, Economic Research Service. Economic Information Bulletin No. 43. January.
- MacDonald, J., P. Korb, and R. Hoppe. 2013. *Farm Size and the Organization of U.S. Crop Farming*. U.S. Department of Agriculture. Economic Research Service. Economic Research Report No. 154. August.
- McBride, W., and N. Key. 2013. *U.S. Hog Production From 1992 to 2009: Technology, Restructuring, and Productivity Growth*. U.S. Department of Agriculture. Economic Research Service. Economic Research Report No. 158. October.
- RTI International. 2007. *Livestock and Meat Marketing Study*. Prepared for Grain Inspection, Packers and Stockyards Administration. U.S. Department of Agriculture. Contract No. 53-32KW04-028. http://www.gipsa.usda.gov/psp/publication/live_meat_market.aspx.
- Schmalensee, R. 1989. "Inter-industry Studies of Structure and Performance", in R. Schmalensee and R.D. Willig, eds. *Handbook of Industrial Organization, volume II*. Amsterdam: North-Holland.
- Sexton, R. J. 2013. Market Power, Misconceptions, and Modern Agricultural Markets. *American Journal of Agricultural Economics* 95: 209-219.
- U.S. Department of Agriculture. Grain Inspection, Packers and Stockyards Administration. 1996a. *Concentration in the Red Meat Packing Industry*. http://www.gipsa.usda.gov/psp/publication/con_tech%20report/conc-rpt.pdf.
- U.S. Department of Agriculture. Grain Inspection, Packers and Stockyards Administration. 1996b. *Concentration Study Technical Reports*. http://www.gipsa.usda.gov/psp/publication/technical_reports.aspx.
- U.S. Department of Justice. 2012. "Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward." <http://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf>.
- U.S. Department of Justice and U.S. Federal Trade Commission. 2010. *Horizontal Merger Guidelines*. <http://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.
- Weiss, L.W. 1989. *Concentration and Price*. Cambridge, MA: The MIT Press.
- Xi, T., and R. Sexton. 2004. The Competitive Implications of Top-of-the Market Pricing and Related Contract-Pricing Clauses. *American Journal of Agricultural Economics* 86: 124-39.

Consolidation in agriculture and food: Challenges for competition enforcement

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I. Introduction

1. The agriculture and food industries in the U.S. and elsewhere have been the subjects of intense merger activity over the last two decades. This shows little signs of abating, as excess cash and currently low interest rates, the influence of activist investors, elusive cost and coordination synergies, and the quest for market power drive further consolidation proposals. The U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC), which share competition enforcement responsibility for agriculture and food, have presided over a fundamental restructuring of these critical industries in the U.S.

2. The complexity of market power in the agriculture and food supply chains takes a number of forms, from noncompetitive prices or contract terms, exclusionary conduct, barriers to entry, to control of intellectual property. Changes in the competitive landscape of U.S. agriculture and food industries raise two major issues that are particularly problematic for competition enforcement.

3. One is increasingly concentrated agricultural input markets such as biotechnology (e.g., genetic traits for herbicide-tolerance and insect resistance), transgenic crop seeds (e.g., corn, soybeans, cotton), chemicals (e.g., herbicides and insecticides), and fertilizer. The few players in these markets exert significant seller market power over growers. Recent proposed mergers involving agricultural inputs (e.g., Dow-DuPont) would further limit competition in the individual markets for traits, seeds, and chemicals, but also hasten the growth of large, integrated traits-seeds-chemicals “systems” that limit access by rivals and raise entry barriers.

4. A second concern is increasing consolidation in the mid- to downstream segments of the food supply chain such as food processing, manufacturing, and retailing. Motivated in part by the quest for greater bargaining power vis-à-vis powerful firms in adjacent and nearby markets, consolidation has resulted in a few, often vertically integrated, competitors at each level that exert significant buyer power over growers of crops and animals.

5. A major effect of consolidation in agriculture and food is that growers are increasingly “squeezed” by powerful buyers that drive down prices for crops and animals, at the same time they pay higher prices for critical agricultural inputs. At the other end of the supply chain, consumers are adversely affected through higher prices, lower quality, and less choice for essential commodities. These issues pose traditional antitrust concerns involving prices, output, quality, and innovation. But they also raise new and troubling concerns over the viability, safety, and stability of the food system, thus highlighting the critical intersection between competition and public policy involving agriculture and food. To the extent these issues are observed in other countries, the lessons for competition enforcement and policy are likely to be similar. This article describes these issues and discusses their implications for competition, growers, consumers, and the food supply chain more generally. Moreover, it suggests ways that the “lens” of competition enforcement can be adjusted to account for them.

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II. Market concentration in agricultural inputs and food processing, manufacturing, and retailing

6. U.S. merger enforcement in food and agriculture has largely failed to stop the march toward higher and higher concentration. This gradual elimination of competition has resulted in just a handful of large rivals in each segment of the supply chain. The restructuring of the U.S. agriculture and food sector is symptomatic of broader trends toward consolidation in the U.S. over the last 20 years. The U.S. economy is only beginning to grapple with the ramifications of this swath of consolidation, as recent “meta-analysis” of merger retrospectives across industries indicates that on average, prices have increased as a result of merger activity.¹⁶

7. Major agriculture and food deals over the last decade in the U.S. include: Monsanto-Delta and Pine Land (cotton biotechnology), ConAgra-Ralcorp (branded and private label foods), ConAgra-Horizon Milling (flour milling), Tyson-Hillshire and JBS-Cargill (pork), and a chain of retail grocery mergers, including Safeway-Albertsons. The FTC’s successful challenge of the merger of broadline food distributors Sysco and US Foods is a rare exception to this array of transactions that were allowed to proceed, largely unimpeded.¹⁷ Many of the large market players involved in merger activity are vertically integrated, including global players such as JBS, Cargill, ConAgra, Monsanto, Potash Corp., and others.

8. The foregoing emphasizes the unique structure of the food supply chain, namely the presence of a large number of relatively small growers of crops and animals and a massive base of consumers that possess little, if any, economic power. Farming and ranching is relatively unconcentrated for most commodities in the U.S. and across much of the globe. While growers face vigorous competition in their *own* markets, the input and output markets they buy from and sell into, respectively, are highly concentrated. Moreover, growers often deal with vertically integrated buyers of their commodities. A few examples illustrate the problem:

- Markets for potash and phosphate fertilizers are tight oligopolies. Three U.S. and Canadian firms

account for the bulk of North American output, with concentration levels exceeding 3,000 HHI for phosphorus and 4,500 HHI for potash.¹⁸

- Concentration in agricultural biotechnology is extremely high. In 2009, the “Big 6” biotechnology firms (Monsanto, DuPont-Pioneer, Syngenta, Dow, Bayer, and BASF) held greater than 95% of trait acres for corn, soybeans, and cotton in the U.S., with Monsanto alone accounting for 90% of those acres.¹⁹
- In a 2012 report, the U.S. Department of Agriculture (USDA) noted that levels of global concentration, and increases in concentration, of key agricultural input markets were the highest in crop seed.²⁰ In 2009, the global market share of the four largest firms in crop seed was 54%.²¹ In the late 2000s, the top four held 95% of the U.S. market for cottonseed, 72% of the market for corn seed, and 55% of the soybean market.²² In 2009, the four-firm concentration ratio for agricultural chemicals was 53%.²³
- Fed-beef packing in the U.S. is controlled by three firms which accounted for 68% of the market in 2012, while the top four accounted for 81% of output.²⁴ Likewise, the top three firms controlled about 54% of U.S. pork-packing capacity, while the top four controlled 62%.²⁵ The top four broiler processing firms controlled about 54% of the market in 2012.²⁶ And in the milling of wheat flour, two firms account for over 55% of the U.S. market.²⁷

18 C. R. Taylor and D. L. Moss, *The Road to Monopoly: The Case for Global Antitrust Enforcement*, American Antitrust Institute (2013), at 15

19 D. L. Moss, *Competition, Intellectual Property Rights, and Transgenic Seed*, 58 *S.D. L. Rev.* 543 (2013), at 548, citing K. Fuglie et al., *Econ. Research Serv., USDA, Rising Concentration in Agricultural Input Industries Influences New Farm Technologies*, Amber Waves (Dec. 3, 2012), at 4, available at <http://www.ers.usda.gov/media/960711/risingconcentration.pdf>.

20 K. Fuglie et al., *Econ. Research Serv., USDA, Report No. 130, Research Investments and Market Structure in the Food, Processing, Agricultural Input, and Biofuels Industries Worldwide*, at vi (2011), available at <http://www.ers.usda.gov/publications/err-economic-research-report/err130.aspx>.

21 *Id.*

22 *Id.*

23 *Id.*

24 D. L. Moss and C. R. Taylor, *Short Ends of the Stick: The Plight of Growers and Consumers in Concentrated Agricultural Supply Chains*, 2014 *Wis. L. Rev.* 337 (2014), at 356, citing CME Group, *Daily Livestock Report* (Jan. 18, 2013), available at <http://www.dailylivestockreport.com/documents/dlr%2001-18-13.pdf>. The top three firms are Cargill, Tyson, and JBS.

25 Steve Meyer, *Slaughter Projects Will Test Packer Capacities*, NAT’L HOG FARMER (May 15, 2012), <http://nationalhogfarmer.com/marketing/slaughter-projections-will-test-packer-capacities>. The top three firms are Smithfield, Tyson Foods, and Swift.

26 G. Thornton, *U.S. Chicken Companies Enter 2013 With Production Increases*, *Watt Poultry USA*, Mar. 2013, at 12, 13, available at <http://www.wattagnet.com/articles/21852-top-poultry-companies-us-chicken-companies-enter-2013-with-production-increases?v=preview>. The top four firms are Tyson Foods, Pilgrims Corp., Sanderson Farms, Inc., and Perdue Farms, Inc.

27 *Grain & Milling Annual 2013*, at 94 (2013). The top three firms are ConAgra, Cargill, and Archer Daniels Midland.

16 J. Kwoka, *Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy* (2015), Cambridge, MA. The MIT Press.

17 Federal Trade Commission, *Following Sysco’s Abandonment of Proposed Merger with US Foods, FTC Closes Case* (July 1, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/07/following-syscos-abandonment-proposed-merger-us-foods-ftc-closes>. The agencies negotiated remedies in some cases, ranging from structured divestitures to behavioral conditions on post-merger conduct.

- In food manufacturing, single firms dominate food manufacturing in major food groups, with two to four companies holding a 75% to 95% market share in U.S. grocery stores for items such as baby formula, beer, and numerous other categories.²⁸ About 54% of dollars spent on groceries in 2012 went to the top four grocery retailers with Wal-Mart holding over 30% of the market.²⁹

III. Concentration in agricultural biotechnology – Debunking the innovation myth

9. Transgenic seed has been genetically modified to produce plants that are tolerant to herbicides, resistant to insects, and to other conditions such as drought. While the initial positive effects of biotechnology on crop yields attracted much attention, the focus is now turning to growing concentration in the markets for genetic traits and crop seed for corn, soybeans, and cotton. Indeed, merger activity, as opposed to organic growth, has likely accounted for the major increases in market concentration in traits and transgenic seed over the past two decades. From the late 1990s through the 2000s, for example, Monsanto acquired almost forty agricultural biotechnology firms and independent seed companies.³⁰ Monsanto recently proposed to acquire Syngenta, albeit unsuccessfully. Even more recently, Dow and DuPont have proposed joining forces.

10. Further consolidation in the agricultural traits, seeds, and chemicals markets pose potentially grave concerns for competition, growers, and consumers. For example, the USDA noted in 2012 that agricultural input prices have risen faster than farm commodity prices.³¹ Crop seed (and fertilizer) prices were two categories that experienced particularly significant growth. The largest increase from 1990-2010 was in crop seed prices, which

more than doubled relative to the prices growers received for their agricultural commodities.³² Increasing levels of concentration in traits, seeds, and chemicals raise two major issues that bear directly on adverse price effects and other problems.

11. One issue is the prevalence of transgenic seeds containing “stacked” traits, which have become the industry standard in corn and cotton. Stacking addresses multiple issues, including the drive for higher yields from multiple modes of action (i.e., insect resistance and herbicide tolerance) and refuge concerns or requirements that growers plant both conventional and non-transgenic seed to combat growing resistance of insects.³³ New stacked trait profiles are enabled through “intra-firm” and “inter-firm” stacking. The former involves combinations of traits innovated by a single biotechnology firm, while the latter combines traits across multiple firms. Inter-firm stacking is facilitated by licensing agreements, including cross-licensing and out-licensing of patented genetic traits.³⁴

12. The presence of a dominant firm (e.g., Monsanto) in the markets for genetic crop traits has raised barriers to entry and expansion by new or smaller biotechnology innovators. 2009 data on trait stacks show that 62% of total stacks were inter-firm combinations—50% of which contained Monsanto traits.³⁵ The presence of a dominant Monsanto platform has driven the industry to standardize largely on a single system, making it more difficult for rival inter-firm stacks that do not contain Monsanto traits to gain a foothold.³⁶ Inter-firm stacking involving a dominant firm’s technology platform is also limited by that firm’s intellectual property licensing policies.

13. Anemic competition in agricultural biotechnology -- coupled with any use of intellectual property to shape and limit competition -- can stifle innovation, raise prices for biotechnology, and reduce choice for growers. This emphasizes the importance of promoting rivalry, not only to facilitate innovation more generally but also to ensure that there are multiple opportunities for collaborations that could result in commercializable inter-firm stacks. The imperative of such collaborations is evident in the 2013 decision by Monsanto and DuPont-Pioneer to settle a patent infringement case, not through damages,

28 Food & Water Watch, *Grocery Goliaths: How Food Monopolies Impact Consumers* 7 (2013), available at http://documents.foodandwaterwatch.org/doc/Grocery_Goliaths_12-19-13.pdf. PepsiCo, Nestle, General Mills, Kraft Foods, and ConAgra are dominant in a variety of food areas.

29 G. Gerlock, *What Does Walmart Have To Do With ConAgra’s Move Into Store Brand Food?* *Net Neb.* (Apr. 10, 2013), <http://netnebraska.org/article/news/what-does-walmart-have-do-conagras-move-store-brand-food>.

30 D. L. Moss, *Transgenic Seed Platforms: Competition Between a Rock and a Hard Place?* *American Antitrust Institute* (Oct. 23, 2009), citing C. Pray, J. F. Oehmke, and A. Naseem, *Innovation and Dynamic Efficiency in Plant Biotechnology: An Introduction to the Researchable Issues*, 8 *AgBioforum* 52, at 60; and United Nations Conference on Trade and Development, *Trading the Trend Towards Market Concentration: The Case of the Agricultural Input Industry*, (April 2006), at 5 and 9-10.

31 Fuglie et al., *supra* note 5.

32 *Id.*

33 Moss, *supra* note 4, at 553.

34 *See, e.g.,* D. L. Moss, *Competition and Transgenic Seed Systems*, 56 *Antitrust Bull.* 81 2011 and Moss, *supra* note 4.

35 Moss, *supra* note 4, at 554. 38% of all stacks were intra-firm combinations. Monsanto traits appear in 91% of intra-firm stacks.

