The Comparison of the US and EU Agricultural Antitrust Exemptions

by

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Abstract

The article aims to compare the sectoral antitrust exemption for agriculture that exists in the United States (US) and the European Union (EU). The roots for the privileged position of agriculture under antitrust laws date back to 1914. Section 6 of the Clayton Act was the first US law which exempted certain cooperatives. In 1922, the protection was extended to a broader range of agricultural entities by the Capper-Volstead Act. These two acts have since then determined the scope and extent of the US exemption but have evolved through judiciary interpretation. The EU has had a similar exemption for agriculture since the beginnings of European integration. After presenting briefly the likely explanations for the privileged treatment of this sector under antitrust, the article aims to analyse the regulations in force in order to explore their similarities and differences. The analysis also

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seeks to answer the question of whether the 'accusation' that EU competition law – in contrast with the US antitrust regime – is not purely based on efficiency considerations can also be extended to the agricultural sector's privileged treatment. In the end, the rules in force of the two jurisdictions are compared and conclusions drawn.

Resumé

Cet article vise à comparer les exemptions sectorielles des règles de concurrence pour l'agriculture qui existent aux États-Unis (US) et dans l'Union européenne (UE). Les origines de la position privilégiée de l'agriculture au regard du droit de la concurrence remontent à 1914. La section 6 du Clayton Act a été la première loi américaine à exempter certaines coopératives. En 1922, la protection a été étendue à un plus large éventail d'entités agricoles par le Capper-Volstead Act. Ces deux lois ont depuis lors déterminé la portée et l'étendue de l'exemption américaine, mais ont évolué par le biais de l'interprétation judiciaire. L'UE dispose d'une exemption similaire pour l'agriculture depuis les débuts de l'intégration européenne. Après avoir présenté brièvement les explications probables du traitement privilégié de ce secteur dans le cadre du droit de la concurrence, l'article vise à analyser les réglementations en vigueur afin d'explorer leurs similitudes et leurs différences. L'analyse cherche également à répondre à la question de savoir si l'»accusation» selon laquelle le droit européen de la concurrence – contrairement au régime antitrust américain – n'est pas purement fondé sur des considérations d'efficacité peut également être étendue au traitement privilégié du secteur agricole. Enfin, les règles en vigueur dans les deux juridictions sont comparées et des conclusions sont tirées.

Key words: antitrust exemption; agriculture; European Union; United States; comparison.

JEL: K21, Q18

I. Introduction

The relationship between agriculture and antitrust has remained uncertain in many aspects ever since antitrust law has come to the fore at the end of the 19th century. However, it became clear early on that general antitrust provisions should not apply to the sector unconditionally, because primary agricultural production has its own burdens. The question whether agriculture's privileged position under antitrust is justified, first of all from an economic perspective, does not have an unequivocal answer. The ambiguity has further increased with the appearance of the consumer welfare paradigm and the

more economic approach, which have not escaped criticism regarding their effects on agri-food markets.[1]

The article aims to provide a comparative legal analysis on the sectoral agricultural exemption of the United States and the European Union, in the expectation that the juxtaposition may deepen the knowledge of the peculiar relationship between antitrust and the agricultural sector. The term 'comparative method' is understood as the functional, structural and hermeneutical methods used in comparative law. The functional one, as the name implies, aims to examine which function a certain provision fulfills in a legal system, and how this function is fulfilled in another legal system. Functionality is 'the basic methodological principle of all comparative law.'[2] The structural method is concerned with the question of the structure in which a legal norm is embedded in a legal system, and how it differs from the structure of another legal system built around a similar legal norm. The hermeneutical method concentrates on textual interpretation of laws. This comparison is not genealogical in nature, because the compared jurisdictions do not have a common ancestor. Instead, it is analogical, which may rather result in weaker conclusions, but 'these weak concepts may in turn be gateways to more profound research which could result in epistemological insights.'[3]

Of course, functional, structural and hermeneutical methods all interrelate in the course of the comparison and so it may be difficult to draw a firm dividing line between the methods. This comparison is based on the functional and structural methods rather than on the hermeneutical one.

The one and only comparison between the agricultural antitrust exemption of the EU and that of the United States was published more than 15 years ago,[4] and since then a number of developments have taken place regarding the issue; it is, therefore, worth giving fresh impetus to the discourse. Furthermore, it takes a political economy approach, rather than comparing the provisions in detail from a legal perspective.

The article is divided into three main parts. First, a concise explanation is provided on the two opposite approaches towards the exempted nature of agriculture under antitrust laws. It is necessary to briefly present that the viewpoints on this issue vary to a great extent, which results in indissoluble

[1] Valeria Sodano and Fabio Verneau, 'Competition Policy and Food Sector in the European Union' (2014) 26(3) Journal of International Food & Agribusiness Marketing 170.

[2] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 34.

[3] Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014) 57–58, 65–120.

[4] Arie Reich, 'The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation' (2006–2007) 42(3) Texas International Law Journal 843–874.

debates on the sector's competition-related treatment. Second, the paper puts together the current antitrust treatment of the agricultural sector, in terms of both legislation and enforcement, in order to compare the two analysed jurisdictions. Regarding the United States, Section 6 of the Clayton Act[5] and the Capper-Volstead Act[6] are scrutinised, while as to the European Union, attention is directed at the relevant provisions of the TFEU[7] and two EU Regulations, the single common market organisation (hereinafter: the CMO Regulation[8]) and the Regulation setting up antitrust derogations for the agricultural sector (hereinafter: the Agri-Food Competition Regulation[9]). The analysis provides the possibility to explore the similarities and differences between the two sides of the Atlantic. Third, an in-depth comparison is provided for two reasons. First, in order to answer whether it is true that EU competition law does not only operate with efficiency-based assessment in its antitrust applying to the agricultural sector, and second, in order to update the discourse on agricultural antitrust exemptions and fill the analitical gap concerning their comparison.

II. Explanations behind the privileged position of agriculture

Antitrust law contains special provisions exclusively applying to the agricultural sector. These rules aim to put market players of this sector in a more favourable market position. The increased protection is typically provided for farmers, that is, those at the starting point of the agricultural and food supply chain. The question arises as to what explains and justifies the existence of sector-specific rules exempting agriculture from general antitrust rules, and that of sector-specific rules adopted only and exclusively for the agricultural sector.

The positions – in a simplified manner – can be divided into two broad categories. On the one hand, there are those who in most cases have strong reservations about the privileged position of the sector, and argue that there

[5] 15 US Code § 17.

[6] 7 US Code §§ 291–292.

[7] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/1.

[8] Regulation (EU) No 1308/2013 of the European Parliament and of the Council on establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 [2013] OJ L 347/671.

[9] Council Regulation (EC) No 1184/2006 on applying certain rules of competition to the production of, and trade in, agricultural products [2006] OJ L 214/7.

is little justification for the privileged treatment of farmers under antitrust laws and trade regulations. They are the ones who see in these specific and exceptional norms the strength and success of the agricultural lobby, both at national and EU level, and do not connect the justification behind the adoption of these rules with the specific nature of agricultural production and the resulting anomalies experienced by farmers when selling their goods. As a German author puts it, for example, the minimum harmonisation directive on unfair trading practices in the agricultural and food supply chain[10], has pushed the principles of competition and contractual freedom in the food chain even further into the background, sacrificing them to interest-driven politics.[11] In fact, the national and EU power of the agricultural lobby is considerable and, as European integration has continued to deepen, the lobbying organisations and groups at Community (EU) level have been very effective, within the institutional framework of COPA-COGECA (union of the two largest farmer/agro organisations in Europe, that is, Comité des organisations professionnelles agricoles-Comité général de la coopération agricole de l'Union européenne), which brings together European producers. In this way, they have achieved the Europeanisation of national agricultural interests, which has enabled them to channel their needs and demands into the EU institutions and their decision-making processes.[12] The position of this group can be paralleled with the theory of regulatory capture[13] described by *Stigler* in his influential article on economic regulation theory,[14] which suggests that regulation is nothing more than the result of political battles between interest groups in order to maximise the benefits of a policy for one or another interest group.[15]

Others take a more moderate tone. In *Buhr*'s opinion, legislators and enforcers must be careful when restricting certain contractual practices in the food supply chain and preventing vertical integration or horizontal

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[10] Directive (EU) 2019/633 of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (UTP Directive) [2019] OJ L 111/59.

[11] Philipp Pichler, 'Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm' (2021) 9 Neue Zeitschrift für Kartellrecht 537.

[12] Carine Germond, 'Preventing Reform: Farm Interest Groups and the Common Agricultural Policy' in Wolfram Kaiser and Jan Henrik Meyer (eds), *Societal Actors in European Integration – Polity-Building and Policy-Making 1958–1992* (Palgrave Macmillan 2013) 121–123.

[13] John Lipczynski, John O.S. Wilson and John Goddard, *Industrial Organization* (5th edn, Pearson 2017) 16.

[14] George J. Stigler, 'The Theory of Economic Regulation' (1971) 2(3) The Bell Journal of Economics and Management Science, 3–21.

[15] Herbert Hovenkamp and Fiona M. Scott Morton, 'Framing the Chicago School of Antitrust Analysis' (2020) 168 University of Pennsylvania Law Review 1843, 1854.

concentration, because they may pursue 'risk reducing overall welfare' by not taking into account the advantages of economies of scale and efficiencies created by integration.[16] That is to say, the justification behind sectoral provisions can rather be assessed on a case-by-case basis.

