

Unclassified

English - Or. English

15 November 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

Competition in the Food Supply Chain – Contribution from European Union

- Session IV -

2-3 December 2024

This contribution is submitted by European Union under Session IV of the Global Forum on Competition to be held on 2-3 December 2024.

More documentation related to this discussion can be found at: oe.cd/gfc24.

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JT03555606

Competition in the Food Supply Chain

- Contribution from European Union -

1. Introduction

1. Food supply chains are a priority for competition policy and enforcement in the European Union, in line with the sector's significance to consumer welfare and economic stability, and the societal impact of agriculture. The European Commission's competition agenda addresses three main challenges. First, it protects effective competition by addressing practices and intervening in mergers that negatively impact food prices and, where relevant, limit choice and innovation to the detriment of consumers. Second, in conjunction with the European Common Agricultural Policy, the Commission seeks to enhance the position of farms in the food chain by empowering producers through specific antitrust rules and by addressing distortive practices or anticompetitive mergers of their suppliers and buyers. Finally, it promotes sustainability in food supply chains, including through specific antitrust rules for agricultural products. Together, these priorities aim to ensure that the European food market is competitive, fair, and sustainable.

2. Food Supply Chains in Europe

2.1. The economic importance of the food sector.

2. In 2023, food and non-alcoholic drinks represent the largest share (17%) of total expenditure of households in the European Union (EU), ahead of housing, energy, or transport. In some Member States, this share of food and non-alcoholic drinks in the total expenditure of households can be much higher, reaching up to 30% in Romania¹. Reflecting this demand, the EU food supply chain contributed 6.1% to the Union's gross value added and accounted for 10.8% of total employment, engaging 20.7 million people².

3. In 2023, the agricultural and fisheries sector alone represented 1.9% of the EU's total value added (reaching up to about 4% in some Member States) and 4.1% of total employment³. The agricultural sector used 38.4% of total EU land area in 2020⁴.

4. The food and drink industry generates €1.2 trillion in turnover with a value added of €229 billion⁵. The food and drink industry represents the largest industry in the EU by turnover (15.5%), manufacturing value added (12.2%), and investment (15.7%), ahead of

¹ European Commission, *Key Figures on Europe – 2024 Edition*, June 2024, page 41.

² FoodDrinkEurope, *Data & Trends of the EU Food and Drink Industry – 2023 Edition*, December 2023, page 11.

³ <https://ec.europa.eu/eurostat/databrowser>

⁴ Eurostat, 'Farms and farmland in the European Union – statistics', November 2022, available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Farms_and_farmland_in_the_European_Union_-_statistics#Farms_in_2020 (accessed 25 October 2024).

⁵ FoodDrinkEurope, *supra* note 2, page 2.

the automotive, machinery and chemicals industry. The sector also leads in employment, providing jobs for 4.6 million people across 291,000 companies⁶.

5. Food retail and wholesale are similarly substantial, contributing €293 billion in value added and employing 8.4 million people across 1.12 million companies in 2020⁷.

2.2. Structure of the European food chains

6. In 2020, agriculture involved 9.1 million farms and a regular agricultural labour force of 17 million people⁸. This sector generated €460 billion in turnover and €224 billion in value-added. The fisheries sector numbered 70,110 fishing vessels in April 2024⁹, employing an estimated 81,620 people in full-time equivalent¹⁰. In the aquaculture sector, value-added reached €3.9 billion in 2020¹¹, with around 34,582 full-time employees¹². The food and drink industry consisted of 291,000 companies employing 4.6 million people, had a turnover of €1.112 trillion, and generated €229 billion in value-added. The food retail sector employed 6.2 million people across 780,000 companies and stores, achieved a turnover of €1.117 trillion and generated €185 billion in value added¹³.

7. Beyond these aggregate large numbers of operators, there are various situations of concentration at the different levels of the European food chain – agriculture, food processing, wholesale, and retail.

8. At the agricultural level, most segments of production remain relatively fragmented. The majority of the 9.1 million farms in the EU are small (often family-run) operations, with 63.8% of farms measuring less than 5.0 hectares. In contrast, only 3.6% of farms are at least 100.0 hectares, yet these larger farms collectively account for more than 51.8% of the total area used for agricultural production in the EU¹⁴. Notably, in the period between 2010 and 2020, the number of farms larger than 100.0 hectares has increased while the number of farmers smaller than 5.0 hectares has decreased by 2.7 million. Since the overall area used for agricultural production has remained relatively

⁶ Ibid., pages 3 and 4.