36 P. Carstensen, *Post-Sale Restraints via Patent Licensing: A “Seedcentric” Perspective*, 16 *Fordham Intell. Prop. Media & Ent. L.J.* 1053 (2006).

but technology collaborations.³⁷ Dow and Syngenta have reached agreements to cross-license corn traits and Dow entered into cross-licensing agreements with Bayer and Syngenta to develop stacked trait cotton varieties.³⁸

14. A second issue raised by consolidation in agricultural biotechnology is the relationship between concentration and innovation. Recent empirical research demonstrates that increasing levels of concentration in agricultural input markets (including crop seed) are no longer generally associated with higher levels of R&D or a permanent rise in R&D intensity.³⁹ There is also evidence that growing concentration in the seed industry in the 1990s correlates with a decrease in the quality of innovation, including a fall in private research intensity, as measured by declining numbers of field trials and sponsorship of R&D. A key measure of the output of R&D has also declined over time. The number of transgenic research products deregulated by the USDA (and thus available for commercial use) has trended steadily downward since the mid-1990s, falling by about 80% between 1995 and 2008.⁴⁰ Finally, some analysis indicates that the average quality of agricultural biotechnology patents declined over the period 1985 to 2000.⁴¹

15. These observations are warning signs, on a number of fronts. First, innovation depends critically on the ability of biotechnology rivals to collaborate in pro-competitive ways. Only competition will promote this outcome. Limited rivalry, in contrast, is likely to produce anti-competitive collaborations that limit competition and raise entry barriers to new innovators. Second, further consolidation will hasten the quest to engineer integrated systems of traits, seeds, and chemicals. The presence of these large systems would limit access by rivals and raise entry barriers to smaller innovators. Further

consolidation among the large players in agricultural inputs would move the industry in this direction, further reducing innovation, raising prices for biotechnology, and squeezing growers.

16. Finally, R&D-based efficiency justifications for biotechnology mergers appear to have “run their course.” Accumulating evidence points in the other direction, namely that high levels of concentration are not necessary to fund R&D successful programs. Competition enforcers thus face the difficult task of unpacking biotechnology firm’s efficiencies claims that only further consolidation will promote innovation. If such claims are debunked, the anticompetitive effects of further mergers will be particularly pronounced.

IV. “Reactive consolidation” — Competition law meets food policy

17. Over a decade ago, the USDA characterized consolidation at the processing, wholesale, and retail levels as “unabated and unprecedented.”⁴² Over 80% of total agricultural and food transactions reported under the U.S. Hart-Scott-Rodino premerger notification program from 2003-2012 involve processing and food manufacturing.⁴³ Statutory antitrust exemptions and immunities in the U.S. for certain types of organizations such as agricultural cooperatives (Capper-Volstead Act) and export associations (Webb-Pomerene Act) have not aided in restraining the accretion and exercise of market power by large, vertically integrated firms.

18. Consolidation has been credited largely with enhancing seller market power. This is antiquated thinking, particularly in agriculture and food, where it has also strongly created and reinforced buyer power, particularly at the processing, manufacturing, and retailing levels where firms are simultaneously buyers and sellers in a market.

19. Mergers at the mid- and downstream levels of the U.S. food supply chain have been motivated in part by the quest for greater bargaining power by processors, manufacturers, and retailers to counteract bargaining power in adjacent or nearby markets. This dynamic triggers what can be called “reactive” consolidation along the supply chain, ultimately resulting in levels with fewer,

³⁷ See, e.g., News Release, Syngenta, Dow AgroSciences Agree to Cross License Corn Traits (Apr. 1, 2009), available at <http://www.syngenta.com/global/corporate/en/news-center/news-releases/Pages/en-090401.aspx>; News Release, Dow AgroSciences, Bayer CropScience Sign Global Cotton Technology Cross-Licensing Agreements (May 20, 2010), available at <http://newsroom.dowagro.com/press-release/dow-agrosciences-bayer-cropscience-sign-global-cotton-technology-cross-licensing-agree>; News Release, New Dow AgroSciences Herbicide Tolerant Trait Technology Stays on Schedule (Mar. 03, 2010), available at <http://newsroom.dowagro.com/press-release/new-dow-agrosciences-herbicide-tolerant-trait-technology-stays-schedule>; News Release, Syngenta, Dow AgroSciences Sign Cotton Technology Licensing Agreements (Jan. 5, 2010), available at <http://newsroom.dowagro.com/press-release/2010/syngenta-dow-agrosciences-sign-cotton-technology-licensing-agreements>. Dow also entered into agreements with DuPont-Pioneer and with Monsanto to develop soybean technologies. See News Release, Monsanto and Dow AgroSciences Reach New Licensing Agreement on Roundup Ready 2 Yield@ Soybean Technology (June 2, 2010), available at <http://news.monsanto.com/press-release/monsanto-and-dow-agrosciences-reach-new-licensing-agreement-roundup-ready-2-yield-soybean>.

³⁸ News Release, DuPont and Monsanto Reach Technology Licensing Agreements on Next-Generation Soybean Technologies (Mar. 26, 2013), available at <http://investors.dupont.com/investor-relations/investor-news/investor-news-details/2013/DuPont-and-Monsanto-Reach-Technology-Licensing-Agreements-on-Next-Generation-Soybean-Technologies/default.aspx>.

³⁹ Fuglie, *supra* note 5.

⁴⁰ See D. E. Schimmpfennig, C. E. Pray and M. F. Brennan, The Impact of Seed Industry Concentration on Innovation: A Study of US Biotech Market Leaders, 30 *Agric. Econ.* 157 (2004).

⁴¹ Quality is measured by the average number of patent citations per patent observed in research work. See S. Buccola and Y. Xia, The Rate of Progress in Agricultural Biotechnology, 26 *Rev. Agric. Econ.* 3.7 (2004)

⁴² Moss and Taylor, *supra* note 9, at 356, citing J. R. Dunn et al., USDA, Agricultural Cooperatives in the 21st Century 3 (2002), available at <http://www.rurdev.usda.gov/rbs/pub/cir-60.pdf>.

⁴³ Moss and Taylor, *supra* note 9, at 357, citing Annual Competition Reports, Fed. Trade Commission, <https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports> (containing links to the reports covering the years from 1977 to 2012).

larger buyers that effectively control terms of trade.⁴⁴ For example, Wal-Mart exerts significant buyer power over some of its suppliers, forcing down their prices and narrowing margins.⁴⁵ Wal-Mart's market power has arguably prompted mergers in markets upstream of retail grocery, ultimately reverberating up the supply chain and squeezing growers through lower prices and/or discriminatory contact terms.⁴⁶

20. These effects are a losing proposition for competition, growers, and consumers. Prices that are determined by bargaining between powerful buyers and sellers do not produce the benefits of vigorous competition. And incentives for exclusionary conduct by large, vertically integrated firms are a threat to innovation and market entry. While these are standard concerns in antitrust analysis, reactive consolidation raises the specter of potentially more damaging effects. Robust rivalry at each level promotes redundancy, diversity, and stability in the supply chain.⁴⁷ These conditions are far more likely to promote not only price competition, but also non-price competition that leads to the quality, safety, and reliability that is an essential for health and human safety.

21. Reactive consolidation in processing, manufacturing, and food retailing thus imperils a stable food supply chain. Such supply chains lack are less likely to withstand exogenous shocks such as input disruptions, shortages, contamination, animal and crop disease, bioterrorism, weather, and even political events. Antitrust enforcement approaches in the U.S. and most other countries do not account for these types of adverse effects. This potential harm deserves serious attention in analyzing the long-term competitive effects of mergers that result in markets with a small number of large players.

22. Among other possibilities, enforcers might give considerably more weight to non-price effects of mergers in the mid- to downstream segments of the food supply chain. Safety and reliability are essential quality issues. At a broader level, a public interest merger standard—as opposed to a “no harm to competition” standard—would bring into the calculus the types of supply chain issues raised here. ■

44 J. R. Dunn et al., U.S. Dept of Agric., *Agricultural Cooperatives in the 21st Century* 3 (2002), available at <http://www.rd.usda.gov/files/publications/CIR-60.pdf>.

45 See, e.g., T. V. Riper, *The Walmart Squeeze*, *Forbes* (Apr. 24, 2007), http://www.forbes.com/2007/04/23/walmart-suppliers-margins-lead-ex_tvr_0423_walmart.html.

46 <http://www.bloomberg.com/news/articles/2015-10-07/monsanto-says-agriculture-industry-consolidation-is-inevitable->

47 Vertical and horizontal integration in large agribusinesses raises questions about the ability of managers to implement and monitor quality control programs that ensure safety and reliability of the food supply. The U.S. Center for Disease Control (CDC) reported that in 2012, “*data showed a lack of recent progress in reducing foodborne infections and highlight[ed] the need for improved prevention.*” Statistics from 199 to 2012 indicate upward trends in rates of certain types of foodborne infections. Whether these trends related to consolidation—particularly at the processing level—should be further studied. See Moss and Taylor, *supra* note 9, at 359.

The mixed record of the Obama administration in food competition policy leaves many unresolved issues: “Talking the talk, but not walking the walk”

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1. The Obama Administration for its first three years showed substantial interest in rethinking and reorienting competition policy as it related to the production of food. The primary players were the Department of Agriculture (USDA) and the Antitrust Division of the Department of Justice (DOJ). The Federal Trade Commission (FTC), which has primary responsibility with respect to oversight of grocery manufacturing and retailing, however, was not actively engaged in this policy and enforcement program. The results of this period largely took the form of initiating (and sometimes adopting) policy positions rather than active enforcement.

2. Starting in late 2011 with the dramatic cut back in efforts to create a set of rules to govern the purchases of livestock and poultry, both the USDA and the DOJ largely abandoned reform efforts and public enforcement of competition rules attenuated. Private litigation has, however, continued to exist and has resulted in some clarification of competition policy especially as it relates to agricultural cooperatives that market farm commodities. Overall, a large number of important competition policy issues remain unresolved or have been resolved in ways that are unsatisfactory from the perspective of maintaining and enhancing workably competitive markets in the food system.

3. The Obama Administration initially made some positive statements about competition policy in food

and agriculture. There was an apparent recognition of the need for enhanced enforcement of competition law and of the need to use the USDA's authority to improve the functioning of markets for agricultural commodities. The most visible aspect of this stance was a series of five workshops held around the country in 2010-2011 to listen to the concerns of farmers and ranchers with respect to the state of both input and output markets in agriculture.⁴⁸ The DOJ and USDA jointly sponsored these events. Secretary of Agriculture Vilsack attended all of the Workshops and Attorney General Holder attended all but one. The conspicuous absence of the FTC, which shares antitrust authority in food and agriculture, suggests that agency cooperation to ensure competitive agriculture and food markets was lacking.

4. A subsequent report by the DOJ titled “Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward” summarized competition concerns and stated that the workshops had enhanced its understanding of agricultural markets.⁴⁹ The Workshops highlighted a number of issues. First, the marketing of livestock, both hogs and cattle, had substantially moved from direct market transactions to various forms of contractual commitments which caused concerns about access to meat packers by producers who lacked or were denied such commitments. In addition, there were questions about the competitive implications of those contracts.

* I am a proponent of an active program for competition law and policy with respect to the food system. My preferences will be evident in the text. This paper draws on work done with Professor Robert Taylor and Patrick Woodall on competition policy with respect to food and agriculture. Jose Castro (UW Law '16) has provided valuable research assistance. I, however, remain responsible for any errors of fact or interpretation.

48 Transcripts of these sessions and the Antitrust Division's summary can be found at <http://www.justice.gov/atar/events/public-workshops-agriculture-and-antitrust-enforcement-issues-our-21st-century-economy-10>.

49 <http://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf>.

Second, very similar and more serious concerns were expressed about poultry growing contracts. There is no cash market for commercial production of chickens or turkeys. Growers have only short-term contracts with the integrators who own the birds, provide the feed, and compensate the growers for their labor and facilities. Third, the production of milk was another focus of concern. A single cooperative dominated the production side in many regions of the country. A number of dairy farmers had concerns about its operation and how the entire milk pricing system operated. Finally, there were concerns about the genetically modified seed markets. Monsanto with its “round-up ready” herbicide resistant genetics had come to dominate the market. It imposed a number of restraints on the uses that farmers could make of the seed that came from their plantings as well as imposing restraints on its licensees with respect to combining the Monsanto genetics with other genetic modifications. In addition to these four substantive topics there were recurring concerns expressed about increased concentration on the buying side of the market for all agricultural commodities and, related primarily to the dairy issues, there were concerns about how some farm marketing cooperatives were carrying out their responsibilities to their members as well as how they were seeking to control production in some commodities.

5. These topics provide the basis for the remainder of this brief summary. As noted at the outset, in the period from 2009 to 2011, the USDA and DOJ addressed some of these concerns and apparently investigated others. However, starting in late 2011 and continuing through to the present (January 2016), these efforts were either abandoned or diminished dramatically in their intensity.

I. Clarification of the Packers and Stockyards Act: Addressing the concerns of livestock and poultry producers

6. The Packers and Stockyards Act (PSA) prohibits discriminatory and unfair acts by meat packers and poultry integrators in the purchase of livestock and poultry.⁵⁰ As such it is the primary statutory tool through which farmers can challenge unfair or discriminatory conduct by poultry integrators and meat packers. Those challenges increased substantially starting in the 1990s as

⁵⁰ See, 7 U.S.C. § 181 et seq.

concentration increased and buyers moved dramatically to use of contracts for livestock. Commercial poultry production had moved exclusively to a contractual model decades earlier. Such contracts were very one-sided. Farmers were required to make substantial long-term investments in facilities, but usually had only flock to flock commitments from the integrator. Not surprisingly, these conditions led to a number of lawsuits that attempted to invoke the PSA to seek relief.

7. The problems in hogs and cattle were somewhat different. Prices were still based on an increasingly thin public market price for cash sales, but access to slaughter facilities were given first to contracted animals. As a result, both price and market access created serious concerns for those producing either cattle or hogs. Although less numerous, the resulting problems for a number of farmers lead to another group of law suits that relied on the PSA to challenge various contracting practices.

8. By 2010, several court of appeals decisions had effectively gutted the PSA. Some decisions, based on a poorly informed analogy to the Sherman Act’s rule of reason,⁵¹ required that the plaintiff establish that the specific conduct “*harmed competition*.”⁵² For individual producers such proof was impossible. Another decision held that so long as the buyer had any possible justification for its discriminatory conduct, even if there were less harmful alternatives, the conduct was lawful.⁵³ While the USDA through the Civil Division of the DOJ opposed the interpretation that harm to competition was an essential element of every case, it failed to employ its rule-making authority under the act to adopt rules which articulated this interpretation. Moreover, the USDA itself did not invoke its own enforcement authority which at least applied to livestock transactions.⁵⁴ It should also be recognized that the courts did face a serious problem of defining, in the absence of USDA rules, what conduct was unfair or discriminatory such that it violated the act.⁵⁵

9. In 2009, the USDA initiated a process to revise the rules implementing the PSA and proposed a number of new rules that could have made a significant improvement

⁵¹ The rule of reason’s inquiry into competitive effect calls for a determination as to whether the type of conduct would cause harm to competition in the affected market. See, e.g., *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. en banc, 2001). The relevant PSA provisions deal with vertical, buyer-seller, relationships, and a more properly analogous to unfair practices rules.

⁵² See, *Wheeler v. Pilgrim’s Pride*, 591 F.3d 355 (5th Cir. en banc, 2009); *Terry v. Tyson Farms*, 604 F.3d 272 (6th Cir. 2010).

⁵³ *Pickett v. Tyson Fresh Meats*, 420 F.3d 1272 (11th Cir., 2005).

⁵⁴ The statutory language authorizing the USDA to challenge conduct arguably does not include poultry production, but PSA administrative rules do apply. See, 7 U.S.C. §§ 192, 209, 210.