The other group's representatives not only take into account but also emphasise that the agricultural sector has certain specific characteristics which, compared with other sectors of the economy, justify its special treatment under antitrust law.[17] Among these sectoral characteristics, they mention: (a) the long duration of the production period and profitability; (b) the very large number of farmers; (c) the irregularity of the supply of agricultural products, that is, the difficulty of predicting and determining the quantity and quality of harvests; (d) the rigidity of demand, that is, the fact that demand is independent of price changes; (e) the fact that agricultural production costs adapt to falling prices with astonishing slowness. In addition, there are also non-economic aspects such as the strong conservatism of farmers, for whom agriculture is not only a source of income that provides them with living expenses but also a complex lifestyle.[18] The most important objective and unavoidable factor, which is the basis of many of the characteristics listed, is the dependence and vulnerability of agricultural production to weather and climatic conditions. Unusual weather conditions are clearly reflected in the year-to-year volatility of yields,[19] which is reflected in price volatility of produced goods. These factors strongly determine, influence and constrain farmers who wish to market and sell their produce to food processors, wholesalers and retailers. The effects of price volatility are increasingly being felt by producers as the globalisation of the food chain and the increasing integration of agricultural markets are having their effects felt more rapidly than ever before on domestic markets.[20]

The truth may lie on the Horatian *aurea mediocritas*: by finding the middle ground somewhere halfway between these two groups. The agricultural lobby does include strong and vocal interest groups, both at national level and in the European Union, but its representatives can bring about convincing arguments

[16] Brian L. Buhr, 'Economics of Antitrust in an Era of Global Agri-Food Supply Chains: Litigate, Legislate and/or Facilitate?' (2010) 15(1) Drake Journal of Agricultural Law 59.

[17] See, for example: K.J. Cseres, '"Acceptable" Cartels at the Crossroads of EU Competition Law and the Common Agricultural Policy: A Legal Inquiry into the Political, Economic, and Social Dimensions of (Strengthening Farmers') Bargaining Power' (2020) 65(3) The Antitrust Bulletin 406.

[18] Wilhelm Röpke, *Crises and Cycles* (William Hodge & Company 1936) 21.

[19] John B. Penson, Jr., Oral Capps, Jr., C. Parr Rosson III and Richard T. Woodward, *Introduction to Agricultural Economics* (7th edn, Pearson 2018) 24.

[20] Food and Agriculture Organization of the United Nations, Price Volatility in Agricultural Markets: Evidence, impact on food security and policy responses (2010).

to get the legislation they want. This is – of course – a clear privilegisation from the viewpoint of antitrust law. Nevertheless, as an additional remark, it is worth mentioning that the commodification of agricultural products and foodstuffs, that is treating them merely as commodities, ignores their most important feature: food is essential. Those who produce it are predominantly not only sellers of products in a given market but also representatives of the rural lifestyle, the guardians of rural communities. Moreover, the necessity of food for our existence may suggest that those who produce our foodstuffs need protection against exclusionary and exploitative business conducts so that they can appropriately perform their activity. The absence of sector-specific regulations would show precisely that this specificity is not respected during the lawmaking processes. The exceptional norms for the agricultural sector, and the specific norms adopted solely and exclusively for the agricultural sector, such as the UTP Directive in the EU, lead us towards the opposite direction, that is, towards the acknowledgement of agriculture's importance beyond commodity production. There are no illusions here, this argument is insufficient from the standpoint of antitrust; therefore, it is reasonable to search for economic justifications.

Agricultural antitrust exemptions are related to anti-competitive agreements, which make it possible for agricultural producers and their associations to combine forces and unite their economic power. This statutory possibility, both in the EU and the United States, is crucial so that farmers could have countervailing market power against their buyers. Buyer power depresses the prices producers receive for their products, which is beneficial for end consumers if these lower prices paid to suppliers by buyers are actually reflected in lower consumer prices in the retail sector.[21] Buyer power can be evidenced by an 'asymmetric' price response of retail products to farmgate price changes. This means, for example, that when there is a supply shortage that raises farmgate prices, this increase is immediately passed on to consumers, while when there is a decrease in farmgate prices, the expected decrease in retail prices appears only gradually, and results in high profits for intermediaries during the period in which prices are unusually high.'[22]

Lower farmgate prices may force less competitive agricultural producers out of business or mean that producers in their capacity as employers lower the wages of their workers. Therefore, there is a connection between the ability of competition regimes to address buyer power problems and rural

[21] On price transmissions, see: Commission of the European Communities, Analysis of price transmission along the food supply chain in the EU (2009).

[22] Executive Summary, OECD Policy Roundtable on Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling (2004) 8.

employment.[23] There are scholars who even find a a causal link between buyer power abuses and violations of the right to food.[24] It goes without saying that these problems – unless linked to monopsony – are difficult to be handled by antitrust agencies strictly operating with the credo of increasing economic efficiency (mostly in the form of consumer welfare).

Buyer power has two forms: monopsony power and bargaining power. While the former is inefficient in all cases because of its withholding effect, the latter requires a much more careful analysis whether it actually has adverse effects on competition.[25] Countervailing power established with the help of the exemption offsets monopsony power,[26] but the exemption in the EU is also applicable when farmers face bargaining power which does not necessarily constitute a danger to efficiency. Therefore, it seems that the statutory exemption may create a possibility for agricultural producers to have market power versus their buyers even when this power has nothing to countervail. It may even be detrimental in that consumer prices might increase. This is called supervailing power by *Baumer, Masson and Masson*. As can be seen later, for the sake of controlling supervailing power which may arise from the antitrust exemption, US antitrust has a 'control mechanism' in the form of forbidding undue price enhancement.[27] This explicit control mechanism is missing in EU antitrust.

Based on *Carstensen*'s clustering, which distinguishes five categories for the justifications of antitrust exemptions,[28] three of them may prove to be useful regarding the agricultural sector: (1) market or institutional failures, (2) wealth transfers and protection from competition, and (3) exemptions that improve the efficiency of the enforcement of competition policy. Of these three relevant justifications, only one group seems to be acceptable for contemporary antitrust,

[23] Olivier de Schutter, 'Addressing Concentration in Food Supply Chains: The Role of Competition Law in Tackling the Abuse of Buyer Power' (2010) Briefing Note 03 – United Nations Special Rapporteur on the Right to Food.

[24] Aravind R. Ganesh, 'The Right to Food and Buyer Power' (2010) 11(11) German Law Journal 1190–1244; Tristan Feunteun, 'Cartels and the Right to Food: An Analysis of States' Duties and Options' (2015) 18(2) Journal of International Economic Law 341–382.

[25] Ignacio Herrera Anchustegui, *Buyer Power in EU Competition Law* (Concurrences 2017).

[26] David L. Baumer, Robert T. Masson and Robin Abrahamson Masson, 'Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture' (1986) 31(1) Villanova Law Review 183–252.

[27] Baumer, Masson and Masson (n 26) 201.

[28] 1. Natural monopoly, 2. Market or institutional failure, 3. Wealth transfers and protection from competition, 4. Exemptions facilitating the transition of industry structure from state ownership or direct regulation to market orientation, 5. Exemptions that improve the efficiency of the enforcement of competition policy. See: Peter Carstensen, 'Economic Analysis of Antitrust Exemptions' in Roger D. Blair and D. Daniel Sokol (eds), *The Oxford Handbook of International Antitrust Economics*, vol. 1 (OUP 2015) 33–62.

that is, the group of market failures which covers the above-mentioned creation of countervailing power. Countervailing power, first coined by *Galbraith*, enabled by Section 6 of the Clayton Act and the Capper-Volstead Act in the US and secondary law provisions in the EU, is different from the market power of industrial firms in that it is *the response* 'to the power of those to whom they sold their […] products.'[29] The concept of countervailing power can be complemented with the consideration of reducing contracting costs.[30] Suppliers of agricultural products have no market power even if they negotiate terms and conditions jointly. However, joint negotiations do reduce costs, and could restrain their business partners when they engage in strategic conduct. Another theory, which is listed by *Carstensen* among the justifications to cure market or institutional failures, and which is useful for agricultural producers, is the possibility for competitors to cooperate for the sake of creating an efficient market. This is embodied by agricultural cooperatives in the US and producer organisations (hereinafter: POs) in the EU.

The considerations of the group pursuing 'wealth transfers and protection from competition' is not what antitrust tolerates and to what it wants to subscribe to at all. Simply put, it is related to competition policy but it is not the field of antitrust. As put by *Shelanski*, '[a]ntitrust is not, however, the only institution through which government addresses competition concerns and market failures.'[31] *Carstensen* mentions, as one of the underlying arguments of wealth transfers and protection from competition, the conferring of market power to achieve specific, in particular social, goals. Trade regulation provisions, such as the UTP Directive, aim to contribute to the attainment of increasing individual earnings of agricultural producers, and thus their standard of living. Besides this social goal, there are other arguments to appear within this group. The activity of agricultural producers, that is, agricultural production, is supported because, as put by *Carstensen* in general, 'the costs of protection are worth the benefit to some other socially desirable objective.'[32] As to the agricultural sector, these other socially desirable goals are perfectly described by the concept of 'multifunctional agriculture'. The protection of the environment, the preservation of landscape, as well as rural employment and food security all are important pillars of the agricultural activity, which may be deemed to be justifications for the intervention into competition in agri-food markets. If policymakers are of the opinion that small and medium-

[29] John Kenneth Galbraith, *American Capitalism – The Concept of Countervailing Power* (Routledge 1993) 139.