⁷ Eurocommerce, *Retail & Wholesale in the agri-food value chain – key facts and figures*, 2023.

⁸ Eurostat, ‘Farmers and the agricultural labour force – statistics’, November 2022, available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Farmers_and_the_agricultural_labour_force_-_statistics#Agriculture_remains_a_big_employer_in_the_EU.3B_about_8.7_million_people_work_in_agriculture (accessed 28 October 2024).

⁹ European Commission, *Key figures on the European food chain – 2023 edition*, November 2023, page 47.

¹⁰ European Commission, Fact Sheet, ‘European fisheries in figures’, 2024, available at <https://www.europarl.europa.eu/factsheets/en/sheet/122/european-fisheries-in-figures> (accessed 28 October 2024).

¹¹ European Commission, Fact Sheet, ‘Aquaculture production in the European Union’, 2024, available at <https://www.europarl.europa.eu/factsheets/en/sheet/120/aquaculture-production-in-the-european-union> (accessed 28 October 2024).

¹² European Commission, ‘European fisheries in figures’, supra note 10.

¹³ FoodDrinkEurope, supra note 2, page 11.

¹⁴ European Commission, *Key figures on the European food chain – 2023 edition*, supra note 9, page 15.

stable, the decrease in smaller farms reflects mergers or takeovers rather than cessation of production¹⁵. Individual producers often have limited bargaining power when buying inputs from suppliers or selling output to processors or retailers. Additionally, some sectors, such as dairy, arable crops and certain fruits and vegetables, have seen consolidation through cooperatives, which allow farms to pool resources, expertise, and facilities (e.g. storage) and negotiate better terms collectively. There are some national market situations (e.g. for dairy) where cooperatives of farms have reached dominance in their markets (e.g. in Cyprus, Denmark, Finland, or Sweden).

9. The food processing and manufacturing industry exhibits a level of market concentration often much higher than for agriculture. Although the sector includes a mix of small and medium-sized enterprises (SMEs) – which make up 95.8% of the EU’s food and beverage processors – it is dominated by large multinational corporations in key sub-sectors such as meat processing, seed processing, dairy, and beverages¹⁶. These corporations contribute 57.6% of the total value added in food processing and 68% in beverage processing¹⁷. This dominance is also evident in the high concentration levels within certain sub-sectors. For instance, an analysis showed that the average Herfindahl-Hirschman Index (HHI) value for 14 Member States in branded markets for baby food, cereals, coffee, frozen pizzas and ready cooked meals, ice cream, and yogurt exceeded 2500. On the other hand, there were many sectors in which the HHI value did not exceed 1500, including for bread, where the HHI value was only 306¹⁸. Concentration also varies by Member State: while average HHI values in Denmark, the Netherlands and Finland exceeded 2500, both Italy and Germany had average HHI values below 1600 across 23 product categories. This concentration, which reflects the increasing economics of scale in these sectors, affords these processors and manufacturers substantial buyer power over smaller agricultural producers, especially in negotiating prices and contract terms, and in a number situation towards buyers. International trading of agricultural commodities is also a traditionally concentrated segment, with few strong trading companies controlling important logistical assets (e.g. for transportation terminals and storage facilities) at the main trade hubs.

10. Finally, the retail level exhibits often moderate levels of concentration and sometimes high concentration levels, both at the national level for the wholesale purchase of goods and at local level for the retail sale to final consumers. The CR4 ratio (sum of the share of sales of the four largest retailers in a national market) provides their share of total demand at national level for the purchase of goods. It also provides a general indication of the average concentration at local level for final sales to end consumers, although that might vary significantly among various local catchment. In 2017, the CR4 varied across all national markets from 31% to 94%. The CR4 ratio was high, for instance, in Germany where the four largest retailers jointly held a 76% share of all retail sales and thus of demand at national level for the purchase of goods in 2023¹⁹. Similarly, in the Netherlands, the four

¹⁵ Ibid.

¹⁶ Ibid., page 54.