⁵⁵ In the *Wheeler*, *Terry*, and *Pickett* cases, however, there would have been no great difficulty in defining the unfairness or discriminatory elements of the alleged conduct (in *Wheeler* it was terms given an insider that were allegedly significantly more favorable than those given to other growers; in *Terry*, the conduct included behavior that violated specific existing PSA regulations; and in *Pickett*, the conduct claim was that the plaintiffs were excluded from the opportunity to have contracts for their livestock and that the practices did not in fact serve any legitimate interest of the packers).

in the operation of livestock and poultry markets.⁵⁶ This initiative was in response to an earlier mandate from Congress.⁵⁷ The proposed rules would have rejected the requirement of proof of harm to competition and defined a number of obligations for meat packers and poultry integrators. These proposals were consistent with the issues raised at the Workshops. They generated a vast number of comments both favorable and unfavorable. Indeed, some of the proposed rules were vague and may have imposed unnecessary constraints on the buyers. However, the buyers and their allies among the large livestock feeders focused on a broader attack on the entire proposal.

10. Major food processors and some groups representing large producers lobbied Congress vigorously against this initiative. As a result, in 2011, the USDA abandoned most of the proposed rules intended to implement the PSA in the contemporary world of production contracts especially in beef and pork production.⁵⁸ The federal budget bill for fiscal 2012, as a result of a compromise by the Obama Administration and its legislative allies, removed funding to continue the process of adopting and implementing the new rules.⁵⁹ Moreover, the USDA apparently has failed to initiate any enforcement proceedings under the existing rules despite a good deal of private litigation and complaints showing that farmers are in fact subject to unfair and unjustified discrimination.

11. In 2015, a federal district court in West Virginia rejected the “*competitive effect*” requirement as an element of a PSA claim by a poultry producer.⁶⁰ The defendant in January 2016 asked the trial court for permission to seek interlocutory review.⁶¹ In the Court of Appeals. If such review occurs and the ruling is upheld, this could restore some vitality to the PSA as a source of protection for poultry producers.

II. Merger guidelines and antitrust enforcement

12. In 2010, the DOJ and FTC undertook a revision of their joint horizontal merger guidelines. The revision expressly recognized the competitive risks posed by

mergers that created undue buyer power.⁶² This is very relevant to the issues raised by farmers and food processors concerning downstream buyer power. Several court decisions, not all involving food, had demonstrated that there were significant competitive effects from abuse of buyer power.⁶³

13. Moreover, these cases showed that dangerous power could arise with smaller market shares than had been conventionally assumed to raise concerns. The new Guideline recognized that harm to competition could arise even if the volume of goods purchased was not reduced and when there is no adverse effect in the downstream market.⁶⁴

14. The implementation of a merger policy that takes seriously buyer power issues has been less consistent. In the waning days of the Bush Administration, the DOJ sued the proposed merger of JBS Swift and National Beef, which would have reduced the number of major beef packers from four to three. The parties abandoned the merger in February of 2009 shortly after the Obama Administration took office. In May of 2011, the DOJ challenged the combination of two small chicken processors in Virginia because they were two of the three potential employers of farmers to raise chickens.⁶⁵ The case settled quickly based on some conduct commitments that caused at least some observers to express concern.⁶⁶ It also settled two other cases with partial divestiture involving fluid milk and sow buying.⁶⁷ In 2014, however, the DOJ allowed the two largest flour millers to combine with only modest divestiture which in turn creates a greater risk of buyer power with respect to wheat producers and grain elevator operators.⁶⁸

15. Despite the expanded focus of the Guidelines on buyer power, the FTC, which did not participate in the Workshops but oversees most types of grocery manufacturing and grocery retailing, has not exhibited any

⁵⁶ See, 75 Fed. Reg. 44163 (July 28, 2010).

⁵⁷ Title XI of the Food, Conservation and Energy Act of 2008 (Farm Bill) (Pub. L. 110-246).

⁵⁸ The final rules are found at 76 Fed. Reg. 76874 (Friday, December 9, 2011). These rules relate to poultry production but even as to these rules, the USDA is effectively barred from any enforcement efforts.

⁵⁹ See, <http://sustainableagriculture.net/blog/fy-2012-ag-appropriations>, Title XI of the Food, Conservation and Energy Act of 2008 (Farm Bill) (Pub. L. 110-246).

⁶⁰ *M & M Poultry v. Pilgrim's Pride*, CA No. 2:15-cv-32, Doc. 31, filed 10/26/2015 (N.D. W.Va.), unpublished decision, copy on file with author.

⁶¹ Motion, filed 1/14/16 on file with author.

⁶² Horizontal Merger Guidelines section 12 (“mergers of competing buyers”) (2010), available at <http://www.justice.gov/atr/horizontal-merger-guidelines-08192010#12>.

⁶³ See, e.g., *Knevelbaard Dairies v. Kraft Foods*, 232 F3d 979 (9th Cir. 2000) (price manipulation of cheese caused decreased milk prices and dairy farmers had standing under state antitrust law to pursue damage claims); *Toys R Us v. FTC*, 221 F3d 928 (7th Cir. 2000) (largest toy retailer unlawfully used its buyer power to coerce suppliers to refuse to deal with buyer's competitors); *Todd v. Exxon*, 275 F3d 191 (2nd Cir. 2001) (employers coordination of job descriptions can constitute an antitrust violation because of effect on wages).

⁶⁴ “The Agencies do not view a short-run reduction in the quantity purchased as the only, or best, indicator of whether a merger enhances buyer market power. Nor do the Agencies evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell.” See, Guidelines, *supra* note 14.

⁶⁵ *United States v. George's Foods*, 5:11CV00043 (W.D.Va.) available at <http://www.justice.gov/atr/case/us-v-georges-foods-llc-et-al>.

⁶⁶ *Id.*; see Comments of D. Balto, P. Carstensen, available at <http://www.justice.gov/file/497371/download>.

⁶⁷ *United States*, See other cases cited : et al., Inc. and Co are not reported v. *Dean Foods*, c. a. No. 2:10-cv-00059 (JPS) (W.D. Wisc. 2011) available at <http://www.justice.gov/atr/case/us-et-al-v-dean-foods-co>; *United States, et al. v. Tyson Foods*, c.a. No. 1:14-cv-01474 (D.D.C. 2014) available at <http://www.justice.gov/atr/case/us-et-al-v-tyson-foods-inc-and-hillshire-brands-company>.

⁶⁸ *United States v. ConAgra Foods*, Case No. 1:14-cv-00823-KBJ (D.D.C. 2014) available at <http://www.justice.gov/atr/case/us-v-conagra-foods-inc-et-al>.

concern with the increased buyer power generated by grocery store or food processor mergers. Its model for grocery merger analysis focuses only on local retail markets. It did not litigate any grocery merger in this period. It did settle a number of cases by accepting divestiture of some stores in specific locations. As a result, especially after 2012, the supermarket industry experienced a merger wave that has further concentrated the retail grocery market.⁶⁹ In 2015, Albertsons and Safeway combined to form a supermarket chain with 2,230 stores in 34 states. The FTC, after some dithering, insisted on partial divestitures that purportedly would eliminate any potential harm to consumers. The complaint identified 130 local markets in which the merger was likely to have an adverse effect on competition in grocery retailing.⁷⁰ So, the FTC fashioned a consent decree that requires divestitures in many of these local markets.⁷¹ This involved over 140 stores sold to Haggen. But very shortly after the sale, Haggen had to close a number of the stores and itself entered bankruptcy.⁷² Whether the cause of this debacle was Haggen's inability to expand to the scale necessary to run such an operation as Albertsons has claimed or whether, as Haggen claims, Albertsons deliberately sabotaged the stores is irrelevant to the competition policy concern. By electing to resolve the manifest competitive risks to consumers by a settlement, the FTC failed to protect those consumers. It also created an even stronger buyer of groceries which in turn is likely to have adverse effects on upstream suppliers and ultimately farmers. Illustrative of the FTC's unwillingness to consider the adverse effects of such mergers on buyer power, the complaint in this case makes no reference to the substantial enhancement of buyer power that results from this kind of consolidation among major grocery retailers.

16. Although the FTC has not exhibited any concern with the increased buyer power generated by grocery store or food processor mergers, it did block the combination of Sysco and US Foods, the two largest institutional food distributors in the country.⁷³ The FTC complaint did not advert to the buyer power of those firms or the fact that

their combination would have significantly increased that power.⁷⁴ Nevertheless, blocking that merger did in fact avoid a substantial increase in buyer power with respect to agricultural commodities and processed food.

17. In sum, while the stated policy of the revised merger guidelines asserts a focus on mergers that create buyer power, the DOJ's actual enforcement efforts have been modest at best and the FTC has, despite its earlier success in the *Toys "R" Us* case, failed so far to show any concern for buyer power in the food marketing system.

III. Cooperatives and dairy marketing

18. In 2004, the Division had initiated a case challenging exclusionary strategies of a mushroom cooperative.⁷⁵ The Capper-Volstead Act exempts farm cooperatives from antitrust law when marketing their members' products.⁷⁶ But the mushroom cooperative was acting to restrict production rather than coordinating the marketing of the commodity. The case thus raised the issue of the limits of the Capper-Volstead immunity. At the time of the Workshops, the then-Assistant Attorney General for Antitrust expressed some concerns about the competitive effects of the act and suggested that it might be useful to re-examine its terms and application.⁷⁷ There is substantial evidence from private litigation or settlements involving a number of other cooperatives in fields such as mushrooms,⁷⁸ dairy,⁷⁹ potatoes,⁸⁰ and eggs⁸¹ that there are serious problems with the conduct of some cooperatives. But the DOJ has made no effort to challenge any cooperative's supply suppressing practices during the Obama Administration. Indeed, neither Assistant Attorney General Varney, having first suggested some concerns, nor her successors have challenged the immunities conferred by that statute

69 In 2012, Bi-Lo purchased the 688-store Winn-Dixie chain in the South, *Business Wire, Bi-Lo and Winn-Dixie complete merger*, March 13, 2012 available at <http://www.businesswire.com/news/home/20120312005690/en/Bi-Lo-Winn-Dixie-Complete-Merger>; the Midwest grocery chains Nash Finch and Spartan merged in 2013, A. Belz, S. Alexander, *Nash Finch To Be Sold To Spartan Stores in \$1.3B Deal*, *Minneapolis Star-Tribune*, July 23, 2013; in 2014, Kroger purchased Harris Teeter, *Associated Press*, *Largest US grocer Kroger closes Harris Teeter buy*, January 29, 2014; in mid-2015, Ahold (Giant and Stop & Shop) and Delhaize (Food Lion and Hanneford) announced a merger that would combine more than 6,500 supermarkets in the United States, S. Strom, *Ahold-Delhaize Deal Would Create One of Largest Grocery Chains in U.S.*, *New York Times*, June 24, 2015.

70 *In the Matter of Cerberus Institutional Partners V*, available at <https://www.ftc.gov/system/files/documents/cases/150127cerebuscmpt.pdf>

71 A total of 168 stores in 130 local markets were to be divested. See consent agreement, available at <https://www.ftc.gov/system/files/documents/cases/150127cerebusagreorder.pdf>.

72 Complaint, *Haggen Holdings v. Albertson's*, Case 1:15-cv-00768-UNA (Sep. 1, 2015) available at http://media2.haggen.com.s3.amazonaws.com/website/temp/Haggen_Albertsons-Timestamped_copy_of_complaint.pdf.

73 *FTC v. Sysco*, 2015—F.Supp.3d—2015 WL 3958568 (D.D.C. 2015) (granting preliminary injunction).

74 See complaint, available at <https://www.ftc.gov/system/files/documents/cases/150220syscoufcmplt.pdf>.

75 *United States v. Eastern Mushroom Marketing Cooperative*, (E.D. Pa. 2005) information available at <http://www.justice.gov/atr/case/us-v-eastern-mushroom-marketing-cooperative-inc>.

76 7 U.S.C. §§ 291-292

77 C. A. Varney, *The Capper-Volstead Act, Cooperatives, and Antitrust Immunity*, *The Antitrust Source*, (Dec. 2010) available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_Varney12_21_authcheckdam.pdf

78 *In re Mushroom Direct Purchaser Antitrust Litigation*, 621 F.Supp.2d 274 (E.D. Pa. 2009).

79 *Allen v. Dairy Farmers of America, Inc.* 748 F.Supp.2d 323 (D. Vt. 2010); *In re Southeastern Milk Antitrust Litigation*, 801 F.Supp.2d 705 (E.D.Tenn. 2011); *In re: Fresh Dairy Products Antitrust Litigation*, 856 F.Supp.2d 1344 (United States Judicial Panel on Multidistrict Litigation, 2012) (Mem) (declining to consolidate four cases all challenging output suppression in milk).

80 *In re Fresh and Process Potatoes Antitrust Litigation*, 834 F. Supp.2d 1142 (D. Idaho, 2011).

81 *In re Processed Egg Products Antitrust Litigation*, 2011 WL 4945864, (E.D.Pa. 2011).

apparently because of congressional pushback.⁸² As a result, the DOJ was not involved in the resolution of a number of claims involving cooperative conduct where an informed public interest perspective would have been very important.

19. Another recent private litigation has highlighted claims of exploitation of some members of the Ocean Spray cranberry cooperative as well as independent producers by other members of that cooperative who apparently control its decisions.⁸³ Ocean Spray itself appears to have a monopsony or near monopsony dominance of cranberry production. In addition, all American cranberry growers are included in a “marketing order” under which the growers have authority to restrict the amount of production that can be sold.⁸⁴ The Antitrust Division did notify the Department of Agriculture that a proposed agreement between the cranberry marketing order and independent Canadian producers to withhold a share of the total crop from the market would constitute an antitrust violation.⁸⁵ As a result, the USDA rejected the proposed order. However, the USDA has continued to allow other orders to impose similar output restrictions.⁸⁶

20. The Supreme Court, however, has held that in the case of raisins such output controls involve a taking for which compensation must be paid.⁸⁷ Output restricting orders are economically inefficient. They induce market participants to overproduce as a way of increasing their share of the permitted market. The order system does have some utility in providing standards including grading of produce, but it requires a more focused oversight with attention of how orders can and do adversely affect both market access by producers and the consumer interest in an efficient food production system.

21. The USDA has substantial authority to control unfair and anticompetitive practices associated with market orders under the AMAA.⁸⁸ To date under a number of Administrations it has not made any significant use of this authority.⁸⁹ Most milk production is subject to such orders, but the USDA has allowed the exclusion of dairy farmers who are not members of a dominant cooperative

or its affiliates from participation in the premiums that come from the sale of milk for use as fluid milk. Most dairy farms now are Grade A producers, i.e., their milk qualifies for fluid use. No rational justifies excluding any dairy farmer involuntarily from participation in the order premium.

22. Those *premia* may not be very significant in many orders because the great bulk of milk is sold for other uses. However, even then there can be and has been significant exclusion of producers because the dominant cooperatives have negotiated exclusive supply contracts even when they lack the production to fulfill those commitments. Hence, they then often truck in milk from member producers from distant points with the order paying the cost of that trucking. Because the USDA has the power to oversee the order process, it should evaluate whether its authority extends to limiting or even prohibiting the use of full-supply contracts thus opening the market for milk to more competition.

23. In addition, dominant dairy cooperatives often impose other burdens on all farmers in the order area as conditions of access to the fluid milk premium and to buyers controlled by exclusive supply contracts. Those burdens include potentially biased and costly testing or weighing of the milk being supplied. There is evidence that DFA may have, on the one hand, imposed monopsony prices on dairy farmers in some regions while combining with a milk processor to raise milk prices to consumers.⁹⁰ Finally, the USDA’s process for setting the price of milk is subject to serious manipulation and distortion. Reports of the prices paid for cheese provide the nominal basis for the pricing of all uses of milk. But those prices in turn are almost entirely derivative from the prices generated on the Chicago Mercantile Exchange’s public market for cheese. That market is even thinner than the ones used to set base prices for beef and pork. There are a number of proposals for reforming the pricing of milk but so far there has been no progress in identifying a better base pricing mechanism.