[30] Carstensen (n 28) 49.

[31] Howard Shelanski, 'Antitrust and Deregulation' (2018) 127(7) The Yale Law Journal 1926.

[32] Carstensen (n 28) 56.

sized agricultural enterprises better contribute to the preservation of rural landscape and environmental protection than large agribusinesses engaged in agricultural production, they may attempt to give a higher level of protection to smaller market participants so that they can not easily be squeezed out of the market despite the fact that they may be (less) efficient. To this group, we can also add the wealth transfer considerations[33] provided for agricultural producers through sector-specific regulations. Regarding agriculture, it is closely related to the specific social objective of increasing the standard of living of producers, which is pursued by agricultural policy. Highly regulated sectors, such as agriculture, may require that not only antitrust agencies but also sectoral authorities have certain powers to contribute to the efficiency of the enforcement of competition policy.[34] A good example of this is the situation after the implementation of the Unfair Trading Practices Directive (hereinafter: the UTP Directive) in Germany, and the regulation in force even before the implementation of the UTP Directive in Hungary, where agriculture-specific authorities (*Federal Agency for Agriculture and Food und Ernährung* and *National Food Chain Safety Office*) make decisions on unfair trading practices committed against the suppliers of agri-food products. Of course, addressing imbalances in the food supply chain with legal instruments beyond antitrust, may create contradictions between, on one hand, competition laws and fair trading laws,[35] and, on the other hand, competition authorities and other regulatory agencies.

All in all, it is reasonable to distinguish between, on the one hand, economic arguments suitable to justify agricultural antitrust exemptions, and, on the other hand, arguments which can be called upon when one aims to justify other competition-related regulations in agri-food markets. The one and only acceptable antitrust argument for adopting exceptional norms for the agricultural sector is related to the concept of countervailing power. Its creation by agricultural suppliers has to be made possible to offset the monopsony powers of buyers. From an efficiency-based viewpoint, it is only acceptable if buyer power appears as monopsony, rather than bargaining power. Although the bargaining power of buyers may have adverse effects on competition, as put by *Anchustegui*, it is not harmful at first sight. However, there may be other arguments to be referred to when attempting to find the justification for competition-related regulations not falling under the scope of conventional antitrust. The prohibition of unfair trading practices is easier to be explained by arguments related to wealth transfers or socially desirable objectives pursued by other policies. Although wealth transfers to

[33] Carstensen (n 28) 56.

[34] Carstensen (n 28) 58–59.

[35] Philippe Chauve, Antonia Parera, and An Renckens, 'Agriculture, Food and Competition Law: Moving the Borders' (2014) 5(5) Journal of European Competition Law & Practice 304.

agricultural producers are economic in nature, they do not play a role in antitrust enforcement, similarly to those agricultural policy objectives which aim to raise the standard of living of farmers. These latter types of arguments seem like demands of interest groups,[36] in which the power of agricultural lobby can be discovered.

In conclusion, competition-related rules in agri-food markets have two different groups of justifications. While the exemptions provided for the creation of countervailing power are accepted by antitrust policy, socially desirable objectives and wealth transfers come from the field of agricultural policy that influences competition in agri-food markets; they do not fit the legal toolbox at the disposal of conventional antitrust law.

III. Regulation in force

1. US regulations: Clayton Act's Section 6 and the Capper-Volstead Act

It is wrong to assume that antitrust laws do not apply to agricultural cooperatives at all: they are not completely immune.[37] The scope of the exemption benefiting them under antitrust laws is limited.[38] However, its exact extent is unclear.[39]

The essence of Clayton Act's Section 6 is to permit 'the operation of agricultural or horticultural mutual assistance organizations when such organizations do not have capital stock or are not conducted for profit.'[40] The reason behind this is clear: the provisions of the Sherman Act can be interpreted in such a way that they cover mutual assistance, between local farmers managing small farms, which normally violate the Act, through the joint pricing and marketing of agricultural products, resulting in the elimination of competition.[41] If no protection was afforded to farmer organisations, these

[36] R. Shyam Khemani, 'Application of Competition Law: Exemptions and Exceptions' (2003) UNCTAD Series on Issues in Competition Law and Policy.

[37] T.O., 'Agricultural Cooperatives and the Antitrust Laws: Clayton, Capper-Volstead, and Common Sense' (1958) 44(1) Virginia Law Review 63.

[38] Alice Schumacher Horneber, 'Agricultural Cooperatives: Gain of Market Power and the Antitrust Exemption' (1982) 27(3) South Dakota Law Review 476.

[39] William E. Peters, 'Agricultural Cooperatives and the Antitrust Laws' (1963) 43(1) Nebraska Law Review 103.

[40] US Department of Justice – Antitrust Division, *Antitrust Division Manual* (5th edn, 2021) II-13.

[41] Stephen D. Hawke, 'Antitrust Implications of Agricultural Cooperatives' (1984) 73(4) Kentucky Law Journal 1036–1037.

practices would mean a *per se* violation of the Sherman Act.[42] However, this was counteracted by Section 6, albeit with significant limitations where capital-stock and for-profit organisations are not covered by this provision. This limitation was overruled by the Capper-Volstead Act which extended the scope of protection.

First of all, a distinction has to be made. While the activities *below* cooperative level, such as marketing agreements between farmers and cooperatives and joint marketing contracts among affiliated cooperatives, are exempt from antitrust laws, the activities *on* cooperative level, such as the ones mentioned in the next two cases, are not.[43] In its 1939 judgment of the *United States v. Borden* case, the US Supreme Court also emphasised that agricultural cooperatives do not enjoy full exemption under antitrust laws.[44] The *Borden* judgment clearly shows that cooperatives shall not combine with non-exempt persons in restraining trade.[45] In 1960, as a continuation of this restrictive analysis[46], the *Borden* approach was clarified and expanded on in the *Maryland and Virginia Milk Producers Assn., Inc. v. United States* case.[47] With this judgment 'the Supreme Court established that the agricultural cooperative exemption does not extend to unilateral competition-stifling practices. The Court condemned a cooperative's coercive and predatory trade practices which were so far outside the legitimate objectives of agricultural cooperatives as to be clear violations of the Sherman Act.'[48] The 'predatory action' test was developed by the Supreme Court in light of the legislative history of Clayton Act's Section 6 and the Capper-Volstead Act.[49]

Capper-Volstead immunity is granted to a cooperative, if it has a legitimate objective to be attained when engaged in agricultural business activities, and no predatory trade practices are used by the cooperative to achieve this goal. It means that an ends-means analysis can be carried out consisting of four patterns: (a) legitimate goal – non-predatory action, (b) legitimate goal – predatory action, (c) illegitimate goal – non-predatory action, and (d) illegitimate goal – predatory action.[50] Obviously, only the first pattern

[42] Richard T. Rogers and Richard J. Sexton, 'Assessing the Importance of Oligopsony Power in Agricultural Markets' (1994) 76(5) American Journal of Agricultural Economics 1144.

[43] Alan M. Anderson, 'Agricultural Cooperative Antitrust Exemption-Fairdale Farms Inc. v. Yankee Milk Inc.' (1981–1982) 67(2) Cornell Law Review 401–402.

[44] US Supreme Court: United States v. Borden Co., 308 US 188 (1939).

[45] Schumacher Horneber (n 23) 480.

[46] Hawke (n 41) 1044.

[47] US Supreme Court: Maryland and Virginia Milk Producers Assn., Inc. v. United States, 362 US 458 (1960).

[48] Schumacher Horneber (n 23) 480.

[49] Hawke (n 41) 1045.

[50] Hawke (n 41) 1047–1048.

is exempt. Although it is an established element of the US Supreme Court case law that antitrust law exemptions shall be interpreted narrowly,[51] the Capper-Volstead Act's protection has even been extended to price-fixing agreements,[52] despite the fact that the Act's wording does not explicitly mention it. Some say that price-fixing is the most effective tool of achieving bargaining balance, and has to be interpreted as an aspect to be included in the term 'marketing'.[53] This also shows the likely interpretation problems emerging from Section 6 of the Clayton Act: what is meant by 'legitimate objects'? Besides collective processing, preparing for market, and handling, Section 1 of the Capper-Volstead Act declares that marketing is also a possible legitimate object to be carried out by a cooperative; however, the boundaries of these terms leave room for different interpretations.

Furthermore, we must also not forget the express requirements of the Capper-Volstead Act, which are well summarised by *Hawke* as: producing agricultural products by the cooperative's members; operating for the mutual benefit of members; the volume of non-member business not exceeding that of member business; structured so that each and every member has one vote irrespective of the capital owned, or the dividends paid per year do not exceed eight percent on stock or membership capital; voluntary membership; and performing at least one of the statute's enumerated acts before the immunity. 'Most of these requirements are inherent in an agricultural cooperative's basic structure and, therefore, should present little problem for the eligible cooperative.'[54] It was explicitly held by the Supreme Court that even one non-farmer member in a cooperative deprives that cooperative of the exemption provided by the Capper-Volstead Act.[55] This approach has also been adopted by district court judgments recently.[56] The inadvertent nature of the inclusion

[51] See the cited cases in footnote 155 of Alison Peck, 'The Cost of Cutting Agricultural Output: Interpreting the Capper-Volstead Act' (2015) 80(2) Missouri Law Review 473: 'Union Labor Life Ins. Co. v. Pireno, 458 US 119, 126 (1982); see also Bankamerica Corp. v. United States, 462 US 122, 147–48 (1983); Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 US 205, 231 (1979); Abbott Labs. v. Portland Retail Druggists Ass'n, Inc., 425 US 1, 11 (1976); Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 US 726, 733 (1973); United States v. McKesson & Robbins, Inc., 351 US 305, 316 (1956); United States v. Masonite Corp., 316 US 265, 280 (1942).'