¹⁷ Ibid.

¹⁸ European Commission, *The economic impact of modern retail on choice and innovation in the EU food sector – final report*, September 2014.

¹⁹ Ahrens, S., ‘Market shares of the leading companies in the food retailer sector in Germany 2023’ (Statista, 12 July 2024), available at <https://de.statista.com/statistik/daten/studie/159987/umfrage/umsatzanteile-von-lebensmittelhaendlern/> (accessed 22 October 2024).

largest retailers represented 95.1% of all retail sales and thus of demand at national level for the purchase of goods in 2021²⁰. At the other end of the spectrum, in Bulgaria, Greece, Italy, and Romania, the CR4 was below 40% in 2017²¹.

11. This being said, three important caveats must be considered regarding market concentration. First, a high CR4 concentration ratio does not provide the full picture. For example, for retail the HHI indicates that even where there are few large players it is rare that only one or two dominate the market. According to figures from 2017, the average HHI value in the retail sectors of all Member States²² – except for Finland and Sweden – was 1245, with a median of 2000²². In addition, investigations have revealed that price competition can be intense even in some retail markets with four main players while being less intense in some other markets with lower CR4.

12. Second, it is important to understand the local dynamics of food retail. Competition often occurs within a small geographic radius where consumers typically shop. In these local markets, there may be just three or four main competitors and the degree of competition may vary significantly for example between situations with three operators depending on how dynamic (on prices, choice, innovation) one or more of these players may be.

13. Third, at the wholesale level, retailers must negotiate with processors and manufacturers. While the degree of concentration is sometimes higher on the demand side, this is not always the case²³. In addition, the parties' bargaining power depends not only on the balance of market concentration but also on the alternative options available to each party. For instance, manufacturers sometimes enjoy superior bargaining power because of the assortment they offer or because their products are essential to retailers, who need them to attract customers and meet demand. On the other hand, retailers can improve their position by joining national or international buying alliances to balance or counteract the position of large manufacturers. Ultimately, bargaining power in these wholesale negotiations is shaped not just by market concentration, but by the bargaining options available to each party.

14. In addition to market concentration, the food chain is also affected by horizontal and vertical integration. Large retailers are engaging in vertical integration, either by acquiring and/or developing upstream suppliers (such as farms and food processors) or by developing private-label products. Large commodity traders have expanded their operations into the upstream origination of crops to ensure stable supply chains, as well as in the downstream production of added value products to secure better profit margins.

²⁰ Distrifood, 'Marktaandeelen 2008-2020 Nielsen', available at <https://www.distrifood.nl/food-data/marktaandeelen> (accessed 22 October 2024).

²¹ Van Dam, I. et al., 'A detailed mapping of the food industry in the European single market: similarities and differences in market structure across countries and sectors' (2021) 18(54) *International Journal of Behavioural Nutrition and Physical Activity*, page 9; Deconinck, K., 'Concentration and market power in the food chain', *OECD Food, Agriculture and Fisheries Papers*, 2021, No.151, page 6.

²² Ibid.

²³ European Commission, *Key figures on the European food chain – 2023 edition*, supra note 9, page 15.

2.3. Impacts on the European food chain

15. The Covid-19 pandemic and Russian invasion of Ukraine have both severely disrupted European food supply chains, increased production costs, and have been driving significant food price inflation and market volatility. During the pandemic, extraordinary measures caused disruptions in production, logistics and trade. In April 2020, these disruptions led to an exceptional 1.1% month-on-month increase in food prices – an unprecedented rate not seen since 1999, according to the European Central Bank (hereinafter, ECB) ⁽²⁴⁾. The exit from the pandemic triggered an inflation in 2021. The war in Ukraine further exacerbated the situation in 2022. Ukraine and Russia’s roles as major exporters of grains, oil, and fertilizers – critical inputs for food production – saw a sharp reduction in supply, pushing prices upward. This rise was compounded by energy supply constraints, with the ECB estimating that energy costs for food production surged by 9% in total²⁵.