IV. Seeds

24. Control over genetically engineered seeds was yet another source of concern in Workshops. The control rests with a handful of global companies, primarily Monsanto. The law allows patenting the genes that are inserted into seeds. This in turn has given these companies the power to restrict access to plant genetics because any work with a plant having patented genetics constitutes practicing the patent and so is unlawful without express permission of the patent holder. Despite substantial investments of investigative resources, neither the DOJ nor the state antitrust authorities have challenged any of these restraints. It is likely that Monsanto has modified a

82 M. Heller, A Senator Opposes Change in Laws, *Watertown Daily Times*, May 9, 2010 (Sen. Schumer of New York pushed back against any changes in the Capper-Volstead Act), available at <http://www.watertowndailytimes.com/article/20100509/NEWS02/305099964>.

83 *Growers 1-7 v. Ocean Spray Cranberries, Inc.*, 2014 WL 1764533 (D. Mass. 2014) (complaint charged Ocean Spray with discriminating against some members and independent cranberry producers by market price manipulation relying on its monopoly position in the cranberry market).

84 *See* 7 U.S.C. § 608b and other sections of title 7, and C.F.R. § 929 (the current cranberry order).

85 USDA Turns Down Request to Limit Cranberry Production, *Wisconsin Ag News Headlines*, August 21, 2014, available at <http://www.wisconsinagconnection.com/story-state.php?id=989&yr=2014>.

86 *See*, e.g., pie cherry order, 7 CFR § 930 et seq.; raisin order, Id. § 989 et. seq.

87 *Horne v. Department of Agriculture*, ___U.S.____, 135 S.Ct. 2419 (2015).

88 *See* 7 U.S.C. § 608c (7) (A).

89 *See* R. H. Folsom, Antitrust Enforcement Under the Secretaries of Agriculture and Commerce, 80 *Colum. L. Rev.* 1623 (1980).

90 *In re Southeastern Milk Antitrust Litigation*, 739 F.3d 262 (6th Cir. 2014) (reinstating claims against a dominant milk processor and dairy cooperative that had conspired to raise wholesale milk prices even as the same defendants settled claims that they had underpaid farmers for milk).

few of its restrictions in order to reduce the potential for government action. The fundamental legal problem has been that the courts generally had regarded the exercise of patent rights with respect to the patented product to be exempt from antitrust scrutiny.

25. In 2013, the government won a major battle to restrict abuses of patents in the “pay for delay” *Actavis* case involving pharmaceuticals.⁹¹ Essentially that case held that antitrust law applied to the licensing agreements involving patented goods even though patent law expressly authorizes such agreements. The antitrust standard is ambiguous, but requires that the licensing agreements be reasonable.

26. Also in 2013, the government sided with Monsanto to expand the scope of Monsanto’s patent right on genetically modified seeds in the *Bowman* case.⁹² That case involved a farmer who purchased soybean seeds from a grain elevator. Other farmers had sold the grain to elevators as Monsanto had authorized them to, and the elevators had no duty to restrict the uses made by its buyers. The Supreme Court, however, determined that farmer Bowman had “*infringed*” the Monsanto patent just by planting the seed and required a license to grow the plant. Hence, one patented gene out of an estimated 46,000⁹³ gave Monsanto control over the entire plant. Anyone planting such a seed, even if purchased from Monsanto, was infringing the patent unless Monsanto also licensed the buyer to plant the seed. However, the Court further observed that “*Monsanto (...) could not realistically—preclude all planting. No sane farmer, after all, would buy the product without some ability to grow soybeans from it.*”⁹⁴ Further, the Court made clear that it would imply a license: “*farmer[s] might reasonably claim that the sale came with an implied license.*”⁹⁵ Hence, by implication the Court acknowledged that Monsanto by making a sale of its seed had a duty to provide a “*reasonable license*” to the farmer. This result is consistent with *Actavis* and suggests that the antitrust agencies can (and should) take a more active role in reviewing the merits of various restrictive practices that patent holders employ by the use of patent licensing.

27. Unfortunately the exploitive and exclusionary licensing practices of major patent holders in the seed business have not yet received any effective challenge. Monsanto, the dominant firm, has used its licensing to restrict the ability of its licensees to “stack” patented genes from other sources on seeds containing Monsanto patented genes. Monsanto also withdrew its initial genetics before the patent expired and forced licensees to transfer to a newly patented version of the same genetics. This short-circuited the capacity of competitors

to develop generic substitutes for the patented version. Again, the antitrust authorities made no effort to challenge this practice and the associated refusal to allow licensees to use the patented genetics to develop generic replacements in the post patent period. This defeated the very goal of patenting which is to ensure that after the expiration of the patent the public can enjoy the benefits of the invention without a monopoly premium. Monsanto has also retained a policy of prohibiting farmers from saving seed with patented genes thereby forcing them to buy “new” seed each year whether the seed comes directly from Monsanto or from some other licensed seed producer. The ban on saving seed eliminates a source of price competition for new seed. While much of the markup in seed price reflects Monsanto license fees, another significant part comes from the fact that the seed sellers do not face any competition from saved seed. It is technically feasible for Monsanto to offer a separate license to save and replant seed.⁹⁶ Not all farmers would choose to take such licenses, but some would and that in turn would pressure seed producers to lower the price of new seed. The Federal Circuit rejected earlier efforts to challenge this ban⁹⁷ and no current litigation exists that would compel the circuit to revisit its decision in light of *Actavis* and *Bowman*.

28. In sum, the market for commercial seeds remains, as it was eight years ago, highly concentrated and encrusted with anticompetitive practices that both entrench the existing market leaders and exploit the buyers of their seeds.

V. The continuing issues

29. The foregoing discussions highlight a number of areas needing continued attention. There ought to be better articulated rules to govern contracting for poultry and livestock. The pattern of misuse of the Capper-Volstead rights to suppress output at the expense of consumers and to exclude or exploit some producers should be the object of greater concern by both the DOJ and USDA. While it may be aspirational given the apparent political clout of Capper-Volstead’s advocates, a serious review of this exemption and how it operates is long overdue.⁹⁸ A related concern is the anticompetitive use of marketing orders under the AMAA. There is a need for a critical review and modification of a number of these orders. Some cause anticompetitive harms in the guise of setting standards for quality or other elements of the marketing of commodities. Other orders impose restrictions on output or discriminate among producers. Not all market regulation by orders are anticompetitive, but a focused review process is necessary to eliminate unreasonable regulations.

⁹¹ *FTC v. Actavis*, 570 U.S. ___, 133 S.Ct. 2223 (2013).

⁹² *Bowman v. Monsanto*, 569 U.S. ___, 133 S. Ct. 1761 (2013).

⁹³ See J. Schmutz et al., Genome Sequence of The Palaeopolyploid Soybean, 463 *Nature* 178 (14 January 2010).

⁹⁴ *Bowman v. Monsanto*, 133 S. Ct. at 1768.

⁹⁵ *Id.* at 1767, footnote 3.

⁹⁶ See, P. C. Carstensen, Post-Sale Restraints via Patent Licensing: A “Seedcentric” Perspective, 16 *Fordham Intel Prop. Media & Entertainment L. J.* 1053 (2006).

⁹⁷ *Monsanto v. Scruggs*, 459 F.3d 1328 (Fed. Cir. 2006).

⁹⁸ See, e.g., P. C. Carstensen, Agricultural Cooperatives and the Law: Obsolete Statutes in a Dynamic Economy, 58 *S. D. L. Rev.* 462 (2013).

30. Concerns about buyer power and its abuse are pervasive in agriculture and food. Specific areas of concern were discussed in connection with contracting for poultry and livestock as well as in merger policy generally. It is important that the scope of these problems be appreciated as well as the intractable nature of remedying such abuses once the market structure makes them feasible. Producers of fish from fish farms and trees from tree farms are experiencing the same deprivations resulting from exploitation of buyer power as the poultry and livestock markets. Grocery stores and grocery manufacturers each have an increasing level of buyer power. Both

levels ultimately result in burdens on the producers of farm products. The FTC in particular needs to acknowledge the importance of buyer power risks in its assessment of mergers in grocery retailing and manufacturing.

31. Overall, the Obama Administration deserves some credit for recognizing that there are serious issues related to the competitiveness of the food system. Unfortunately, having recognized that these issues exist, it has done very little to remedy them. Going forward, there needs to be a greater willingness on the part of the DOJ, USDA, and FTC to “walk the walk” and not just “talk the talk.” ■

Superior bargaining power and the global food value chain: The wuthering heights of holistic competition law?

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I. Introduction

1. The social and economic importance of the food sector has always put in the spotlight of competition authorities.⁹⁹ As Chauve et al. remark “*the food supply chain accounts for 5 per cent of E.U. value added and 7 per cent of employment, bringing together the agricultural sector, the food processing and manufacturing industry, wholesale trade, and the distribution sector,*” also noting that the “[f]ood spending represents about 15 per cent of the average EU household budget.”¹⁰⁰ Two subsequent developments have ensured that food issues have recently gained prominence in the work of competition authorities. First, the

considerable rise of the price of commodities, including food, in 2008, led to increasing demands for intervention from public authorities in order to curb the phenomenon of food inflation.¹⁰¹ Food inflation trends seem, however, to have since been reversed, the prices of commodities decreasing sharply the last few months of 2015.¹⁰² Second, additional concerns have been raised by the perception that retailers have gained considerable power over the upstream parts of the supply chain, in particular processors but also farmers. Individual or collective retailer power has been at the centre of the attention of

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99 For a description of antitrust decisions in the agribusiness sector in Europe, see P. Buccirossi, S. Marette and A. Schiavina, Competition policy and the agribusiness sector in the European Union, (2002) 29(3) *European Review of Agricultural Economics* 373-397; ECN, Report on Competition Law Enforcement and Market Monitoring Activities by European Competition Authorities in the Food Sector (2012), available at http://ec.europa.eu/competition/ecen/food_report_en.pdf, noting that in the period 2004-2012, European national antitrust authorities have brought in total 180 antitrust cases and 1,300 merger cases. To this, one may add the market monitoring actions launched by the national antitrust authorities in the same period, which according to the report amount to 102. A similar trend may be identified with regard to the competition authorities of emergent economies.

100 P. Chauve, A. Parera and A. Renckens, Agriculture, Food and Competition Law: Moving the Borders, (2014) 5(5) *Journal of European Competition Law & Practice* 304-313, 304. See also, L. Bukeviciute, A. Dierx and F. Ilzkovitz, The functioning of the food supply chain and its effect on food prices in the European Union, (2009) *European Economy, Occasional Papers* 47, 6-8.

101 It was reported that inflation from 2005 to 2011 saw food prices increase by around 22% on average across OECD countries. However, there has been substantial variation: relatively low levels of food inflation in the US (14%) through to higher levels in Turkey (67%) and Mexico (48%). These variations even occur within countries participating to more homogeneous (from a trade perspective) blocks (e.g. EU): OECD, *Competition in the Food Chain*, vol. DAF/COMP(2013)15 (OECD 2013).

102 The FAO Food Price Index averaged 155.7 points in August 2015, down 8.5 points (5.2%) from July, the sharpest monthly drop since December 2008: FAO, Food Price Index, available at <http://www.fao.org/worldfoodsituation/foodpricesindex/en>.

public authorities in Europe,¹⁰³ with certain investigations being recently carried out at the national level.¹⁰⁴ As a recent study commissioned by the European Commission shows, the top 10 European retailers have seen their market share grow from 26% of total EU grocery in 2000 to almost 31% in 2011, the overall concentration of retailers increasing in virtually all Member States.¹⁰⁵ The international expansion of some retail brands across Europe, but also in non-European markets, has led to a general decrease in the importance of home markets for top European retailers in terms of the domestic share of European grocery banner sales.¹⁰⁶ Retailer power also manifests itself increasingly with the use of private labels, which compete directly with leading manufacturers' brands and other national brands and illustrate this shift in the balance of power between retailers and suppliers.¹⁰⁷

2. Concerns over the rising power of retailers in the food sector have led many competition authorities to use existing rules or adopt new rules on superior bargaining power, these rules either forming part of competition law statutes or of other functional equivalents.¹⁰⁸ These different rules stay relatively opaque as to the definition of the concept of superior bargaining power, the common characteristic (and presumably) advantage of these provisions being that they may potentially impose competition law related duties to undertakings not disposing of a dominant position or a significant market power, for unilateral conduct, which would have otherwise not been subject to competition law related duties under the traditional rules of abuse of a dominant position. The concept of superior (or unequal) bargaining power

is also a well-known concept in the fields of contract law and unfair competition law,¹⁰⁹ where it has given rise to a considerable literature attempting to unveil its theoretical underpinnings.¹¹⁰ Authors usually contrast the use of this concept in these areas of law, where the focus is on the unfairness of the process of exchange, with the efforts to integrate this rule in the field of competition law, where the emphasis is usually put on outcomes, such as efficiency or consumer welfare. The underlying objective of contract law or unfair competition statutes consists in regulating the contest between contracting parties and ensuring a relatively equalized landscape of bargaining capacity, bargaining power being interpreted as the interplay of the parties' actual power relationship in an exchange transaction.¹¹¹ On the contrary, competition law defines bargaining power more generally, in terms of the ability of an undertaking to introduce a deviation from the price or quantity obtained from the competitive situation in the market in which the transaction takes place. In this context, buying power denotes the ability of a buyer to achieve more favourable terms than those available to other buyers or what would otherwise be expected under normal competitive conditions. This approach emphasizes the gain resulting from the presence of bargaining power relative to a situation in which it is absent (not necessarily that of perfect competition),¹¹² focusing on market structure and concentration.¹¹³

3. It is usually thought that superior (or unequal) bargaining power may constitute a competition law problem as long as it leads to negative welfare effects in terms of pricing, choice or innovation, these

103 See the study commissioned by the OFT: P. Dobson, M. Waterson and A. Chu, *The Welfare Consequences of the Exercise of Buyer Power*, OFT, September 1998, *Research Paper* 16; OECD, *Buying Power of Multiproduct Retailers*, 1999; European Commission, *Buyer Power and its Impact in the Food Retail Distribution Sector of the European Union*, 1999; UK Competition Commission, *Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom*, 2000, Cm. 4842.

104 UK Competition Commission, *The supply of groceries in the UK market investigation*, April 2008; OFT, *Grocery Market – Proposed Decision to Make a Market Investigation Reference*, March 2006, at 42-49; A. Svetlicinii, *The Croatian Competition Authority issues a report on competition on the food retail market in 2008*, 16 July 2009, *e-Competitions*, No. 28749, www.concurrences.com; H. P. Nehl, *The Austrian competition authority concludes general inquiry in the highly concentrated food distribution sector while highlighting indications of strong buyer power (Branchenuntersuchung Lebensmittelhandel)*, 18 June 2007, *e-Competitions*, No. 13981, www.concurrences.com;

105 European Commission, DG COMP, *The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector*, (2014), available at <http://ec.europa.eu/competition/publications/KD0214955ENN.pdf>, 50-52. This is driven by higher concentration of modern retail.

106 European Commission, DG COMP, *The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector*, (2014), available at <http://ec.europa.eu/competition/publications/KD0214955ENN.pdf>, 55.

107 D. R. Desai, I. Lianos and S. Weber Waller, *Brands, Competition Law and IP* (CUP, 2015); A. Ezrachi and U. Bernitz, *Private Labels, Branded Goods and Competition Policy: The Changing Landscape of Retail Competition* (OUP 2009); A. Ezrachi, *Unchallenged Market Power? The Tale of Supermarkets, Private Labels, and Competition Law*, (2010) 33(2) *World Competition* 257-274; A. Foer, *Introduction to Symposium on Buyer Power and Antitrust*, 72 *Antitrust L.J.* 505 (2005); L. Vogel, *Competition Law and Buying Power*, 19(1) *ECLR* 4 (1998).