[52] Donald M. Barnes and Jay L. Levine, Farmer Cooperatives 'Take Cover': The Capper-Volstead Exemption is Under Siege (2021) 74(1) Arkansas Law Review 16.

[53] Charles Edward Black and Ronald Kent Sufrin, 'Agricultural Cooperatives: Price-Fixing and the Antitrust Exemption' (1978) 11 U.C.D. Law Review 553–554.

[54] Hawke (n 41) 1039–1040.

[55] US Supreme Court: Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 389 US 384 (1967); US Supreme Court: National Broiler Marketing Association, Petitioner, v. United States, 436 US 816 (1978).

[56] John C. Monica, Jr. and Jetta C. Sandin, 'Agricultural Antitrust Pitfalls' (2017) 50(5) Maryland Bar Journal 19. See: United States District Court, E.D. Pennsylvania: In Re

is irrelevant, so is the good faith of the members in being part of a properly constituted cooperative.[57]

Today, the Capper-Volstead Act is under fire. Many criticise that cooperatives have grown to such a size that their protection under the Act is unjustified. However, it is simplistic to label all cooperatives with the same size. These voices fail to take into account that not only have cooperatives grown, but so have their buyers, particularly retail chains, and thus the imbalance in bargaining power has remained. Due to the small number of court cases interpreting the Capper-Volstead Act, there are still many unanswered questions about this law. There are conflicting views as to whether the exemption covers supply management in the form of production restriction, as well as whether vertical integration of farmers nullifies the exemption. Moreover, in many cases, even deciding who qualifies as a 'farmer' may also be a challenging question.[58] The issue of immunity for production and supply restrictions under the Act is manifold, and arguments can be raised both pro and contra.[59] A comprehensive and in-depth analysis of the question concludes that 'Congress did give agriculture certain exemptions because of inherent difficulties endemic to agricultural markets, but those exemptions extend only as far as Congress intended. Output limitations – however effective in controlling supply and fixing prices – do not appear to be among the tools that Congress intended to exempt in passing the Capper-Volstead Act.'[60]

The provision on jurisdiction set in Section 2 of the Capper-Volstead Act is also worthy of a few comments. It gives authorisation to the Secretary of Agriculture 'to obtain a cease and desist order if he finds that an association has monopolized or restrained trade to such an extent that the price of any agricultural product is unduly enhanced.'[61] The main issue is the extent and scope of this jurisdiction: is it exclusive or primary in relation to that of the Federal Trade Commission and the Department of Justice? The question was answered in the *Borden* case, whose relevant findings on this are reproduced here in full:

> 'We find no ground for saying that this limited procedure is a substitute for the provisions of the Sherman Act, or has the result of permitting the sort of

Mushroom Direct Purchaser Antitrust Litigation, 621 F. Supp. 2d 274 (2008); United States District Court, E.D. Pennsylvania: In Re Processed Egg Products Antitrust Litigation, 206 F. Supp. 3d 1033 (2016).

[57] Barnes and Levine (n 52) 10 and 13.

[58] Barnes and Levine (n 52) 16–19, 19–23, and 23–24.

[59] See the arguments summarised by Christine A. Varney, 'The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity' (December 2010) The Antitrust Source 5–8.

[60] Peck (n 51) 498.

[61] Barnes and Levine (n 52) 8.

> combinations and conspiracies here charged unless or until the Secretary of Agriculture takes action. That this provision of the Capper-Volstead Act does not cover the entire field of the Sherman Act is sufficiently clear. The Sherman Act authorizes criminal prosecutions and penalties. The Capper-Volstead Act provides only for a civil proceeding. The Sherman Act hits at attempts to monopolize as well as actual monopolization. And § 2 of the Capper-Volstead Act contains no provision giving immunity from the Sherman Act in the absence of a proceeding by the Secretary. We think that the procedure under § 2 of the Capper-Volstead Act is auxiliary, and was intended merely as a qualification of the authorization given to cooperative agricultural producers by § 1, so that, if the collective action of such producers, as there permitted, results in the opinion of the Secretary in monopolization or unduly enhanced prices, he may intervene and seek to control the action thus taken under § 1. But as § 1 cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment, the qualifying procedure for which § 2 provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under § 1 of the Sherman Act for the purpose of punishing such conspiracies.'[62]

It means that the Secretary of Agriculture has neither exclusive nor primary jurisdiction over antitrust offenses of agricultural cooperatives.[63] Actually, we must not forget that '[t]he Secretary of Agriculture has never been called upon to determine whether an association has restrained trade to such an extent that it has unduly enhanced prices.'[64]

Besides the Capper-Volstead Act, another piece of agricultural legislation must be noted: as an expansion to the former, the Cooperative Marketing Act of 1926 was passed to provide further protection for agricultural cooperatives. It authorises farmers to acquire, exchange, interpret, and disseminate past, present, and prospective information on crops, markets, statistics, economics, and other similar information by direct exchange between them, and/or their associations or federations, and/or by and through a common agent created or selected by them.[65] This law implies that no court action could be brought against farmers because of an anti-competitive exchange of information.

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[62] See: US Supreme Court (1939) United States v. Borden Co., 308 U. S. 206.

[63] Ralph H. Folsom, 'Antitrust Enforcement under the Secretaries of Agriculture and Commerce' (1980) 80(8) Columbia Law Review 1634.

[64] Donald A. Frederick, 'Antitrust Status of Farmer Cooperatives: The Story of the Capper-Volstead Act' (US Department of Agriculture 2002) 281.

[65] 7 US Code § 455. Dissemination of crop, market, etc., information by cooperative marketing associations. As *Mahaffie* put it: 'Elements of the exemption are also contained in the Cooperative Marketing Act of 1926 […].' See: Charles D. Mahaffie Jr., 'Cooperative Exemptions under the Antitrust Laws: A Prosecutor's View' (1970) 22(3) Administrative Law Review 436.

2. EU regulations

2.1. Primary law

When addressing the primary law of the EU on antitrust provisions applying to agriculture, we must start the analysis with the Treaty on the Functioning of the European Union.[66] The Treaty on European Union does not include any specific provision concerning the issue.

In principle, the EU defines its common agricultural and fisheries policy, which – according to *Whish* and *Bailey* – has its own philosophy.[67] The internal market shall extend to agriculture, fisheries and trade in agricultural products.[68] Therefore, the common agricultural and fisheries policy is part of the internal market. Save as otherwise provided in Articles 39 to 44 TFEU, the rules laid down for the establishment and functioning of the internal market shall also apply to agricultural products.[69] Rules on competition, being positioned in Chapter 1[70] of Title VII of the TFEU from Article 101 to 109, are a part of the internal market.[71] However, since the beginning of European integration, European agricultural markets have not been fully exposed to free competition.[72] *Schweizer* posits that the introduction of common competition rules for agricultural markets has a negative and a positive component. The negative component relates to the application to agriculture of the competition rules of Articles 101 et seq. TFEU. The positive component opens the way for the European Parliament and the Council to independently regulate competition issues in the agricultural sector.[73]

The basic system and derogation is provided by Article 42 TFEU which declares as follows:

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[66] See also the analysis: Jan Blockx and Jan Vandenberghe, 'Rebalancing Commercial Relations along the Food Supply Chain: The Agricultural Exemption from EU Competition Law After Regulation 1308/2013' (2014) 10(2) European Competition Journal 387; Cseres (n 17) 409–413.

[67] Richard Whish and David Bailey, *Competition Law* (7th edn, OUP 2012) 963.

[68] TFEU, Art. 38(1).

[69] TFEU, Art. 38(2).

[70] Section 1 of Chapter 1 (from Article 101 to 106) deals with rules applying to undertakings, while Section 2 of Chapter 1 is concerned with rules on state aids (from Article 107 to 109).

[71] TFEU, Article 3(1) b). See: Walter Frenz, 'Agrarwettbewerbsrecht' (2010) 40(7) Agrar- und Umweltrecht 193–195.

[72] Ines Härtel, '§ 7 Agrarrecht' in Mathias Ruffert (ed), *Europäisches Sektorales Wirtschaftsrecht* (1st edn, Nomos Verlag 2013) 437.

[73] Dieter Schweizer, 'Art. 42 AEUV' in Torsten Körber, Heike Schweitzer and Daniel Zimmer (eds), *Wettbewerbsrecht, Band 1: EU. Kommentar zum Europäischen Kartellrecht* (6th edn, C.H. Beck 2019).