16. These combined pressures contributed to a historic peak in food inflation. Since 2022, food prices have increased by an average of 25%, reaching a peak in March 2023²⁶. This price spike has had a profound social impact, with 9.5% of the EU population reported being unable to afford a meal containing meat, fish, or a vegetarian equivalent every other day²⁷. This impact is felt most greatly by people at risk of poverty, of which 22.3% were unable to afford a proper meal during the same period. This being said, the increases in disposable income of households have dampened the increase of real prices, and the overall budget share of food of EU households has remained rather stable, with significant differences in levels between the Member States.

17. Encouragingly, the agricultural sector is gradually stabilising in line with broader economic trends. The EU is on track to return to pre-Covid levels of GDP growth and inflation. Although food prices remain significantly elevated – averaging 43% higher than in 2015 – inflation appears to be stabilising at a relatively lower level²⁸. According to data from September 2024, the inflation rate for food, alcohol and tobacco decreased from 8.8% in September 2023 to 2.4% a year later. Within this category, unprocessed food inflation dropped to 1.6% in the same period²⁹.

18. However, this stabilising trend has not been uniform. While deflationary trends are emerging in certain product categories such as sugar, for others, such as bread, dairy, and

²⁴ Rubene, I., ‘Recent developments in euro food area prices’, *ECB Economic Bulletin*, Issue 5/2020, available at https://www.ecb.europa.eu/press/economic-bulletin/focus/2020/html/ecb.ebbox202005_07~174eeeb845.en.html (accessed 21 October 2024).

²⁵ Kuik, F. et al., ‘What were the drivers of euro area food price inflation over the last two years?’, *ECB Economic Bulletin*, Issue 2/2024, available at <https://www.ecb.europa.eu/press/economic-bulletin/html/eb202402.en.html> (accessed 14 October 2024).

²⁶ Ibid.

²⁷ Eurostat, ‘Almost 1 out of 10 in the EU could not afford a proper meal’, 12 July 2024, available at <https://ec.europa.eu/eurostat/en/web/products-eurostat-news/w/ddn-20240712-1#:~:text=Almost%201%20out%20of%2010%20in%20the%20EU,percentage%20points%20%28pp%29%20higher%20compared%20with%202022%20%288.3%25%29> (accessed 14 October 2024).

²⁸ European Commission, supra note 1, page 7.

²⁹ Eurostat, ‘Annual inflation down to 1.7% in the euro area’, 17 October 2024, available at <https://ec.europa.eu/eurostat/web/products-euro-indicators/w/2-17102024-ap> (accessed 22 October 2024).

meat, the trends are converging to the average level of food inflation. This suggests that the price levels achieved through 2022 and 2023 are likely to remain stable rather than decreasing³⁰. Data from the EU's food price index shows that while prices have stabilised since mid-2023, they remain well above 2015 levels, indicating that inflationary pressure has merely eased (³¹). For instance, the prices of oilseed oils and meals remained high after the cost of upstream crops had returned to lower levels after the trade disruptions caused by the war in Ukraine. Moreover, new challenges are likely to further strain the EU food chain. Frequent and extreme weather events during the summer season have had an impact on the yields of summer crops. According to the Potsdam Institute for Climate Impact Research and the European Central Bank, the 2022 summer heat increased food inflation in Europe by about 0.6%. Rising temperatures could drive food inflation up by 3.2% annually by 2035³². Additionally, geopolitical risks – such as the ongoing wars in Ukraine and the Middle East, along with potential trade disputes with China – pose further inflationary threats to the EU food chain.

3. Competition enforcement regarding Prices

19. Considering these figures of food inflation and the importance of food in household expenses, the EU's competition enforcement agenda has intensified its efforts to address through antitrust investigations anticompetitive practices raising food prices and to intervene in mergers that may raise food prices.

3.1. Antitrust enforcement on prices

20. The Commission's antitrust enforcement spans a wide range of food sectors, targeting essential products like beverages, confectionery, fish products and canned goods, as well as emerging markets such as online food delivery services. Several particularly harmful practices have been identified and addressed.

21. First, the Commission has been investigating cartels engaged in price-fixing or market-sharing practices aimed at raising prices. For instance, the Commission sanctioned³³ three main producers of canned vegetables³⁴ because they had fixed prices, had agreed on market shares and volume quotas, allocated customers and markets, exchanged commercially sensitive information, and coordinated their replies to tenders of retailers for the whole European economic area. Their goal was to preserve or strengthen

³⁰ European Commission, *Short-term outlook for EU agricultural markets in 2024*, DG Agricultural and Rural Development, Autumn 2024, N.39, page 7.