108 For a comparative analysis of rules on superior bargaining power, see ICN, *Report on Abuse of Superior Bargaining Position* (2008), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc386.pdf>.

109 See, for instance, for contract law, at the EU level, Article 4:109 (ex-art. 6:109) of the Principles of European Contract Law 2002 on excessive benefit or unfair advantage because at the time of the conclusion of the contract "was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill"; Principle 10 of the Draft Common Frame of Reference (DCFR) concerning restrictions to the principle of the freedom of contract because of inequality of bargaining power (even in the context of B2B relations) and the contract law sub-doctrines that explicitly or implicitly incorporate bargaining power such as unconscionability, duress, undue influence, the parol evidence rule and public policy. On unfair competition, again at the EU level, see Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe COM(2013) 37; Communication of the Commission, *Tackling unfair trading practices in the business-to-business food supply chain*, COM(2014) 472 final.

110 See in particular the seminal cases *Lloyds Bank Ltd v. Bundy* [1974] EWCA Civ 8 (EWCA (Civ)); *Macaulay v. Schroeder Publishing Co Ltd* [1974] 1 WLR; and the following critical and explanatory appraisal by S. N. Thal, *Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness*, (1988) 8 *Oxford J. Legal Stud.* 17; M. J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords* [1976] *University of Toronto L.J.* 359; L. A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law* (1998) 33 *New Eng. L. Rev.* 265; and more recently A. Choi and G. Triantis, *The Effect of Bargaining Power on Contract Design* [2012] *Va. L. Rev.* 1665.

111 Yet, it is important to note that regulatory interventions in order to rebalance contractual inequality are still designed as exceptions to the principle of the freedom of contract and the certainty of the contract, especially in B2B contracts, where a very limited power to rebalance the contractual arrangement is generally left to the discretion of the judge.

112 See, R. Clarke, S. Davies, P. W. Dobson and M. Waterson, *Buyer Power and Competition in European Food Retailing* (Edward Elgar 2002).

113 J. T. Dunlop and B. Higgins, *Bargaining Power and Market Structures*, (1942) L(1) *The Journal of Political Economy* 1, 4-5; R. G. Noll, "Buyer Power" and Economic Policy, (2005) 72 *Antitrust Law J.* 589.

“competition law concerns” being carefully distinguished from “non-competition” law concerns.¹¹⁴ Two views are usually advanced with regard to the interaction of provisions on superior bargaining power and competition law. First, considerable effort has been spent in order to mould the concept of superior bargaining power into the competition law and economics traditional framework by bringing adjustments to traditional competition law concepts such as relevant market and market power¹¹⁵ or focusing competition law enforcement on “buying power.” Second, new provisions on superior bargaining power or economic dependence, introduced in the competition law statutes by some jurisdictions, are typically examined from the perspective of efficiency and consumer welfare and usually relegated to the outer boundaries of competition law provisions on abuse of a dominant position, for instance on the basis of an error cost analysis,¹¹⁶ or the perception that fairness concerns have little role to play in modern competition law.¹¹⁷ Provisions on superior bargaining power are examined from a public choice perspective as a by-product of the political pressure of organised interests of small and medium undertakings or farmers, leading to the adoption of mainly redistributive statutes that restrict competition and presumably economic efficiency. From this angle, the existence of a superior bargaining power of retailers in the procurement markets does not necessarily give rise to market power at the selling side, harming final consumers. Price transmission from producer to consumer prices seems to have worked so far in favour of final consumers, as producer price increases during the period of the recent rise of commodity prices in 2008 have been partially absorbed by the food retail sector through a reduction

of profit margins, at least in the old Member States.¹¹⁸ It remains to be seen if the most recent decrease of food prices will also be passed on to consumers or if we will face a situation of asymmetric price transmission from producer to consumer food prices.¹¹⁹ Similarly, the recent Modern Retail Study of the European Commission noted that the increase in the overall retail concentration has been counter-balanced to a certain extent by consolidation in the processing and manufacturing industries for certain products, such as coffee, frozen ready cooked meals, baby food¹²⁰. Finally, critics of the concept of superior bargaining power usually explain that the complexity of the problems raised by unequal bargaining power between retailers and suppliers cannot be solved by competition law and a more integrated framework is needed, combining the enforcement of competition law, when there is conduct that enters its scope, but also unfair trading practices laws, provisions of contract law and more generally civil law (tort law, European sales law), which aim to deal with abusive use of unequal bargaining power, and finally, soft law and self-regulatory initiatives by the industry that have emerged in several Member States.¹²¹ The argument is often made that competition law may be less effective in dealing with the problem than these other areas of law, without, however, that conclusion being based on a thorough comparative institutional analysis that also examines the institutional and social norms related constraints that may limit the remedial potential of other areas of law to deal with the problem.¹²²

4. This paper aims to question this quick dismissal of superior bargaining power from the traditional competition law framework. First, from a normative perspective,

114 Recent empirical work has relativized the impact of the superior bargaining power of retailers, as this is exemplified by rising consolidation and increasing concentration levels, on price: see E. Ciapanna and C. Rondinelli, Retail Market Structure and Consumer prices in the Euro Area, *ECB Working Paper Series*, No. 1744, December 2014 (observing that larger concentration of retailers on the purchasing side of the procurement market is associated with lower consumer prices). See also, European Commission, DG COMP, The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector, (2014), available at <http://ec.europa.eu/competition/publications/KD0214955ENN.pdf> (noting that consumer choice was not affected by the rise of concentration levels at retail, although innovation may have been).

115 See, for instance, § 20 of the German Act against Restraints of Competition on “relative and superior market power” (*relative und absolute Marktmacht*).

116 See, for instance, F. Wagner von Papp, Unilateral conduct by non-dominant firms: a comparative reappraisal, ASCOLA Tokyo Conference (2015), (on file with the author, shortly available at the SSRN) conducting an “error cost analysis” and advancing the view that dominance, and consequently the definition of a relevant market, is a necessary condition for a superior bargaining power to be considered as a competition law problem and recognising the countervailing impact that subsidiary contract law enforcement would have on error costs. An error cost analysis conducted *in abstracto* may underestimate the transaction costs associated with the use of the specific legal process, which may vary from jurisdiction to jurisdiction and in some cases may be less important in the context of competition law enforcement than other alternatives. Error cost analysis may also lead to the “*sin of single institutional analysis*” see, K. N. Komesar *Law’s Limits*, (Cambridge: Cambridge University Press, 2001) as it will emphasize the defects of one institutional alternative (e.g. competition law) on some aspects to argue for an expansive role of another, probably equally defective in some other aspects, institutional choice: contract law or unfair competition law statutes.

117 See, for instance, P. Akman, *The Concept of Abuse in EU Competition Law* (Hart Pub. 2012), Ch. 4.

118 L. Bukeviciute, A. Dierx and F. Ilzkovitz, The functioning of the food supply chain and its effect on food prices in the European Union, (2009) *European Economy, Occasional Papers* 47, 14.

119 Asymmetric transmission is often linked to the existence of market power at a level of the value chain: OECD, Food Price Formation, October 2015, available at <http://www.oecd.org/site/agrfcn/meetings/agrfcn-7-food-price-formation-paper-october-2015.pdf>; in a 2009 report for the European Commission, L. Bukeviciute, A. Dierx and F. Ilzkovitz, The functioning of the food supply chain and its effect on food prices in the European Union, (2009) *European Economy, Occasional Papers* 47, 18, noted that for the euro area, “the magnitude of the transmission is similar in the case of a price increase and a price decrease.”

120 European Commission, DG COMP, The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector, (2014), available at <http://ec.europa.eu/competition/publications/KD0214955ENN.pdf>, 218, 304-377.

121 On a discussion of the possible combinations between these different tools across Member States, see Final Report, Study on the Legal Framework Covering Business – to Business Unfair Trading Practices in the Retail Supply Chain, Final Report (26 February 2014), available at http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf.

122 These may, for instance, relate to inefficient judicial systems with few capabilities to engage with the economic underpinnings of superior bargaining power, in comparison to the more expert competition authorities, entrenched power relations that make it difficult for suppliers to bring contractual disputes against retailer networks and raise a contract law point based on economic duress or unconscionability against a partner with superior bargaining power, a complaint to the competition authority offering in this case a better option, in view of the far-reaching remedies that a competition law violation may give rise to and that neither contract law nor unfair competition law offer. Even if private enforcement of competition law is more frequently used in these instances, competition authorities focusing on cartels as their enforcement priority, it might still be preferable from the point of view of the parties, in view of the general hostility of contract law judges to legal intervention in order to rebalance contractual inequality.

the role the concept of superior bargaining power may play in competition law enforcement becomes particularly significant, should one abandon a narrow neoclassical price theory (NPT) efficiency or consumer welfare driven perspective for an approach that would seek to preserve the competitive process or even one that will be inspired by political economy considerations and a “holistic” competition law model.¹²³ In our view, the global value chain approach, developed by political economists and economic sociologists, provides the appropriate theoretical framework in order to better understand the interaction between suppliers and retailers in the food sector and enable us, on this basis, to design competition law interventions (II.). Second, from a descriptive perspective, we note that legislators and competition authorities do not share the antitrust law pessimism usually displayed by authors inspired by the NPT paradigm towards the concept of superior bargaining power, and have increasingly engaged with it, in the context of traditional competition law enforcement with regard to retail consolidation through buying alliances or mergers (III.). Finally, we observe the framing of new tools of competition law intervention in order to deal with situations of superior bargaining power in specific settings related to the food value chain (IV.).

II. The global value chain perspective

5. The structure of the food value chain and the relationship between the firms operating in it has changed drastically the last two decades.¹²⁴ Agriculture and agri-food production has taken advantage of technological innovation becoming more industrialised¹²⁵ and globalised.¹²⁶ Modern information systems enable suppliers to receive directly signals over the preferences of consumers for higher quality products, the private sector responding by creating “value chains” with the aim to reduce, through the exercise of control, the uncertainty emerging out of their interaction with a number of economic actors present in different market segments (and for which they do not dispose sufficient information). The globalisation of the economy has also led to the development of a transnational mode of production, with a number of production facilities dispersed in various jurisdictions, thus

increasing the need to put in place transnational value chains reducing the resulting uncertainty of dealing with foreign economic actors. One may also trace the development of value chains in the expansion of national and international regulations regarding consumer protection, food safety and quality, for instance regulation imposing the traceability of food, feed, at all stages of production, processing and distribution (e.g. EU Regulation 178/2002,¹²⁷ the WTO sanitary and phytosanitary standards, *Codex Alimentarius*). The private sector complies with such regulations by establishing standards and specific codes of conduct managed by industry associations or non-governmental organizations. Being at the one end of the value chain, retailers develop strategies with the aim to build store loyalty, thus enabling them to extract a more significant part of the total surplus value. Because of this direct interaction with consumers and the need to preserve store loyalty, retail networks have more incentives than suppliers to control potential risks at the various nodes of the supply chain (e.g. in order to guarantee product safety).¹²⁸ For this reason, “buyer-driven” chains develop private food standards, which operate on top of public regulations. As a result of these developments, the food value chain is increasingly structured around “global value chains” (GVCs), which permit the simultaneous and coordinated production and distribution of a very large array of products that each stage of the supply chain has to manage effectively, without this involving vertical integration by ownership.¹²⁹

6. The GVC approach provides a theoretical framework enabling us to understand how the global division and integration of labour in the world economy has evolved over time and, more importantly, how the distribution of awards, from the total surplus value, is allocated between the various segments of the chain.¹³⁰ The starting point for the development of this framework was the growing importance of new global buyers (big retail) constituting “buyer-driven global commodity chains.” The framework also shares Michael Porter’s emphasis on “value systems” a concept that has been used in order to describe a set of inter-firm linkages through which different economic actors (and their value chains) are interconnected.¹³¹ Hence, contrary to traditional NPT analysis, and more in vogue with transaction cost economics (TCE) and economics of organization, the GVC approach does not mainly focus on issues of horizontal market

123 On the perils and advantages of “holistic” competition law, see I. Lianos, Some Reflections on the Question of the Goals of EU Competition Law, in *Handbook in EU Competition Law: Substantive Aspects*, I. Lianos and D. Geradin (eds.), (Edward Elgar, 2013), 1-84.

124 J. F. M. Swinnen, *Global Supply Chains, Standards and the Poor How the Globalization of Food Systems and Standards Affects Rural Development and Poverty* (CABI 2007) 1.

125 J. Humphrey and O. Memedovic, Global Value Chains in the Agrifood Sector [2006] UNIDO5, available at <http://agris.fao.org/agris-search/search.do?recordID=GB2013202293>.

126 G. Gereffi and M. M. Christian, Trade, Transnational Corporations and Food Consumption: A Global Value Chain Approach, in *Trade, Food, Diet and Health Perspectives and Policy Options* (2010), C. Hawkes, C. Blouin, S. Henson, N. Drager, L. Dubé (eds.), 3, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564948.

127 Regulation 178/2002 of the European Parliament and the European Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L 31/1.

128 J. Lee, G. Gereffi and J. Beauvais, Global value chains and agrifood standards: Challenges and possibilities for smallholders in developing countries, (2012) 109 (31) *Proceedings of the National Academy of Science* 12326-12331, 12328.

129 K. De Backer and S. Miroudot, Mapping Global Value Chains, European Central Bank, *Working Paper Series*, No. 1677, May 2014.

130 On the GVC framework and its predecessor Global Commodity Chains, see G. Gereffi and M. Korzienenewicz (eds.), *Commodity Chains and Global Capitalism* (Westport: Praeger, 1994); G. Gereffi, J. Humphrey and T. Sturgeon, The governance of global value chains, (2005) 12(1) *Review of International Political Economy* 78-104.

131 M. Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (Free Press, 1985).

power and concentration at each segment of the chain, but engages with the vertical links between the various actors with the aim to understand how and whether “lead” actors can capture value. Hence, its focus is on the distribution of the value generated by the chain, rather than the maximization of the surplus (efficiency) as such. GVC’s “holistic view” of global industries focuses on the governance of the value chain, that is, how some actors can shape the distribution of profits and risks in the chain. Taking a political economy perspective, the GVC approach explores the way economic actors may maintain or improve (“upgrade”) their position in the global value chain, “*economic upgrading*” being defined as “*the process by which economic actors—firms and workers—move from low-value to relatively high-value activities in GVC.*”¹³²

7. A typology of GVC governance structures was elaborated with the aim to describe and explain the driving forces for the constitution of global value chains. According to Gereffi et al., there are “*three key determinants of value chain governance patterns: complexity of transactions, codifiability of information; and capability of suppliers.*”¹³³ His framework is broader than the framework often employed by TCE in order to explain the prevalence of certain forms of organization (hierarchy versus the market system), as the latter focuses only on the determinants of asset specificity and the frequency of the transactions as the driving forces for organizational choice.¹³⁴ The GVC framework draws inspiration from the resource-based or competences-based view of the firm,¹³⁵ according to which firms as path-dependent entities characterised by heterogeneous competence bases and operating under conditions of genuine uncertainty, their existence being justified by the development of productive competencies and learning for a specific cognitive community that forms the firm’s core. Contrary to what TCE predicts, firms will not necessarily develop specific capabilities and learning in order to engage in certain value activities, because for instance of economies of scale and the frequency of transactions, as they may be unable to develop the capabilities which are necessary for them to participate in certain value chain activities; they will be thus obliged to appeal to external resources.¹³⁶ Contrary to the contract theory of the firm, pioneered by TCE, the competence-base view of the firm

enquires into the sources of the competitive advantage and the path-dependent process of accumulation of such capabilities. Although the GVC framework adopts the markets and hierarchy categories of TCE, it perceives them as part of a continuum, the network category, which it then analyses as three distinct types of governance regime. In a nutshell, the GVC framework advances the following five governance categories:

- Markets where the costs of switching to new partners is very low;
- Modular value chains where suppliers make products to a customer’s specifications, without however making transaction-specific investments that will generate a situation of mutual dependence or just dependence;
- Relational value chains in which complex interactions between buyers and sellers often create mutual dependence and high levels of asset specificity;
- Captive value chains where relatively small suppliers face significant switching costs and are “captive” to large buyers, such networks being characterized by a high degree of monitoring and control by lead firms;
- Hierarchy which denotes situations of vertical integration with the exercise of managerial control.¹³⁷

The operation of the key determinants of global value chain governance is described in the following table.