> The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.[74]

This provision establishes the primacy of agricultural policy over general competition law.[75] Article 39 TFEU comprises the objectives of the Common Agricultural Policy (hereinafter: CAP), which have to be taken into consideration when deciding on the extent of the application of competition rules to the production and trade in agricultural products.[76] One – perhaps the most important – objective of the CAP runs counter to the conventional objective(s) of antitrust. The goal of ensuring a fair living standard for farmers through, in particular, increasing their individual earnings is in objective contradiction with the aim of conventional antitrust that is committed to increase economic efficiency in the form of enhancing consumer welfare. That is to say, while agricultural policy places its main emphasis on producer surplus, antitrust policy places it on consumer surplus.[77] It brings an irresolvable tension between these two public policies and draws a boundary between the above-mentioned groups based on their respective value judgments, that is, whether to prefer producers or consumers in this specific context.

Article 43(2) TFEU lays down the procedural rules which have to be followed within the framework of EU decision-making: the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish[78] those rules which provide the possibility of derogation from general competition rules and, thus, the special treatment of agriculture.

2.2. Secondary law: Agri-Food Competition Regulation

The possibility for derogations established by the TFEU is realised in secondary legal acts, as already mentioned, in the CMO Regulation and the Agri-Food Competition Regulation. The antitrust provisions in these legal acts

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[74] TFEU, Article 42. See also Philipp Groteloh, 'Grundzüge des Agrarkartellrechts' in Matthias Dombert and Karsten Witt (eds), *Münchener Anwaltshandbuch Agrarrecht* (2nd edn, C.H. Beck 2016).

[75] Härtel (n 73) 438.

[76] TFEU, Article 39(1).

[77] Philip Watson and Jason Winfree, 'Should we use antitrust policies on big agriculture?' (2021) Applied Economic Perspectives and Policy <https://doi.org/10.1002/aepp.13173> accessed 25 June 2022.

[78] TFEU, Article 43(2).

complement each other in terms of the scope *ratione materiae*. The Agri-Food Competition Regulation covers the trade in those Annex I products, which are not covered by the CMO Regulation.

The Agri-Food Competition Regulation replaced – with minor changes – the Council Regulation No 26 of 4 April 1962.[79] The replacement took place because of clarity and rationality requirements.[80] The policy behind its adoption is derivable from the general objectives of the Common Agricultural Policy.

Although pursuant to Article 1 of the Agri-Food Competition Regulation, Articles 101 to 106 TFEU, as well as provisions adopted for their implementation, shall apply to all agreements, decisions and practices referred to in Articles 101(1) and 102 TFEU which relate to the production of, or the trade in, the products listed in Annex I to the TFEU, these conducts are also subject to Article 2 of the Agri-Food Competition Regulation.[81]

The meaning of agricultural products is clarified in CJEU case law.[82] Given that the following examples are not agricultural products listed in Annex I, special provisions do not apply to them: products obtained by further processing made from original products listed in Annex I, such as cognac brandies;[83] primary, but non-Annex I, agricultural products used as auxiliary substances for Annex I products;[84] primary, but non-Annex I, agricultural products, such as furskins.[85] Insofar as primary products have already been

[79] Although it is of little importance, Cseres [(n 17) 411] writes that Regulation No 26 of 4 April 1962 was superseded by Regulation 1234/2007, the first Single Common Market Organisation. However, this statement is not true. Council Regulation (EC) No 1184/2006, which I call Agri-Food Competition Regulation in this article, is the one that declares in its Article 4 that Regulation No 26 shall be repealed.

[80] Agri-Food Competition Regulation, Recital (1) and Art. 5.

[81] Agri-Food Competition Regulation, Art. 1.

[82] See: Dieter Schweizer, 'GWB § 28 Landwirtschaft' in Torsten Körber, Heike Schweitzer and Daniel Zimmer (eds), *Wettbewerbsrecht, Band 2: GWB. Kommentar zum Deutschen Kartellrecht* (6th edn, C.H. Beck 2020).

[83] Case 123/83 *Bureau national interprofessionnel du cognac v Guy Clair* EU:C:1985:33, para 15: '[…] potable spirits are expressly excluded from the category of agricultural products.'

[84] Case 61/80 *Coöperatieve Stremsel- en Kleurselfabriek v Commission of the European Communities* EU:C:1981:75, paras 20–21: The applicant's fifth submission was that animal rennet for cheese making is agricultural product despite of the fact that it is not included in the Annex of agricultural products (then: Annex II, now: Annex I). According to the Court, 'in order for the Regulation to be applicable to rennet, that product must therefore itself come under Annex II to the Treaty. It follows that Regulation No 26/62 can have no application in this case and that the applicant's fifth submission must be rejected.'

[85] Case T-61/89 *Dansk Pelsdyravlerforening v Commission of the European Communities* EU:T:1992:79, para 2: 'The scope of Regulation No 26 applying certain rules of competition to production of and trade in agricultural products was limited in Article 1 thereof to the production of and trade in the products listed in Annex II to the Treaty. Consequently, that

treated or processed, they are only covered by the special competition regime if the treated or processed product is listed in Annex I.[86]

Article 2 includes the exceptions to Article 101(1) TFEU. In *Whish*'s words, these exceptions are the so-called derogations.[87] Of the two pillars of EU competition law applying to undertakings regulated in the TFEU, the Agri-Food Competition Regulation only sets out derogations with regard to the prohibition of anti-competitive agreements; it does not recognise any derogation regarding the abuse of dominance.[88] That is, the Agri-Food Competition Regulation does not affect the prohibition of abuse of dominace under Article 102 TFEU; this, therefore, applies in full in the agricultural sector.[89]

The two main derogations in relation to Article 101(1) TFEU may be called upon when agreements, decisions and practices

a form an integral part of a national market organisation; or
b are necessary for the attainment of the objectives set out in Article 39 TFEU.[90]

Sentence 2 of Article 2(1) also includes an example. The wording 'in particular' reflects the indicative/illustrative nature of the provision: *in particular*, Article 101(1) TFEU shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State, which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products. Nevertheless, there are also negative criteria determined as regards this provision. On one hand, there is an absolute requirement that under the agreement, decision or practice of farmers, farmers' associations, or associations of such associations, there shall be no obligation to charge identical prices. On the other hand, the exemption shall not apply, if either (a) the Commission finds that competition is thereby excluded or (b) the objectives of the Common Agricultural Policy are jeopardised. This means that for an agreement, decision or practice to be exempted from Article 101(1) TFEU, the following prohibitions shall be respected cumulatively: (a) the

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regulation may not be applied to the production of or trade in products, such as furskins, which do not come under Annex II to the Treaty even if they are ancillary to the production of another product which itself comes under that annex.'

[86] Schweizer (n 74).

[87] Whish and Bailey (n 68) 964.

[88] Whish and Bailey (n 68) 964.

[89] Ines Härtel, 'AEUV Art. 42 [Eingeschränkte Anwendung der Wettbewerbs- und Beihilferegeln]' in Rudolf Streinz (ed), *EUV/AEUV – Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union* (3rd edn, C.H. Beck 2018).

[90] Agri-Food Competition Regulation, Art. 2(1).

prohibition on charging identical prices, (b) the prohibition on the exclusion of competition, and (c) the prohibition on jeopardising CAP objectives.[91] From a reversed point of view, to return to the application of Article 101(1), it is sufficient that one of the three above-mentioned prohibitions is violated.

Paragraphs 2 and 3 of Article 2 consist of procedural rules. The European Commission has sole power, subject to review by the General Court and the Court of Justice of the European Union, to determine which agreements, decisions and practices fulfil the substantive conditions. The decision shall be made after consulting the Member States and hearing the undertakings or associations of undertakings concerned, and any other natural or legal person that the Commission considers should be heard. The decision shall be published. Determining so may take place (a) on the Commission's own-initiative; (b) at the request of a competent authority of a Member State; or (c) at the request of an interested undertaking or association of undertakings.[92] The publication of the determination shall state the names of the parties and the main content of the decision. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.[93] Nevertheless, it is important to note that 'as farmers assess the applicability of the derogation to the agreement themselves without informing the Members States or the Commission, the Commission has no data on how often farmers relied on this derogation. In competition investigations, parties rarely referred to [this derogation].'[94]

The two derogations included in Article 2 of the Agri-Food Competition Regulation have an unclear relationship. Although the wording shows that they are formulated as alternative conditions (the word '*or*' implies this finding),[95] earlier case law suggests otherwise. The term 'national market organisation' was defined in a 1974 Court judgment. On the basis of Articles 43(3) and 45(1) of the Treaty establishing the European Economic Community, the Court found at that time that the objectives of national market organisations are analogous at national level to those pursued by the common market organisations at Community level. It means that

> The national organization can thus be defined as a totality of legal devices placing the regulation of the market in the products in question under the control of the

[91] Agri-Food Competition Regulation, Art. 2(1).

[92] Agri-Food Competition Regulation, Art. 2(2).

[93] Agri-Food Competition Regulation, Art. 2(3).

[94] European Commission, Report from the Commission to the European Parliament and the Council: The application of the Union competition rules to the agricultural sector (26 October 2018) 17.

[95] See: Those agreements are exempted from the general prohibition of anti-competitive agreements which form an integral part of a national market organisation *or* are necessary for attainment of the Common Agricultural Policy objectives.