³¹ Eurostat, 'Food price monitoring tool – price trends along the food supply chain', 18 October 2024, available at <https://ec.europa.eu/eurostat/cache/website/economy/food-price-monitoring/> (accessed 22 October 2024).

³² Kotz, M. et al., 'Global warming and heat extremes to enhance inflationary pressures' (2024) 5 *Communications Earths & Environment*, page 6.

³³ European Commission, Press Release, 'Antitrust: Commission fines Conserve Italia €20 million for participating in canned vegetables cartel, 19 November 2021, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6164 (accessed 28 October 2024); Commission Decision of 19 November 2021 in Case AT.40127 – *Canned Vegetables*, C(2019) 6903 final.

³⁴ Canned vegetables include green beans, peas, peas-and-carrots mix and vegetable macedoine. The cartel also covered canned sweetcorn.

their position on the market, maintain or increase selling prices, reduce uncertainty for their future commercial conduct and control marketing and trading conditions to their advantage. Other ongoing cartel investigations address the Norwegian salmon market and the online food delivery sector. In the Farmed Atlantic Salmon case, the Commission preliminarily found that six salmon producers, exchanged commercially sensitive information, relating to sales prices, available volumes, sales volumes, production volumes and production capacities, as well as other price-setting factors. This may have diminished spot market uncertainty and may have contributed to inflated prices³⁵.

22. This year, the Commission has also initiated proceedings against Delivery Hero and Glovo, two major undertakings in the online food delivery sector and that are the leaders in many national markets in the EU and worldwide. The companies are suspected of having engaged in three types of collusive practices: agreeing not to poach each other's employees, sharing commercially sensitive information, and allocating markets. The Commission's intervention in this sector is particularly driven by the need to protect a young and dynamic market, where anticompetitive agreements could consolidate market positions to the disadvantage of consumers. The Commission is also concerned that the practices could have been facilitated by Delivery Hero's minority share in Glovo. While the acquisition of minority shareholding in a competitor is not *per se* a concern, particular care must be taken that these links are not used as a means to promote or implement anticompetitive behaviour.

23. Second, the Commission has prioritised the removal of Territorial Supply Constraints (TSCs) that have been imposed by food and beverage manufacturers either through agreements or through unilateral practices by dominant undertakings. These constraints prevent wholesalers and retailers from sourcing products from other Member States where prices are lower, thereby limiting downward pressure on prices by imports. The European internal market has been created for consumers to benefit from the best deals available on a continental scale and European competition law prohibits companies from raising obstacles to such arbitrage. According to a study by DG GROW, around half of retailers and wholesalers surveyed indicated that they had faced TSCs imposed by manufacturers when trying to source products in another EU country (³⁶). Several studies have also on significant retail price differences between national markets in the EU and about the contribution of price discrimination at wholesale level to such price differences³⁷.

24. In two notable decisions – *AB InBev* and *Mondelez* – the Commission sanctioned undertakings for restricting cross-border trade in beer and in chocolate, biscuits, and coffee

³⁵ European Commission, Press Release, 'Commission sends Statement of Objections to six companies in farmed Atlantic salmon cartel cases', 25 January 2024, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_405 (accessed 14 October 2024).

³⁶ European Commission, Final report: Study on territorial supply constraints in the EU retail sector, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), 2020, page 22.

³⁷ See further Messner, T., Rumler, F., and Strasser, G., *Cross-country price and inflation dispersion: retail network or national border?*, European Central Bank Working Paper Series, No 2776, February 2023; Institut des comptes nationaux, *Analyse des prix: rapport annuel 2017-Comparaison du niveaux des prix à la consommation des produits en Belgique, en Allemagne, en France et aux Pays-Bas*, SPF Économie, P.M.E, Classes moyennes et Énergie, Observatoire des prix, 2017 ; and Antoine, T., *Territorial supply constraints in the retail trade in Belgium, the Netherlands and Luxemburg – Consequences for the Benelux internal market*, February 2017.

products, respectively³⁸. The companies concerned implemented various means designed to restrict cross-border sales, including agreements on sale destinations, the restriction of passive sales, discriminatory prices for export resales in purchase agreements, the limitation of volumes of supplies for exports, conditioning rebates on not exporting products, the refusal or cessation of supply, tying products to stop purchases from abroad, and product differentiation (e.g. in terms of volume per product, language or design of packaging).