Table 1: Key determinants of global value chain governance

Governance type	Complexity of transactions	Ability to codify transactions	Capabilities in the supply-base	Degree of explicit coordination and power asymmetry
Market	Low	High	High	Low
Modular	High	High	High	↕
Relational	High	Low	High	
Captive	High	High	Low	
Hierarchy	High	Low	Low	High

8. Of particular interest for the purposes of examining superior bargaining power is the category of captive value chains where power is exercised by “lead firms,” in most cases these being modern retailers and supermarkets who drive the agri-food chain, linking daily groceries’ consumers with small farmers around the world. In this context, supplier’s capabilities are relatively low, the complexity of product specifications being high and amenable to codification. In the face of complex products and specifications, the “lead” firms have important incentives and abilities to intervene and to control the chain, thus building up transactional dependence and locking in suppliers. The latter

132 G. Gereffi, Global value chains in a post-Washington Consensus world, (2014) 21(1) *Review of International Political Economy* 9-37, 18.

133 G. Gereffi, J. Humphrey and T. Sturgeon, The governance of global value chains, (2005) 12(1) *Review of International Political Economy* 78-104, 84.

134 In a nutshell, the more there is asset specificity and the interaction is long-term, the more it is justifiable to invest resources in order to build a hierarchy form of organization.

135 G. Gereffi, J. Humphrey and T. Sturgeon, The governance of global value chains, (2005) 12(1) *Review of International Political Economy* 78-104, 81.

136 The competence or resource-bases view of the firm draws on work by E. Penrose, *The Theory of the Growth of the Firm* (Oxford University Press: Oxford, 1959). See, more generally, N. J. Foss, The Theory of the Firm: Contractual and Competence Perspectives, (1993) *Journal of Evolutionary Economics*, 3, 127-144; G. M. Hodgson, Evolutionary and competence-based theories of the firm, (1998) 25(1) *Journal of Economic Studies*, 25-56.

137 G. Gereffi, J. Humphrey and T. Sturgeon, The governance of global value chains, (2005) 12(1) *Review of International Political Economy* 78-104, 84.

are confined to a narrow set of tasks (for instance, provide raw products or simple assembly) and are dependent on the “lead firm” for complementary value adding activities, such as branding, marketing, commercialisation, advertising. As a consequence of this configuration, “lead firms” are able to reap the overwhelming part of the total surplus-value of the chain. In contrast, in relational value chains the power balance between retailers and suppliers is more symmetrical, as suppliers’ capabilities are high, thus each firm is contributing key competencies leading to a situation of mutual dependence. Trust rather than power constitutes in this case the main mechanism of coordination of the value chain.

9. This classification of various forms of organization of the value chain highlights the importance of conducting a careful analysis of the power relations along the supply chain, the aim being to unveil value extraction bottlenecks affecting the distribution of the total surplus value.¹³⁸ This analysis cannot be undertaken by the traditional NPT framework which mainly focuses on horizontal competition and its effects on consumers or total welfare and assesses the competitive interactions between firms within a specific relevant market. In contrast, the GVC perspective has a purely distributive focus and may be particularly helpful if one aims to understand real business strategies and how the design of the value chain may determine who profits from the collective innovation and other surplus value generated, the inter-country distribution of the total surplus value, in the case of transnational networks, if one takes a political economy perspective, and more broadly the impact of value extraction bottlenecks on the competitive process, the latter concept being intrinsically related to an evolutionary perspective on economic change. GVC analysis may question the mechanistic view of the countervailing bargaining theory argument, claiming for instance that the consolidation and increasing concentration at the supplier level may curtail the rising power of retailers, by emphasizing the risk of the development of “bilateral oligopolies” of consolidated producers and retailers and subsequently of double marginalisation that may harm consumers and the competitive process.¹³⁹

10. We consider that such an approach is particularly helpful, and this not only in the context of global value chains affecting developing or emergent economies¹⁴⁰, which is a topic that has attracted some attention, in view of the necessity to promote a political economy framework

that will enable local firms to participate to global value chains and thus to capture value, or to “upgrade” existing capabilities and to create “domestic” added value. It may also be relevant in the context of a developed countries’ club, such as the EU, in view of the heterogeneity of productive capabilities that one may observe between the North and the South/East part of the Continent and the establishment of value chains with “lead” firms (mostly based in the North of Europe) extracting an important share of the total surplus value. Article 3(3) of Regulation 1/2003 offers some policy space by explicitly authorizing Member States to adopt and apply provisions of national law that predominantly pursue an objective different from that pursued by Articles 101 and 102 TFEU, for instance, legislation that “prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.”¹⁴¹ Hence, Member States dispose of the necessary policy space to implement rules that aim to curtail superior bargaining power and its distributional consequences, if they judge that this is justified from a political economy perspective (for instance, because of an unbalanced inter-country distribution of the total value chain surplus). Although, no authority has for the time being relied on the GVC framework, the concepts and measurement devices they have developed so far may gain in clarity if some effort is spent in integrating the GVC learning in competition law assessment.

III. The rising interest of competition authorities in superior bargaining power

11. Several national antitrust authorities have recently delved into the concept of superior bargaining power in the food-retail sector and commissioned studies in order to better operationalize superior bargaining power in competition law enforcement and develop measurement tools.¹⁴²

141 Recital 9 and Article 3(3) of Regulation 1/2003.

142 See, for instance, Competition Commission, The Supply of Groceries in the UK Market Investigation, available at http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538.pdf; Italian Competition Authority, Indagine Conoscitiva Sul Settore Della GDO’ (2013) IC43, available at <http://www.agcm.it/indagini-conoscitiva-db.html>; Bundeskartellamt, Sektoruntersuchung Nachfragemacht Im Lebensmitteleinzelhandel (2014) B2-15/11 BKartA, available at http://www.bundeskartellamt.de/Sektoruntersuchung_LEH.pdf?__blob=publicationFile&v=7; Autorité de la concurrence, Opinion 15-A-06 of 31 March 2015 Concerning the Joint Purchasing Agreements in the Food Retail Sector, available at <http://www.autoritedelaconcurrence.fr/pdf/avis/15a06.pdf>; Finnish competition authority, Study on Trade in Groceries – How Does Buyer Power Affect The Relations between the Trade and Industry? (2012) 1 FCA reports, available at <http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/selvitykset/2012/en/fca-reports-1-2012-study-on-trade-in-groceries.pdf>.

138 R. L. Steiner, Intra-brand Competition-Stepchild of Antitrust (1991) 36 *The Antitrust Bulletin* 155, has also emphasized the role of “vertical competition” and “vertical market power” in his “dual-stage model” of competition law assessment. However, he does not offer an analytical competition law framework which will go beyond the classic NPT focus on horizontal concentration and the possibility of vertical market power to transform itself to horizontal market (selling or procurement) power.

139 J. Lee, G. Gereffi and J. Beauvais, Global value chains and agrifood standards: Challenges and possibilities for smallholders in developing countries, (2012) 109 (31) *Proceedings of the National Academy of Science* 12326-12331, 12329.

140 See, for instance, R. Kaplinsky, Competitions Policy and the Global Coffee and Cocoa Value Chains, Paper prepared for the United Nations Conference for Trade and Development (Institute of Development Studies, Sussex, Brighton, 2004), available at <https://www.ids.ac.uk/files/RKaplinskycocoacoffee05.pdf>.

12. The attention of the competition law enforcers historically lingers on size and market share or concentration of the negotiating parties in order to define their power relations.¹⁴³ However, scholarly studies on contracts and negotiations take a game/bargaining theory approach arguing that, for the outcome of negotiation, even more important than market shares or the size of negotiating parties is the existence of “threat points” enabling one of the parties to seek a “*best alternative to a negotiated agreement*” (BATNA).¹⁴⁴ Indeed, the negotiating party holding a BATNA has the possibility to resort to a valid alternative to the negotiation in progress or to the contract concluded, preventing hold-up and threats to cease negotiation. In conceiving the bargaining model one may take a Nash cooperative bargaining solution as the axiomatic starting point,¹⁴⁵ or resort to a non-cooperative or sequential bargaining model which will attempt to factor in the costs of the delay to agreement, and extend this analysis from bilateral bargaining to n-person bargaining.¹⁴⁶ Although it is not clear if the results will be the same under each of these models, their common feature, in contrast to industrial organization theory, is that bargaining power is perceived as a concept that can be measured with reference to a specific bargaining relation in a specific context and it is not dependent on structural analysis (for instance the existence of monopsony or oligopsony). Bargaining power may also impact on price as well as on non-price terms.¹⁴⁷ Measuring bargaining power is a difficult exercise that scholars and law enforcers have tried to engage with, adopting diverse approaches.

1. Measuring superior bargaining power

13. For instance, in 2014, the Bundeskartellamt concluded an in-depth study in the food retail sector, where it attempted to measure superior bargaining power (“demand side power” – “*Nachfragemacht*”) econometrically by exploring the conditions of its existence.¹⁴⁸ The conditions of bargaining power were converted into inde-

pendent variables used for the econometric assessment. The selection of the independent variables was performed on the basis of a survey. In particular, the Bundeskartellamt looked into the procurement market of branded products for several reasons, including the fact that they form the core business of retailers, they are at the center of the majority of competition complaints and they are easier to compare and identify.¹⁴⁹ The authority initially divided the products object of negotiations into four categories: “product category”, “must-stock items”, “items listed at a discounter” and “high-turnover items.” Furthermore, they identified seven procurement markets with different market structures. In order to identify and order the branded products forming the statistical population belonging to the sample, the authority used the European Article Number (EAN). The authority then interviewed the retailers and manufacturers about the results of their negotiations on each EAN article. In particular, the Bundeskartellamt inquired about the switching possibilities to alternative negotiating partners and about the overall competitive environment. The authority noted that negotiations between producers and merchants take place once a year. In these negotiations producers and merchants bargain over the conditions for the business relationships of the following year. Yet, the Bundeskartellamt also acknowledged that the sole focus on procurement volumes is not sufficiently differentiated to provide valid conclusions for the definition and measurement of demand-side bargaining power. For its econometric assessment, the Bundeskartellamt considered different determinants in order to describe the individual bargaining position of each party and did not base itself only on market concentration and the existence of a monopsony or an oligopsony. The bargaining model construed on the basis of this theoretical approach can be summarized as following:

$$K \text{ [conditions of superior bargaining power]} = f(x \text{ [amount ordered]; } D^{1-6} \text{ [bargaining determinants, which indicates the “Drohpunkte” (threat points), that is, the best alternative to negotiate]})^{150}.$$

143 This is for instance the approach by the Commission in its last report for the HLF, European Commission, DG COMP, The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector: Final Report, available at <http://ec.europa.eu/competition/publications/KD0214955ENN.pdf>.

144 A. Renda and others, Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain, Final Report (2014) DG MARKT/2012/049/E 25, available at http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf; I. Ayres and B. J. Nalebuff, Common Knowledge as a Barrier to Negotiation (1996) 44 *UCLA L. Rev.* 1631.

145 Most of these studies have relied on this type of model so far.

146 See, for instance, J. Sutton, Non-Cooperative Bargaining Theory: An Introduction, (1986) *LIII Review of Economic Studies* 709-724; K. Binmore, M. J. Osborne, A. Rubinstein, Non-Cooperative Models of Bargaining, Chapter 7 in *Handbook of Game Theory with Economic Applications* (Elsevier, 1992), 179-225.

147 A. Choi and G. Triantis, The Effect of Bargaining Power on Contract Design (2012) *Va. L. Rev.* 1665.

148 Bundeskartellamt, Sektoruntersuchung Nachfragemacht Im Lebensmitteleinzelhandel (2014) B2-15/11 BKartA, available at http://www.bundeskartellamt.de/Sektoruntersuchung_LEH.pdf?__blob=publicationFile&v=7 (hereinafter Bundeskartellamt Food Retail Report)

149 The other market identified by the Bundeskartellamt is the one of private labels, which the authority describes as characterized by a different “*bargaining logic*,” although deeply influencing the negotiations for branded products. Private labels are usually bargained through tenders, while branded products are traded with annual negotiations. However, in its econometric study the Bundeskartellamt states that “private labels are actually considered in the assessment of the “competitive environment” of the branded products,” see Bundeskartellamt, Summary of the Final Report of the Sector Inquiry into the Food Retail Sector, 8. In this connection the Bundeskartellamt observes that private labels are often considered as part of a different market with respect to branded products. However, they can be often used in negotiations to put pressure on manufacturers of branded products, at 11.

150 Hence, the Bundeskartellamt especially focusses on the walk-away point in the specific negotiation and how it is influenced by different factors for each party.

These are the following:

1. Alternative distribution paths for producer p (other than with retailer r) or even alternative production paths (switching to different product) = outside options of producer;¹⁵¹
2. Outside options of retailer: importance of the product for the retailer (is delisting a credible threat?);¹⁵²
3. Brand strength: if consumers expect certain brands, then delisting is improbable;¹⁵³
4. Competition by other producers/brands which creates opportunities for r to circumvent p;¹⁵⁴
5. r's own brands ("Handelsmarken"): these must be substitutable for brands of p, and p must not be (by chance) the actual producer of r's own brands; the Report notes the trend towards private labels even in the premium segment;¹⁵⁵
6. Buyer cooperation: bundling buying power¹⁵⁶.

14. The conditions adopted for this analysis were not only price terms but also non-price terms, such as deadline for payment and agreements on delivery. A fundamental stage of the Bundeskartellamt's assessment was the reckoning of the importance of a retailer for its suppliers and the evaluation of the "outside options" of both parties. The definition of "outside option" given by the authority resembles closely to the one of the BATNA, "the better a party's outside options, the better the conditions that party is able to negotiate."¹⁵⁷ Not surprisingly, the Bundeskartellamt concluded in this study that the purchasing volumes "have a decisive impact on the negotiating conditions,"¹⁵⁸ and therefore constitute one of the main advantages of major retailers vis-à-vis their smaller competitors in negotiations. Furthermore, the authority determined that the well-known branded products "the delisting of which would most likely result in a dispro-

portionate decline in turnover for that retail company, has the effect that its manufacturer is able to achieve better conditions."¹⁵⁹ In such cases, the producer is in a stronger bargaining position, since the retailer has no BATNA.¹⁶⁰

15. In a 2012 sector inquiry, the Italian Competition Authority studied the bargaining power of retailers and suppliers on the basis of three different "clusters" of undertakings, reaching comparable results.¹⁶¹ These "clusters" were obtained by comparing several data, including the overall turnover, the number of retailers supplied, the "strength" of the brand (especially in the specific geographic area). In particular, these three groups or "clusters" were: i) undertakings with high bargaining power; ii) undertakings with medium bargaining power and iii) undertakings with low bargaining power.¹⁶² The data published by the ICA relatively differs from that of the Bundeskartellamt, but still shows a situation of prevalence of retailers' superior bargaining position, irrespective of market concentration levels. On the basis of their clusters, the ICA concluded that in the 23.4% of their sample, the supplier holds a strong bargaining position (not necessarily stronger than the retailer) and is not economically dependent on the retailer. In the 48.8% of cases, the suppliers showed an intermediate degree of dependence from the retailers. Finally, the 27.8% of the sample highlighted a high level of dependence.¹⁶³ It is worth observing that both the Italian and German retail sectors are moderately concentrated, if compared to others such as the Finnish, Latvian or Swedish.¹⁶⁴

16. Both studies by the German and the Italian competition authorities engage with what may be considered as captive value chains in the GVC approach terminology and attempt to develop appropriate measurement tools for superior bargaining power. Competition authorities have also attempted to gauge with superior bargaining power in exploring certain conduct that reinforces retail power vis-à-vis farmers or processors.