> public authority, with a view to ensuring, by means of an increase in productivity and of optimum utilization of the factors of production, in particular of manpower, a fair standard of living for producers, the stabilization of markets, the assurance of supplies and reasonable prices to consumers.[96]

Defining national market organisations based on the objectives of the CAP, thereby drawing an analogy between national and common market organisations, means that the second condition of Article 2 of the Agri-Food Competition Regulation has been merged into the first. That is, based on case law, the first derogation can only apply to an agreement, if it also fulfils the second condition. It is not sufficient for the said agreement to be an integral part of a national market organisation – it also needs to be necessary for the attainment of CAP objectives. This was reiterated in a Commission Decision, which found that the agreements and decisions of various French producer groups in the new potatoes market are exempted because they meet both criteria: not only do they constitute an integral part of a national market organisation, but they are also necessary to atain the objectives of the Common Agricultural Policy.[97] Here a further condition must be mentioned: the first derogation can only be applied, if there is no common market organisation regarding the respective product.[98] It means that the significance of the derogation provided for national market organisations in Article 2 of the Agri-Food Competition Regulation is limited, given that 'the majority of national marketing organisations have ceased to exist'[99] thanks to the system of single common market organisation.

The second derogation refers to the possibility for exempting agreements, decisions or concerted practices, if they are necessary for the attainment of Common Agricultural Policy objectives. The most significant clarification of this provision in EU case law is that the respective agreement shall contribute to the achievement of all five CAP objectives.[100] An agreement cannot be exempted from the general prohibition, if it does not satisfy each and every objective listed in Article 39 TFEU.[101]

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[96] Case 48/74 *Charmasson v Minister for Economic Affairs and Finance* EU:C:1974:137, paras 24 and 26.

[97] *New potatoes* (Case IV/31.735) Commission Decision 88/109/EEC [1987] OJ L 59/25.

[98] Whish and Bailey [(n 68) 965–966] mention the *Scottish Salmon Board* case: '[…] as there was a common organisation of the market in fishery products, the Scottish Salmon Board could not rely on the national market organisation defence.' See *Scottish Salmon Board* (Case No IV/33.494) Commission Decision 92/444/EC [1992] OJ L 246/37.

[99] Whish and Bailey (n 68) 965.

[100] See: Case 71/74 *Frubo v Commission* EU:C:1975:61, paras 24–26; Case C-399/93 *Oude Luttikhuis and others v Verenigde Coöperatieve Melkindustrie Coberco BA* EU:C:1995:434, para 25.

[101] Whish and Bailey (n 68) 965.

The Commission's careful consideration of whether an agreement realises all CAP objectives is clearly shown, for example, in one of its 2003 decisions. Therein, the enforcement authority thoroughly screened whether the five goals of the Common Agricultural Policy had all been attained respectively. The Commission found that the agreement in this case, which – in the French beef market – intended to fix a minimum price higher than the market price, did not in any way increase agricultural productivity [Article 39(1)(a)]. It was not necessary to stabilise markets [Article 39(1)(c)], given that '[t]he crisis in the beef sector was due primarily to a massive imbalance between supply and demand. Fixing a minimum purchase price does nothing to remedy such a situation. It does not affect the volume of supply, of which there was a large surplus; an increase in minimum prices might even cause demand to fall, thus widening the gap between supply and demand.' Furthermore, taking into account that there is no shortage of supply in the beef market, it was not necessary to assure the availability of supplies [Article 39(1)(d)]. The goal of supplies reaching consumers at reasonable prices was seen as also not realised [Article 39(1)(e)], where the Commisison found that '[e]specially in the case of consumption via restaurant and catering services, which are a major user of cheaper, imported meat, the suspension of imports could only have the effect of increasing prices.' All in all, the Commission found that

> the agreement is not necessary in order to achieve at least four of the five objectives of the Common Agricultural Policy. Even if the view were to be taken that it did indeed fall within the scope of the objective 'agreemen a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture', nevertheless, when that objective is weighed against the other four objectives […], which it would not help to achieve, it has to be concluded that the derogation in Regulation No 26 does not apply here.[102]

The Commission, for the sake of strengthening its findings, also declared that, if the respective agreement would have actually contributed to the attainment of all CAP objectives, the word 'necessary' in the provision means that the taken measure shall be proportionate, that is to say, there would be no less restrictive measure to be taken to realise the objectives. This requirement of proportionality was also not met.[103]

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[102] *French beef* (Case COMP/C.38.279/F3) Commission decision 2003/600/EC [2003] OJ L 209/12, para 145.

[103] *French beef* (Case COMP/C.38.279/F3) Commission decision 2003/600/EC [2003] OJ L 209/12, paras 135–149. See also the rejected appeals before the EU Courts: Case T-217/03 *FNCBV and Others v Commission* EU:T:2006:391; Case C-101/07 P *Coop de France bétail and viande v Commission* EU:C:2008:741.

Another remark must be noted. The wording of Article 2 of the Agri-Food Competition Regulation is formulated in such a way that it seems that, after the first two derogations, an example is mentioned in order to illustrate the issue. However, case law treats 'this example' as the third separate derogation from Article 101(1) TFEU. In *Oude Luttikhuis*, the doctrinal elements of this third derogation are greatly summarised:

> The third derogation is subject to three cumulative conditions. For that derogation to be applicable, it must be confirmed, firstly, that the agreements in question concern cooperative associations belonging to a single Member State, secondly that they do not cover prices but concern rather the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of such products, and thirdly that they do not exclude competition or jeopardize the objectives of the Common Agricultural Policy.[104]

The most recent judgment of the Grand Chamber of the Court of Justice of the European Union has established a simplified benchmarks to decide whether competition rules shall apply to the activities of producer organisations and associations of producer organisations. The prohibition in Article 101 TFEU shall apply to agreements, decisions and concerted practices, if (1) they are not agreed/made *within* a producer organisation or an association of producer organisations (hereinafter: APOs), in other words, if they are not agreed/made between the members of *the same* producer organisation or *the same* association of producer organisations; or (2) any of the parties subject thereto is not *legally recognised* by the Member State; or (3) they are not *strictly necessary* for the pursuit of at least one objective assigned to the producer organisation or the association of producer organisations.[105] If any of these three criteria is not fulfilled, Article 101 TFEU shall apply to the respective agreement, decision or concerted practice.

These three requirements have been determined regarding the assessment of the following types of conducts: (1) collective fixing of minimum sale prices, (2) concertation on quantities put on the market, and (3) exchanges of strategic information. That is, the Court ruled that the collective fixing of minimum sale prices escapes the prohibition in Article 101 TFEU, if it is agreed between the members of a legally recognised producer organisation or a legally recognised association of producer organisations and strictly necessary to reach the objective pursued by the respective PO or APO. The question arises as to

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[104] Case C-399/93 *Oude Luttikhuis and others v Verenigde Coöperatieve Melkindustrie Coberco BA* EU:C:1995:434, para 27.

[105] Case C-671/15 *Président de l'Autorité de la concurrence v Association des producteurs vendeurs d'endives (APVE) and Others* EU:C:2017:860, para 67.

what the prohibition on charging identical prices in Article 2 of the Agri-Food Regulation actually means, if a legally recognised PO or APO – to the extent of pursuing one of its objectives which is strictly necessary – can decide to determine a minimum sale price. This possibly means that the respective PO or APO shall ensure for its members to be able to sell their products on their own (outside the PO or APO) below the minimum sale price determined by the PO or APO.[106]

2.3. Secondary law: CMO Regulation

The CMO Regulation has a separate part on competition rules.[107] First and foremost, it is worth mentioning that the provisions of the Agri-Food Competition Regulation and the provisions of Chapter I of Part IV of the CMO Regulation are – in most aspects – identical. In its Article 1, the Agri-Food Competition Regulation declares that it does not apply to products covered by Council Regulation (EC) No 1234/2007. Since references to Regulation (EC) No 1234/2007 shall be construed as references to the CMO Regulation,[108] the declaration of the Agri-Food Competition Regulation on its material scope still applies, and is in force in relation to the CMO Regulation. The *ratione materiae* of Agri-Food Competition does not cover those Annex I products that are covered by the CMO Regulation. However, this issue does not have too much practical significance, given that both the material scope of the Agri-Food Competition Regulation and that of the CMO Regulation are established in Annex I TFEU. Because most Annex I products are covered by the CMO Regulation, the latter leaves little room for the Agri-Food Competition Regulation to be applied.

The CMO Regulation, unlike the Agri-Food Competition Regulation, includes definitions on the relevant product and geographic market. The term 'product market' means the market comprising all products which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use.[109] The term 'geographic market' means the market comprising the area where the undertakings concerned are involved in the supply of the relevant products, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas, particularly because the conditions

[106] Case C-671/15 *Président de l'Autorité de la concurrence v Association des producteurs vendeurs d'endives (APVE) and Others* EU:C:2017:860, para 66.

[107] See Part IV of the CMO Regulation.

[108] CMO Regulation, Art. 230(2).

[109] CMO Regulation, Art. 207(a).

of competition are appreciably different in those areas.[110] These definitions do not say anything new above what can be found in CJEU case law. The definitions are also in line with the Commission Notice on the definition of relevant market for the purposes of Community competition law.[111]

Still, one of the definitions provided by the CMO Regulation may cause slight confusion. Although there are no special rules applying to the agricultural and food sector as to Article 102 TFEU, the CMO Regulation provides for a definition of a dominant position: a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers.[112] It is unclear why Article 208 of the CMO Regulation repeats word-for-word the case-law definition of a dominant position formulated in the *United Brands*[113] and *Hoffmann-La Roche* cases[114]. The definition embedded in this provision lacks reason and has no function at all, for it does not determine a sector-specific provision but repeats general case law.

Although the core meaning of the exceptions formulated in the Agri-Food Competition Regulation and in the CMO Regulation is the same, there are two small differences between their provisions. Pursuant to Article 2(1) of the Agri-Food Competition Regulation, the prohibition of anti-competitive agreements shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations *belonging to a single Member State*. In its Article 209, the CMO Regulation complements this list with producer organisations recognised under Article 152 or Article 161 of the CMO Regulation, or associations of producer organisations recognised under Article 156 of the CMO Regulation; however, as to the associations of farmers' associations, it does not mention the requirement 'belonging to a single Member State'. The latter difference may be based on the fact that associations of farmers' associations must be recognised under national law, the rules of which only apply to organisations which belong to that same Member State. The expansion of the list with producer organisations can be perceived as the concretisation of the concept of farmers' associations. Every producer organisation is a farmers' association, but not every farmers'

[110] CMO Regulation, Art. 207(b).

[111] Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), II/7–8.

[112] CMO Regulation, Art. 208.

[113] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* EU:C:1978:22, para 65.

[114] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* EU:C:1979:36, para 38.

association is a producer organisation. The dividing line is whether the entity in question is recognised by a Member State in accordance with EU law. If it is, it is called a producer organisation; if it is not, it is called a farmers' association. It shows that 'calling up' the exemption does not necessarily require recognition in a legal sense.

Furthermore, pursuant to Article 152(1a), by way of derogation from Article 101(1) TFEU, a recognised producer organisation may plan production, optimise the production costs, place on the market and negotiate contracts for the supply of agricultural products, on behalf of its members for all or part of their total production. There are five cumulative requirements to do so: (1) one or more of the following activities is/are genuinely exercised jointly: processing; distribution; packaging, labelling or promotion; organising quality control; use of equipment or storage facilities; management of waste directly related to production. These activities contribute to the fulfilment of CAP objectives; (2) the producer organisation concentrates supply and places the products of its members on the market, whether or not a transfer takes place of ownership of the agricultural products by the producers to the producer organisation; (3) it is irrelevant whether or not the price negotiated is the same as regards the aggregate production of some or all of the members; (4) the producers concerned are not members of any other producer organisation. This can be ignored in duly justified cases where producer members hold two distinct production units located in different geographical areas; (5) the agricultural product is not covered by an obligation to deliver arising from the farmers' membership of a cooperative, which is not itself a member of the producer organisations concerned, in accordance with the conditions set out in the cooperative's statutes or the rules and decisions provided for in/derived from those statutes.[115]

There are further procedural rules in the CMO Regulation, which do not appear in the Agri-Food Competition Regulation. The listed entities, which can be subject to the exception, may request an opinion from the Commission on the compatibility of the respective agreements, decisions and concerted practices with the objectives set out in Article 39 TFEU.[116] The burden of proof is also established: the burden of proving an infringement of Article 101(1) TFEU shall rest on the party or the authority alleging the infringement; by contrast, the party claiming the benefit of the exemptions

[115] CMO Regulation, Art. 152(1a).

[116] CMO Regulation, Art. 209(2). The provision also declares that the Commission shall deal with requests for opinions promptly and shall send the applicant its opinion within four months of receipt of a complete request. The Commission may, at its own initiative or at the request of a Member State, change the content of an opinion, in particular if the applicant has provided inaccurate information or misused the opinion.

shall bear the burden of proving that its conditions are fulfilled.[117] As can be seen, the agricultural exception follows the same logic regarding the burden of proof as in the case of individual exceptions under Article 101(3) TFEU.

By contrast, when speaking of interbranch organisations, in order for them to be exempted, they shall be recognised.[118] These entities have members at different levels of the food supply chain, that is to say, the competition derogation applies to vertically integrated organisations according to the rules laid down in Article 210 of the CMO Regulation. Recognition not only has general rules[119], but also special rules for the milk and milk products sector[120], for the olive oil and table olives sector and for the tobacco sectors.[121] The exception provided for interbranch organisations is based on a notification system: the notification shall be addressed to the Commission, which shall decide, within two months from the receipt of all details, whether the respective agreements, decisions or concerted practices are compatible with Union rules.[122] The agreements, decisions or concerted practices in question may not be put into effect before the lapse of the two-month period.[123] Five conditions were determined that lead to the incompatibility of these agreements with EU law.

Three of them are quite similar to the previously mentioned exception case: (1) the respective agreement, decision or concerted practice shall not create distortions of competition which are not essential to achieving the objectives of the CAP pursued by the activity of the interbranch organisation (similar to the jeopardisation of CAP objectives); (2) they shall not entail price fixing or quota fixing (similar to charging identical prices); (3) they shall not create discrimination or eliminate competition with respect to a substantial proportion of the products in question (similar to the exclusion of competition). Additionaly, these agreements, decisions and concerted practices (4) shall not lead to the partitioning of markets within the Union in any form, and (5) shall not affect the sound operation of the market organisation.[124]

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[117] CMO Regulation, Art. 209(2).

[118] See a detailed analysis on interbranch organisations: European Commission, The interface between EU competition policy and the Common Agriculture Policy (CAP): Competition rules applicable to cooperation agreements between farmers in the dairy sector (2010) 24–27.

[119] CMO Regulation, Art. 157–158.

[120] CMO Regulation, Art. 163.

[121] CMO Regulation, Art. 162.

[122] CMO Regulation, Art. 210(2).

[123] CMO Regulation, Art. 210(3).

[124] CMO Regulation, Art. 210(4).

IV. Comparison

Both the European Union and the United States have established a legal regime that provides for derogations for the agricultural sector under general antitrust rules. In both legislations, the exemption is not unlimited, but agricultural cooperatives shall respect antitrust rules with some more ease. The US exemption can be found in Section 6 of the Clayton Act and in the Capper-Volstead Act, while the EU exemption is codified in two EU regulations. The limitations of the exemptions are ensured in part in different ways. Similarly, both jurisdictions *expressis verbis* declare which type of activities the agreement shall be related to in order for it to be exempted. The following are listed in the US: collective processing, preparing for market, handling and marketing, as well as common marketing agencies. At the same time, in the EU, the agreement shall concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products. It is immediately visible that the EU exemption also covers agreements related to production, while they are not listed in the United States. It is relevant in the case of limiting production, which the EU deems permissible within a producer organisation, but the United States does not.

The exemption provided for agricultural cooperatives is based, in part, on the doctrine of a single economic entity. An agricultural cooperative is like a parent company which has its own subsidiaries, that is, its agricultural producer members. The members are not independent undertakings from one another from an antitrust law perspective, but constitute a single economic entity – the cooperative. Neither the EU nor the US exemption mentions it explicitly, but as a consequence of the single economic entity doctrine, even price fixing is permissible to a certain extent based on case law. Indirectly, within the framework of the term 'xpli pric', which is a legitimate objective to be carried out by an agricultural cooperative, the US case law also covers price fixing. Although the EU regulation prohibits charging identical prices, recent case law in *Endives* shows that this provision only refers to a situation where a producer organisation prohibits its members from selling their own produce at a price below the minimum fixed price determined within the producer organisation.

As to the personal scope of the exemptions, there are similarities and differences. The EU and the US regulations are similar in that they do not connect the applicability of the exemption to a certain form of legal entity. It is irrelevant in both jurisdictions whether the undertaking is profit-making or non-profit making, or if it is a cooperative or a company. Both the EU and the

US employ criteria, negative or positive, to be fulfilled by an undertaking to be exempted, but the structure of these criteria and their formulation are different. The EU has derogations which can only apply to legally recognised producer organisations (see Article 152(1a) of the CMO Regulation); at the same time, there are other derogations which apply in general to farmers and farmers' associations, without giving them a correct definition (see Article 209 of the CMO Regulation and Article 2 of the Agri-Food Competition Regulation). The recognition of producer organisations is regulated in detail, on the one hand, in secondary EU law (in the CMO Regulation itself) and, on the other hand, in national law. These general rules on the recognition of producer organisations constitute a separate area of provisions in the EU. Meanwhile, the US antitrust formulates its negative criteria on associations, to which the exemption applies, directly among the provisions on the exemption. The US negative conditions – 'one member – one vote', 'dividends not excessing 8 per cent', and 'no dealing to an amount greater in value to nonmembers than to members' – do not have EU equivalents. However, the general rule of 'one member – one vote' also applies in the EU to producer organisations which are cooperatives. But again, this procedural provision derives from general rules and is not present among the rules on the agricultural antitrust exemption. In the US, negative requirements are formulated with regard to the undertaking itself, while the EU is more concerned with the economic conduct itself when formulating negative conditions. The latter declares that the agreement shall not exclude competition, require charging identical prices and jeopardise the objectives of the Common Agricultural Policy. While limiting the exemption in the US takes place primarily from the standpoint of the undertaking, and secondarily from the conduct itself with the prohibition of undue price increases. By contrast, the EU aims more to limit the exemption by regulating and ensuring that certain unwanted effects are avoided (competition exclusion, identical prices, jeopardising agricultural policy objectives).

Another important distinction can be drawn which sheds light on the diverging focus of the two jurisdictions. The European Union withdraws the protection (exemption) provided for the agreement, if the latter jeopardises common agricultural policy objectives. It means that the conduct is not only assessed in antitrust terms, but also within the framework of agricultural law. Hijacking the assessment method from antitrust law, in a direction where other policy objectives are taken into consideration, is clearly missing in the US agricultural antitrust exemption. This EU approach may seem like a folly. It is an antitrust provision, the agreement is related to agricultural products, no competition concerns arise from the collusion of agricultural producers, but the agreement endangers agricultural policy objectives, so it does not deserve privileged treatment under antitrust law.