151 Bundeskartellamt Food Retail Report, 321.

152 Bundeskartellamt Food Retail Report, 322.

153 Bundeskartellamt Food Retail Report, 323.

154 Bundeskartellamt Food Retail Report, 324. However the Bundeskartellamt states that this is only true if two conditions are assumed. Firstly the other brand has to pose a sufficient substitution to the article which is the subject of the negotiations and secondly that the producer of the relevant article is not also the producer of the alternative trade brand. The Bundeskartellamt measures the value of this influence with the help of a survey in which the undertakings were asked to assess the importance of alternative brands. Furthermore the survey asked for an assessment of the substitutability of the specific article through the alternative on a scale from 0% to 100 %..

155 Bundeskartellamt Food Retail Report, 324-325.

156 Membership in a buyer group reduces the outside-options of the supplier and thereby may lead to better conditions for the demand side. The impact of the membership is measured by adding a variable which is 1 for "yes" and 0 for "no". In a second step it is measured whether an undertaking is a "big" or a "small" member of such a group. Thereby a variable only gets the value one, when the undertaking is not the one with the highest turnover in the group.

157 Bundeskartellamt, Summary of the Final Report of the Sector Inquiry into the Food Retail Sector, 10.

158 Bundeskartellamt, Summary of the Final Report of the Sector Inquiry into the Food Retail Sector, 10.

159 Bundeskartellamt, Summary of the Final Report of the Sector Inquiry into the Food Retail Sector, 10.

160 However, these so-called "must-have" products accounted only to 6% of the sample adopted by the authority that, according to the same authority, can be reasonably taken as representative of the whole food-retail national market.

161 Italian Competition Authority, Market Investigation in the Retail Sector (2012).

162 Italian Competition Authority, Market Investigation in the Retail Sector (2012), 162.

163 Italian Competition Authority, Market Investigation in the Retail Sector (2012), 162.

164 European Commission, The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector, 131.

2. Purchasing cooperation agreements and superior bargaining power

17. NCAs have increasingly looked into buying alliances and joint purchasing agreements concluded between major retail chains, these agreements becoming more common following the food crisis of 2008. Group purchasing organisations (“GPOs”) may take different forms of governance structure depending on the level of integration they select, spanning from jointly controlled companies to looser forms of cooperation, collectively referred to as “*joint purchasing arrangements*”¹⁶⁵. From the point of view of the size of retailers, group purchasing organisations are generally of two types. The first type consists in a multilateral agreement formed by retailers of the same size which by bundling their purchase volumes intend to increase their bargaining power vis-à-vis the suppliers. Recently, however, antitrust authorities registered a tendency to form purchasing groups where there is one dominant retailer and several smaller retailers.¹⁶⁶ In this type of agreements, the smaller retailers generally issue mandate contracts to the “head” of the purchasing cooperation in order to negotiate the conditions of procurement for the whole organisation. These forms of cooperation generally include several other conditions in order to coordinate selling practices and share information, especially about procurement costs.¹⁶⁷ The findings of the national competition authorities corroborate the view that these purchasing cooperation agreements have, in many cases, an almost negligible effect on the bargaining power of the major retailers, while, in the short term, they improve the bargaining position of the smaller retailers.¹⁶⁸ This is true even when, as it is apparently the case, the head of the purchasing organisation does not pass on the benefit of the bargain in whole.¹⁶⁹ Yet these agreements may also lead to long-term forms of cooperation, including the sharing of sensitive information, and may create the conditions for the economic dependence of the smaller retailers that often structure their business model to the one dictated by the cooperation agreement.¹⁷⁰ In addition, the coordination of the selling practices may cause the “homogenization” of the

assortments and of the services offered by the undertakings participating to the buying alliance, thus dampening competition.¹⁷¹

18. In analysing these agreements the competition authorities had departed from a strict application of the concept of dominance and adopted a broad understanding of market distortions. Bargaining power does not necessarily depend on the market share owned by a specific firm in the relevant market, neither on the level of concentration. If a producer owns an important share of the market but, nonetheless, has to bargain with retailers disposing of valid alternatives to the negotiation, such as other substitutable brands or private label products, the bargaining power of that producer will most probably be limited. On the other hand, a concentrated local retail market, where a retailer holds an important share, may still be open to balanced negotiations, if the producers have valid “outside alternatives,” both nationally and internationally, instead of negotiating with that retailer. For instance, the extent of the geographic presence at national and international level of the retail chain is able to considerably influence the negotiations, since its demand is difficult to be substituted and it is particularly relevant to reach economies of scale, possibly creating a situation of economic dependence of the supplier.¹⁷² In France, the Autorité de la concurrence explored allegations of abuse of superior bargaining power when examining three different cooperation agreements among the six most important French retailers (Système U/Auchan, ITM/Casino, Carrefour/Cora).¹⁷³ The Autorité pointed out that these agreements may fall within the scope of the prohibition of anticompetitive agreements, in view of the exchange of sensitive information between competitors and/or can be addressed according to abuse of economic dependence provisions. With regard to the latter, the Autorité found that the narrow approach adopted so far with regard to the definition and measurement of economic dependence led to under-enforcement of these provisions and called for “*an amendment to the procedure aimed at establishing the existence of abuses of economic dependency in order to make it more effective.*”¹⁷⁴

3. Abuse of economic dependence provisions

19. Competition authorities also focus on the implementation of specific provisions on abuse of economic dependence, which may emerge in various situations. In the first scenario, two firms bargain the contract in power parity and in a competitive market, but nonetheless the investments made by one of them put this firm

165 European Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements, vol OJ [2011] C 11, 194, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.

166 See, for instance, Italian Competition Authority, Case I768 *Centrale Italiana S.c. a r.l.*; Bundeskartellamt, Summary of the Final Report of the Sector Inquiry into the Food Retail Sector, 5; Autorité de la concurrence, Opinion 15-A-06 of 31 March 2015 Concerning the Joint Purchasing Agreements in the Food Retail Sector.

167 This is for instance the situation described by the ICA in the Case *Centrale Italiana S.c. a r.l.*

168 Bundeskartellamt Food Retail Report; Italian Competition Authority Case *Centrale Italiana S.c. a r.l.*; Autorité de la concurrence, Opinion 15-A-06 of 31 March 2015 Concerning the Joint Purchasing Agreements in the Food Retail Sector.

169 Bundeskartellamt Food Retail Report; Case I768 *Centrale Italiana S.c. a r.l.*

170 Bundeskartellamt, Summary of the Final Report of the Sector Inquiry into the Food Retail Sector, 19.

171 Case I768 *Centrale Italiana S.c. a r.l.*

172 Italian Competition Authority, Market Investigation in the Retail Sector, 212.

173 Autorité de la concurrence, Opinion Concerning the Joint Purchasing Agreements in the Food Retail Sector.

174 Autorité de la concurrence, Press Release: Opinion 15-A-06 of 31 March 2015 Concerning the Joint Purchasing Agreements in the Food Retail Sector, 7, available at <http://www.autoritedelaconcurrence.fr/pdf/avis/15a06.pdf>.

into a situation of economic dependence, exposing it to hold-up from its business partner. In the second scenario, the economic dependence may result from market conditions pre-existing to the stipulation of the contract, which forced one of the parties to accept the terms imposed by the other party and to undertake specific investments. With regard to its causes, the situation of economic dependence may derive from the absence of “outside options” for one of the business parties, or from high switching costs.¹⁷⁵ The food market presents plenty of opportunities for hold-up and anticompetitive conduct engendered by situations of economic dependence.¹⁷⁶ Farmers generally undertake specialized capital investments to provide the products at the local and international standards, under contractual arrangement with buyers. In particular, in markets of perishable products with few buyers, this contractual relationship easily turns into an economic dependence of the farmer to the buyer. Moreover, the particular conditions of the market of perishable products may be the cause of hold-up due to lack of alternatives for logistic reasons. Indeed, some products, such as chicken or sugar beets, have to be marketed locally, as they cannot be shipped far without losing much of their value. Processors and local buyers can therefore use this opportunity to impose low prices on farmers or non-favourable conditions.

20. Focusing on the relations between supplier and buyer, the Italian competition authority identifies four broad categories of economic dependence: i) dependence on assortment of the retailer, typically linked to branded products, which defines the lack of alternatives to a particular product or group of products; ii) dependence for shortage of supply sources, where the economic dependence originates from a situation of temporary lack of the specific product on the market; iii) dependence of the supplier, due to the fact that the supplier produces a significant share of its sales with a single buyer; iv) dependence on trade relations, in which the dependence originates from the significant asset-specific investments made by a contractor in order to fulfil its commitments and the difficulty to redeploy those investments for other purposes.¹⁷⁷

21. The French authority, instead, considers four different criteria for determining a situation of economic dependence: i) the importance of the share of revenue generated by that supplier with the distributor; ii) the importance of the distributor in the marketing of the products concerned; iii) the absence of deliberate choice of supplier to concentrate its sales from the distributor; iv) the absence of alternative solutions supplier.¹⁷⁸ However, both authorities conclude that this situation of economic dependence often gives rise to opportunistic hold-ups

¹⁷⁵ Italian Competition Authority, Market Investigation in the Retail Sector, 200.

¹⁷⁶ J. M. MacDonald and P. Korb, Agricultural Contracting Update: Contracts in 2008 (2011) EIB-72. U.S. Dept. of Agriculture, Econ. Res. Serv. *Economic Information Bulletin* No. 72.

¹⁷⁷ Italian Competition Authority, Market Investigation in the Retail Sector, 201.

¹⁷⁸ Autorité de la concurrence, Opinion Concerning the Joint Purchasing Agreements in the Food Retail Sector, 72.

from the party enjoying superior bargaining position. In particular, these authorities observe that often retailers request contract modifications or additions to dependent suppliers, threatening to delist the supplier’s product or to impose other forms of retaliation.¹⁷⁹

22. In its sector inquiry, the ICA observed that the 67% of the respondent suppliers reported requests of modifications or additions to the supply contracts during their executions.¹⁸⁰ In several cases, the request of the retailer to modify or add contract terms also regarded discount terms and expenditures, which were already been negotiated, having therefore a retroactive effect.¹⁸¹ From the sample adopted, the authority stressed that the 74% of the respondents who refused to modify the contract accordingly to the retailer’s request, reported having suffered retaliation, either by delisting (62% of respondents), or by “clear and unjustified worsening of contract terms for the following procurement period”¹⁸² (59% of respondents), or by adoption of both delisting and worsening of contract terms (47% of respondents). Moreover, according to this study, framework procurement contracts are often stipulated after the start of the supply period,¹⁸³ and the following contracts detailing the procurement agreement are almost always negotiated during the supply period,¹⁸⁴ leaving therefore ample margin for the integration of the contract by the dominant party. These findings seem to support those studies claiming that the adoption of incomplete agreements (such as framework contracts), which parties detail during the execution, exposes the economic dependent undertaking to opportunistic hold-ups.¹⁸⁵

¹⁷⁹ Autorité de la concurrence, Opinion Concerning the Joint Purchasing Agreements in the Food Retail Sector, 81; Italian Competition Authority, Market Investigation in the Retail Sector, 200.

¹⁸⁰ Italian Competition Authority, Market Investigation in the Retail Sector, 163. In detail, the respondents replied that this coercive modification of the contract happens: for the 45% “sometimes,” for the 18% “often”, and for the 4% “always.”

¹⁸¹ In this regard, the ICA points out that “[i]t is particularly interesting to note that the majority of respondents (74%) perceive, always or sometimes, these requests for unilateral modification of contract terms as binding for the supplier, which is exposed in the event of rejection, to specific retaliation, such as ‘delisting’ (that is, the exclusion from the list of suppliers), total or only for some products, or an unjustified worsening of the conditions for the following procurement period” (our translation). The ICA, therefore, acknowledges that 20% of respondents stated that they accept the requests “always,” 37% “often,” 38% said they accept them “sometimes,” and only 5% said they accept them “never,” at 163.

¹⁸² These procurement contracts were generally annual and subject to renegotiation every year.

¹⁸³ In their sample, the 35% of respondents always negotiate the framework agreement before the start of the supply period, the 19% declared that this happens “often,” and the 45% admitted that this happens only “sometimes”; see Italian Competition Authority, Market Investigation in the Retail Sector, 162.

¹⁸⁴ Italian Competition Authority, Market Investigation in the Retail Sector, 163.

¹⁸⁵ O. E. Williamson, Transaction-Cost Economics: The Governance of Contractual Relations (1979) *Journal of law and economics* 233; B. Klein, R. G. Crawford and A. A. Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process (1978) *Journal of law and economics* 297. Based on this theory, Klein, Crawford and Alchian designed an economic model explaining that the intention of an opportunistic behaviour does not necessarily preexist to the formation of the contract, as it may also result from an asset-specific investment of the business partner.

23. In 2011, the Spanish National Commission for Competition (now “CNMC”), published a report on the relations between manufacturers and retailers in the food sector, with the aim to describe the status quo of the relations between retailers and suppliers and analyse the impact on competition of the alleged bargaining power of large distributors.¹⁸⁶ The CNC found that the contracts linking suppliers with retail chains were occasionally left incomplete as for the consideration required, thus producing uncertainty, inefficient transfer of risk on the suppliers and a reduction of intra-brand competition.¹⁸⁷

4. Mergers and effects-based analyses

24. The criterion of a “*significant impediment of effective competition*” in merger control also offers some flexibility in order to assess unilateral effects that may be provoked by superior bargaining power. In the *Edeka* case, concerning the proposed acquisition of Kaiser’s Tengelmann by Edeka, the Bundeskartellamt observed that although the target company had low market shares at the national level, in some districts, it was the strongest and closest competitor of the two major groups, Edeka and Rewe.¹⁸⁸ For this reason, the acquisition of Kaiser by Edeka would have created a significant impediment to effective competition (“SIEC”), because it would have significantly lessened the competitive pressure on Edeka in those markets where also Kaiser was present. Although it only accounted for 2-5% of the procurement market, Kaiser was found to be the only real alternative to Edeka and Rewe.