The organisational criteria for the application of the exemptions are also similar in the EU and the United States. The EU only accepts *certain* derogations if the PO or the APO concerned is legally recognised. The US exemption also establishes the Capper-Volstead criteria to be fulfilled to get exempted. Both legal regimes only provide protection *below* cooperative level, that is to say, agreements between two separate legal entities *on* the cooperative level (between two cooperatives or between two producers organisations) are not exempt. Producers may join forces in an agricultural cooperative fulfilling the Capper-Volstead criteria in the US or in a legally recognised producer organisation in the EU. However, two separate legal entities shall not cooperate – otherwise the doctrine of a single economic entity would be violated and the prohibition should be applied. Furthermore, both legal systems require that only those agreements are exempt that are – in the EU – strictly necessary to achieve the objectives of the respective PO or APO, or that are – in the US – necessary to carry out any of the legitimate objects. The US legitimate objects and the EU objectives are analogous in that they make concentration supply possible. The specific aims to be pursued by a producer organisation, which are determined by the CMO Regulation, fit into the toolbox of means to realise the overall Common Agricultural Policy objectives in the EU. A slight and insignificant difference is that the United States does not determine the exact umbrella objectives to be pursued and realised by its agricultural policy; however, this does not change the fact that it treats agricultural cooperatives in the antitrust environment in the same way as the EU.

The most significant difference between EU and US regulations is that the former also allows supply restrictions, as can be seen from the *Endives* judgment. As to the concertation on quantities put on the market, the Court ruled that it escapes the prohibition in Article 101 TFEU, if it is agreed between the members of a legally recognised producer organisation, or a legally recognised association of producer organisations, and is strictly necessary to reach the objective pursued by the respective PO or APO. By contrast, the US is against limiting production. The CMO Regulation explicitly declares that ensuring that production is planned and adjusted to demand, particularly in terms of quality and *quantity*, is a specific aim which can be pursued by a PO. That is to say, limiting production in the EU by a producer organisation is permissible (under certain conditions) and may be exempt from the general prohibition, if it takes place within a legally recognised PO. The United States does not address price fixing and supply control as two sides of the same coin, unlike the European Union, where both economic activities are lawful from the perspective of the agricultural antitrust exemption. While the US only accepts restrictions which take place *post-production*, the EU also deems

lawful *pre-production* cooperations. The exchange of strategic information is also permissible in both jurisdictions.

The economic justification of limited agricultural exemptions lies in the concept of countervailing power. The exemptions, which make it possible for agricultural producers to combine forces, enable them to create countervailing power versus the market power of buyers. One significant difference between the EU and US regime is that the former does not include a control mechanism when an association of agricultural producers faces a buyer that does not have monopsony power. In that case, the exemption can be misused because of the fact that the 'united front' of farmers does not face a buyer whose economic power should be counterveiled to increase efficiency. That is to say, when there is no monopsony power in the hands of a buyer, which should be countervailed, the market power of sellers becomes a supervailing power, with likely adverse effects on competition. The US antitrust provision that prohibits undue price enhancement by agricultural cooperatives attempts to control the very issue. This explicit control mechanism is missing in EU antitrust. At a theoretical level, POs or APOs, if they meet the general criteria determined and bargain with buyers without market power, have at their disposal the possibility to increase sales prices to a level which is no longer competitive, and thus not efficient, given that their market power is not countervailing but supervailing in relation to their buyers. Hoever, the argument can be raised that the Common Agricultural Policy also aims to ensure that supplies reach consumers at reasonable prices and so there is a somewhat indirect control mechanism against price rises carried out by producers. Nevertheless, this is not as direct and obvious of a criterion as in the United States; instead, it is more of a balancing between CAP objectives.

Another significant difference between the EU and US regimes is that the former also provides for a derogation to interbranch organisations. This derogation is only applicable to recognised entities, unlike Article 209 of the CMO Regulation and the provisions of the Agri-Food Competition Regulation. The other difference with respect to interbranch organisations is that they shall notify the Commission that their agreement could be exempted, unlike horizontal agreements which are self-assessed by farmers, their associations, POs and APOs, as to whether they are compatible with the rules on the derogation.

From the viewpoint of functional comparison, both the EU and US regulations aim to achieve the same goal with the same legal means. The main function is to increase the bargaining power of producers against their buyers. The realisation of it takes place by excluding certain agreements of agricultural producers from the scope of the general prohibition of anti-competitive agreements. Even the most harmful of all agreements, price

cartels, which distort competition by object, are also exempted if they are concluded within a legal entity. In antitrust terms, these would be *per se* prohibited because they are drawn up with the participation of competitors to fix sale price. However, based on the doctrine of a single economic entity, these agricultural associations are treated as one undertaking, despite the fact that they unite competitors.

The structure of the regulations is also similar – the relevant provisions can be found in the legal sources of agricultural law. The US agricultural exemption, the Capper-Volstead Act, is codified in Title 7 of the US Code, which consists of laws related to agriculture. The EU also separates its derogations from general antitrust rules, and codifies them, in part, in the legal act on the single common market organisation of agricultural products, and, in part, in a completely separate legal act, the Agri-Food Competition Regulation, which does not cover any other topic aside the agricultural antitrust exemption.

It is clear from the analysis that the method for providing a higher level of protection for agricultural producers is the same in both jurisdictions. With limitations, both exempt certain agreements from the prohibition of anti-competitive agreements. The place of their emphasis is, nevertheless, different. The United States aims to remain in the area of antitrust with its own economic justification that concentrates on creating countervailing power and preventing it from becoming supervailing power. By contrast, aside from economic reasons, the European Union is *also* concerned with agricultural policy objectives to be attained through the antitrust exemption. This approach validly strengthens and gives impetus to the voices cynically echoing that the EU exemption is the consequence of agricultural lobbing. Limiting the assessment of the EU exemption to antitrust considerations could be the first step for EU legislation to quieten these voices and establish a pure efficiency-enhancing economic justification for this sectoral derogations, and thus, increase its acceptance among antitrust lawyers.

One cannot forget, however, that the European Union (and its predecessor, the European Economic Community) has committed itself long ago to the value judgment that gives precedence to agricultural policy objectives over competition rules. This is unlikely to change in the near future for two reasons. First, the tradition of treating the agricultural sector as the 'favourite child' of its economy is deeply embedded in the European continent despite the fact that in 2020 agriculture contributed only 1.3% to the EU GDP[125] but, at the

[125] European Commission, Performance of the agricultural sector <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Performance_of_the_agricultural_sector> accessed 26 June 2022.

same time, it represented 35% of its total expenditure.[126] Second, general antitrust trends tend to point towards signs of cracks and fractures of the consumer welfare paradigm as well as the more economic approach on both sides of the Atlantic.[127]

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[126] European Commission, CAP expenditure in the total EU expenditure <https://ec.europa.eu/info/sites/default/files/food-farming-fisheries/farming/documents/cap-expenditure-graph1_en.pdf> accessed 26 June 2022.

[127] It is enough to think of Lina Khan's appointment as Chair of the Federal Trade Commission, who is one of the most renowned advocate of a paradigm shift in US antitrust, or legislative developments in the EU that put aside pure efficiency-based considerations and bring fairness back to their assessment, be it the digital sector (Digital Markets Act) or agriculture (UTP Directive).

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Table 1. The comparison of the US and EU regulation

Legal source	The United States of America		The European Union			
	Section 6 of Clayton Act	Capper-Volstead Act	Agri-Food Competition Regulation	CMO Regulation, Art. 152(1a)	CMO Regulation, Art. 209	CMO Regulation, Art. 210
Personal scope	agricultural and horticultural organizations, instituted for the purposes of mutual help, not having capital stock or conducted for profit	persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers in associations, corporate or otherwise, with or without capital stock	farmers, farmers' associations, or associations of such associations belonging to a single Member State	recognised producer organisations [general requirements for recognition shall be fulfilled]	farmers, farmers' associations, or associations of such associations; or recognised producer organisations [general requirements for recognition shall be fulfilled]	recognised interbranch organisations [general requirements for recognition shall be fulfilled]
Material scope	lawfully carrying out their legitimate objects	collectively processing, preparing for market, handling, and marketing, common marketing agencies	agreements concercing the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products	planning production, optimising production costs, placing on the market and negotiating contracts for the supply of agricultural products, on behalf of its members for all or part of their total production	agreements concerning the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products	agreements necessary in order to meet the objectives listed in certain articles

Legal source	The United States of America		The European Union			
	Section 6 of Clayton Act	Capper-Volstead Act	Agri-Food Competition Regulation	CMO Regulation, Art. 152(1a)	CMO Regulation, Art. 209	CMO Regulation, Art. 210
What types of negative criteria?	–	one member – one vote *or* dividends not exceeding 8 per cent per year, *and* no dealing to an amount greater in value to nonmembers than to members	no obligation to charge identical prices, competition is not excluded, common agricultural policy objectives are not jeopardised			no partitioning of markets, not affecting the sound operation of the market organisation, no distortions created which are not essential to achieving the objectives of the CAP, no price fixing or quotas, not creating discrimination or elimination of competition with respect to a substantial proportion of the products
Negative criteria for whom/what?	–	formulated regarding the undertaking	formulated regarding the conduct			