25. The SIEC test does not require market dominance, thus allowing the authority to impede a merger also in cases of non-coordinated or unilateral effects resulting from the dissolution of an important competitor. These effects have to be evaluated for both the downstream and the upstream markets. With particular reference to the procurement sector, the U.K. Competition Commission considered that the further imbalance of the bargaining positions created by the merger may lower the “*levels of investment in new products or manufacturing techniques*” and produce “*adverse effects on product innovation and diversity*.”¹⁸⁹ Moreover, in more than one occasion, the EU Commission has warned against the possible anticompetitive effects that superior buyer power may create in the downstream sector, due to the discounts that the new merged entity is able to obtain to the detriment of competitors.¹⁹⁰

26. European antitrust authorities have engaged with several other potentially anticompetitive effects following an abuse of superior bargaining power, such as “waterbed effects” or “spiraling effects,”¹⁹¹ or the foreclosure and collusive effects caused by category management¹⁹² or by slotting allowances.¹⁹³ The recent study commissioned by the European Commission on The Economic Impact of Modern Retail also raises the possibility that retail concentration at local level may produce negative aggregate dynamic effects, through the reduction of the incentives of suppliers to innovate.¹⁹⁴

27. In conclusion, distortion of negotiations via abuse of superior bargaining position may happen at any node of the value chain and may take different forms. The NCAs have started to analyse how and to what extent superior bargaining power can distort competition and to develop tools and methods for its measurement.

186 Comisión Nacional de la Competencia, Report on the Relations between Manufacturers and Retailers in the Food Sector, available at: <http://www.cncompetencia.es/Inicio/Informes/InformesEstudiosSectoriales/tabid/228/Default.aspx>.

187 OECD, Latin American Competition Forum, Competition Issues in the Groceries Sector: Focus on Conduct – Contribution from Spain, 3, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2015\)5&docLanguage=En..](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2015)5&docLanguage=En..) In the wake of the CNC’s recommendations, the Spanish Parliament approved the Law 12/2013 on measures to improve the functioning of the food supply chain (LCA), with the threefold aim to detail the conditions and characteristics of contracts between retailers and suppliers, lay down a “black list” of prohibited “abusive” practices, and empower the newly created Food Industry Information and Control Agency (AICA) to fine undertakings that fail to comply with these requirements. The Spanish Competition authority is highly critical of this new system where its competence overlaps in some cases with that of the Ministry responsible in the specific sector and with the new competences of the AICA, alleging that this has created a futile duplication of norms and institutions.

188 Bundeskartellamt, Case B2-96/14 *Edeka/Kaiser’s Tengelmann*, available at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Fusionskontrolle/2015/B2-96-14.pdf?__blob=publicationFile&v=3.

189 UK Competition Comm, *Safeway plc Inquiry*, 2003, § 1.22(d).

190 See, for instance, EC Commission, *Carrefour/Promodes*, COMP M/16847, 2 December 1999; *Kesko/Tuko IV/M.78420* November 1996.

191 Both analysed by the Bundeskartellamt Food Retail Sector Inquiry, 25; Autorité de la concurrence, Opinion Concerning the Joint Purchasing Agreements in the Food Retail Sector, 56. The “*waterbed effects*” may result from a merger downstream which leads to marginal costs reductions and lower input prices for the merged entity, which sees its output rising, while at the same time raising the input prices of the merged entity’s competitors, leading to an adverse effect on final consumers. On the “*waterbed effects*,” see, R. Inderst and T. Valletti, Buyer Power and the “Waterbed Effect” (2011) 59(1) *Journal of Industrial Economics*, 1-20; P. Dobson and R. Inderst, Differential Buyer Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers? (2007) 28(7) *ECLR*, 393-400; A. Majumdar, Waterbed Effects and Buying Mergers, *CCP Working Paper* 05-7 (2007).

192 Finnish competition authority, Study on Trade in Groceries, 26.

193 Italian Competition Authority, Market Investigation in the Retail Sector, 133.

194 European Commission, DG COMP, The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector, (2014), available at <http://ec.europa.eu/competition/publications/KD0214955ENN.pdf>, 36. However, the study also found that “*a large imbalance away from suppliers and towards modern retailers was generally found to be associated with more innovation, reflecting in particular the finding that greater supplier concentration was associated with less innovation*,” although it was also noted that the Member States in the sample did not include those with the highest level of national retailer concentration. The methodology of measuring the level of innovation followed in this study was also quite narrow as innovation essentially referred to the introduction of “*new EAN products*” (EAN being European Article Number).

IV. A different kind of competition law?

28. The atomistic nature of agricultural markets and the consolidation of the processing and the retailing part of the food value chain have brought attention to the issue of bargaining power in agricultural markets. As the following table shows, the agricultural/production segment of the chain is populated by a significant number of economic actors, their size varying generally from smallholders to agrohholdings.

29. Despite the increasing trend to larger agricultural exploitations,¹⁹⁵ farmers are generally small economic actors that face considerable pressure from the concentrated upstream segment of factors of production (i.e. seed companies, fertilizers, herbicides) and the concentrated retail level, thus observing their share of the total surplus value diminishing. A classic response to the exercise of such superior selling power upstream, and bargaining power downstream, is the creation of agricultural cooperatives, or other farmers' organizations, as it is thought that such pooling of resources will enable farmers to preserve, or even gain, a larger share of the total surplus of the value chain.¹⁹⁶ Agricultural cooperatives

Table 2. Key profitability metrics for the agribusiness value chain*

Sector	Input	Farmers	Traders	Food companies	Retailers
Sales: US\$bn (approx.)	400	3,000	1,000	3,500	5,400
Number of players	100s	450 million	Tens	Thousands	Millions
EBIT %	15%	Variable	2–5%	10–20%	5%
R&D % sales	<1% (fertilizers) – 10% (seeds)	0%	<1%	1–2%	<1%
R&D spend: US\$bn	10	–	Low	8	Low
Composition/ Sub-sectors	<ul style="list-style-type: none"> • Seed • Fertilizer • Crop protection • Machinery • Animal health and nutrition • Crop insurance • Food ingredients 	<ul style="list-style-type: none"> • Grains • Fruit and vegetables • Meat • Dairy 	<ul style="list-style-type: none"> • Handling • Primary processing • Secondary processing 	<ul style="list-style-type: none"> • Bakery • Meat • Dairy • Snacks • Ready meals • Beverages 	<ul style="list-style-type: none"> • Multiples • Discounters • Wholesalers • Independents
Range	R&D-based majors to generic manufacturers	Smallholders to agrohholdings	Global agribusinesses to local middlemen	SMEs to multinationals	Corner shops to supermarkets

* Source: KPMG International, The agricultural and food value chain: Entering a new era of cooperation (2013), 5.

195 Boston Consulting Group, *Crop Farming 2030 – The Reinvention of the Sector* (April 2015), available at <https://www.bcgperspectives.com/content/articles/process-industries-innovation-crop-farming-2030-reinvention-sector>.

196 These can be state-run institutions, such as the Ghana Cocoa Board. One may also note the emergence of international traders that serve as intermediaries between farmers and retailers. See J. Lee, G. Gereffi and J. Beauvais, *Global value chains and agrifood standards: Challenges and possibilities for smallholders in developing countries*, (2012) 109 (31) *Proceedings of the National Academy of Science* 12326–12331, 12328.

benefit from antitrust immunity in the United States,¹⁹⁷ and have generally been assessed positively under Article 101 TFEU.¹⁹⁸ However, in addition to the quite liberal antitrust approach followed in this area, the EU has instituted specific competition law derogations for producer organizations, on the basis of the Common Agricultural Policy (CAP) provisions of the EU Treaties and related secondary legislation.¹⁹⁹ According to Article 42 TFEU, the EU legislator determines the extent of the application of competition rules to the agricultural sector, taking into account the objectives of the CAP set out in Article 39 TFEU.²⁰⁰ These aims take precedence over the objectives pursued by EU competition law.²⁰¹ Article 206 of the CMO Regulation declares Articles 101 and 102 TFEU applicable to the production and trade in agricultural products, but the CMO Regulation also provides a general derogation for certain types of agreements from the scope of Article 101(1) TFEU (although not from Article 102 TFEU) if these collusive practices are necessary for the attainment of the CAP objectives.²⁰² This derogation also applies to all POs and APOs entering into agreements for the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, although it does not apply to collusive practices involving an obligation to charge an identical price excluding competition. In addition to the general derogation, there are specific additional derogations from which benefit the sectors of olive oil, beef and veal and arable crops, as set out by the CMO Regulation and some impending Commission Guidelines.²⁰³ According to the Commission, “[t]he purpose of the Derogation is to strengthen the bargaining power of producers in the sectors concerned vis-à-vis downstream operators in order

to ensure a fair standard of living for the producers and a viable development of production (...) The Derogation's purpose is to be achieved through POs effectively concentrating supply and placing products on the market and, as a consequence, negotiating supply contracts on behalf of their members.”²⁰⁴ The Derogation is subject to a number of conditions, including consideration of how the practice contributes to the objectives of the PO, a “significant efficiency test,” notification obligations and a production cap, which is 15% of the total national production of each product covered by the contractual negotiations for the sectors of beef and veal and of arable crops and less than 20% of the relevant market in the sector of olive oil.²⁰⁵ As indicated above, this new kind of competition rules is justified by the significant unbalance of bargaining power between farmers and retailers.

30. Other public-interest oriented competition law regimes may provide further illustrations of the increasing importance of distributive concerns and bargaining power in competition law enforcement, thus building the case for adopting a GVC framework.

31. The public interest test in South African merger control has provided South African competition authorities the opportunity to examine bargaining power and its effects on local suppliers in the *Walmart-Massmart* merger. Following the announcement of Walmart's interest to acquire a controlling share in Massmart, the South African Competition Commission examined and unconditionally cleared the merger between the world's largest retailer and one of South Africa's leading retail chains, finding that it was not likely to lead to a substantial prevention or lessening of competition. Massmart is a wholesaler and retailer of groceries, liquors and general merchandise and operates through 10 subsidiaries scattered on the African continent. On the basis of the public interest provisions of the South African Competition Act,²⁰⁶ the labour unions seized the Commission, arguing that the clearing of the merger would have caused significant job losses for South African workers in the retail sector, in view of Walmart's established value chain, which involved imports of foreign products. Consequently, the Commission revised its position, suggesting a conditional approval of the merger.

197 See the Capper-Volstead Act, 7 U.S.C. §§ 291-292. This immunity is narrowly construed by the US courts. For a recent commentary, C. A. Varney, *The Capper-Volstead Act, Agricultural Cooperatives and Antitrust Immunity*, (December 2010) *The Antitrust Source*, 1-9.

198 The CJEU held that constituting cooperatives does not itself constitute an anti-competitive conduct, however agricultural cooperatives do not fall outside the scope of Article 101(1) TFEU, as they may influence the trading conduct of their members so as to restrict competition in the market: Case C-399/93, *H. G. Oude Luttikhuis and others v. Verenigde Coöperatieve Melkindustrie Coberco*, [1995] ECR I-04515, §§ 10-16.

199 Articles 169, 170 and 171 of Regulation No 1308/2013 of the European Parliament and of the Council establishing a Common Organisation of the Markets in agricultural products, [2013] OJ L347/671 (hereinafter CMO Regulation) allowing Producer Organizations (POs) and Associations of Producer Organisations (APOs) to negotiate, on behalf of their members, contracts for the supply of the products concerned under a number of conditions?

200 These are “(i) to increase agricultural productivity (...) and the optimum utilisation of the factors of production, in particular labour; (ii) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; (iii) to stabilise markets; (iv) to assure the availability of supplies; and (v) to ensure that suppliers reach consumers at reasonable prices.”

201 Case 139/79, *Maizena GmbH v. Council*, [1980] ECR 3393, § 23; Case C-280/93, *Federal Republic of Germany v. Council*, [1994] ECR I-4973, § 61.

202 See Articles 207 to 210 of the CMO Regulation.

203 Articles 169, 170 and 171 of the CMO Regulation; Draft Commission Notice, Guidelines on the Application of the Specific Rules Set out in Articles 169, 170 and 181 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors, (2015), available at http://ec.europa.eu/competition/consultations/2015_cmo_regulation/draft_guidelines%20_en.pdf.

204 Draft Commission Notice, Guidelines on the Application of the Specific Rules Set out in Articles 169, 170 and 181 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors, (2015), §§ 38-39.

205 According to the Commission, if the negotiation by a PO on behalf of its members concerns supply in more Member States, the production volumes in each Member State should not exceed 15% of the national production for beef and veal and arable crops and of 20% of the relevant market for olive oil.

206 Section 12A of the Competition Act No. 89/1998 disposes that the Tribunal must “determine whether a merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).” This subsection (3) limits the public interest consideration to four conditions related to the effect that the merger will have on:

- A particular industrial sector or industry;
- Employment;
- The ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
- The ability of national industries to compete in international markets.

32. Both the Competition Tribunal²⁰⁷ and the Court of Appeal,²⁰⁸ found that the merger was not expected to result in a substantial lessening of competition. Walmart, indeed, was only indirectly present in South Africa through an exporter of fresh produce, International Produce Limited, which did not operate as a retailer. Moreover, Massmart had a market share of 25% in the South African retail sector, therefore raising no direct concerns about the existence of a substantial prevention or lessening of competition. Finally, on the basis of the economic evidence available, the Court agreed that the merger would have brought lower prices to consumers.

33. The Court was however concerned by the effects that the merger would have had on Massmart's local suppliers, especially SMEs, which could have been substituted by Walmart's international suppliers. The Court had thus to gauge between the positive effect of price reductions for consumers and the negative effect of possible job displacements in the local supply market. The Court acknowledged that Walmart operates a global value chain and that protecting domestic suppliers by prohibiting the merger would have been "futile." However, the Court felt that it had to balance the positive price effects to consumers with a remedy that would take into consideration the public-interest related condition laid down in Section 12A. For this reason, it ordered the establishment of a supplier development fund by Massmart, aiming at minimizing "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."²⁰⁹ The fund would provide an incentive to Massmart to purchase products from South African producers, thus guaranteeing the access of local suppliers to Walmart's supply chain in South Africa and eventually to its global network. Although the SA Court has not engaged directly with the concept of GVC, this has undoubtedly exercised some influence on the design of the remedy/merger conditions in this case.

34. Competition authorities may also be entrusted specific duties with regard to the regulation of superior bargaining power in the food sector. For instance, in Italy, the legislator has intervened through two different instruments, the traditional abuse of economic dependence laws and some new rules on the regulation of the contractual relationships between agricultural producers and business buyers when it is not possible to use the traditional tools of the prohibition of anticompetitive agreements and abuse of a dominant position. Article 62.8 of the law 27/2012 provides the Italian Antitrust Authority (ICA) the power to punish a conduct resulting in "an unwarranted exercise of bargaining power on the demand side at the expense of suppliers."²¹⁰ 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. Article 62.8, prohibits the stronger contracting party from imposing unfair conditions on the counterparty. On July 9, 2015, the ICA concluded the first procedure based on the application of Article 62.8, against the retailer Eurospin, for allegedly imposing upon its suppliers the half-yearly payment of two unjustifiably large sums which did not correspond to any service provided to them by the group.²¹¹ The ICA concluded, however, that the business conduct put in place by Eurospin did not constitute an infringement of Article 62.8. The contested contractual terms were indeed fairly negotiated and not imposed. Moreover, the ICA observed that the relative costs were proportioned to the service offered by Eurospin. ■

207 Walmart Stores Inc and Massmart Holdings Limited (2011) 73/LM/Nov10.

208 SACCAWU and Massmart Holdings Limited (2012) 110/CAC/Jun11.

209 SACCAWU and Massmart Holdings Limited (2012) 110/CAC/Jun11.

210 ICA, Agri-foodstuffs: according to the Antitrust, the market power of the organized mass distribution getting stronger, conflicting relationships with suppliers and uncertain effects on consumers, IC43, available at <http://www.agcm.it/en/newsroom/press-releases/2101-ic43-agri-foodstuffs-according-to-the-antitrust-the-market-power-of-the-organized-mass-distribution-getting-stronger-conflicting-relationships-with-suppliers-and-uncertain-effects-on-consumers.html>.

211 Italian Competition Authority Eurospin Italia S.p.A. decision No. 25551 of 9 July 2015.

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