25. Third, the Commission also acts against conduct that may prevent access to lower priced products and reduce choice for consumers. For example, the Commission is currently investigating Red Bull for potential anticompetitive conduct concerning energy drinks.

26. Fourth, the Commission has investigated international retail alliances to check, among others, that the benefits that retailers have obtained from those alliances were effectively passed on to consumers. The Commission's Horizontal Guidelines explicitly recognise the potential benefits of retail alliances – which allow retailers to jointly negotiate and purchase their products upstream – on prices, choice, and quality (39). However, these alliances can also raise competition concerns insofar as, for example, they may facilitate collusion, foreclose competing purchasers, or stifle product innovation. In addition, when downstream competition is insufficient, the resulting purchase price reduction may not be passed-on to consumers in the form of decreased food prices. In 2023, the Commission closed its preliminary investigations into two international retail alliances, AgeCore and Coopernic, made by some of the largest retailers in Belgium, France, Germany, Italy, the Netherlands, and Spain⁴⁰. While the investigations identified no evidence of anticompetitive effects, the Commission found that the rebates obtained by the alliances contributed to the retailers' overall pricing strategies allowing them to reduce retail prices to match or undercut competitors' pricing. The extent of such price reductions depended notably on the degree of competition existing in the relevant downstream retail markets. Especially in times of high inflation, it is therefore fundamental for competition authorities to continue monitoring the retail sector, including alliances, to ensure that retail remains competitive.

27. Lastly, the Commission has taken action against protectionist agreements between producers and/or retailers. In 2022, it worked in collaboration with national competition authorities (NCAs) to investigate several such agreements established between supermarket chains and other operators along the food supply chain. These agreements often gave preference to domestic preferences under the guise of promoting consumer and environmental preferences for 'local food'. Such preferences are often promoted through the labelling of origin of domestic products⁴¹. However, this form of discrimination based on nationality conflicts with the EU's fundamental principle of ensuring a fair chance to all

³⁸ Commission Decision of 13 May 2019 in Case AT.40134 – *AB InBev beer trade restrictions*, C(2019) 3465 final; Commission Decision of 23 May 2024 in Case AT.40632 – *Mondelez trade restrictions*, C(2024) 3313 final.

³⁹ Communication from the Commission – Guidelines on the applicability of Article 101 of the TFEU of the European Union to horizontal co-operation agreements, OJ C 259, 21 July 2023, paragraph 275.

⁴⁰ European Commission, Daily News, 'Antitrust: Commission closes antitrust investigations into AgeCore and Coopernic', 13 July 2023, available at https://ec.europa.eu/commission/presscorner/detail/en/mex_23_3847 (accessed 14 October 2024).

⁴¹ European Commission, *Report on Competition Policy 2020*, COM(2021) 373 final, page 75.

producers inside the EU, regardless of their origin. It may also adversely affect the competition from products originating in other Member States, reducing their ability to drive prices down. The Commission requested and obtained the termination or modification of these agreements insofar as they appeared to unjustifiably foster nationality-based discrimination.

3.2. Merger enforcement on prices

28. The EU's merger enforcement policy complements its antitrust policy by preventing or remedying transactions that could raise prices. In the food industry, the Commission has again intervened across a wide range of products and markets, including edible oils, beverages, fish products, and confectionery, in order to ensure that food prices remain affordable for European consumers.

29. First, the Commission has addressed concerns over mergers between producers active at the same level of the food supply chain. It has accepted divestment commitments from merging parties to mitigate the risk of reduced competition and rising prices. For example, in both Icelandic salmon and the beer markets, the Commission has approved acquisitions subject to the divestment of the acquired undertaking's overlapping business. In the case of SalMar/NTS, this measure prevented the reduction of players on the Icelandic salmon market from three to two. In AB InBev/SABMiller, it ensured that AB InBev, the world's largest brewer, would continue to face competition from the second-largest brewing business post-transaction⁴².

30. A more targeted issue arose in the industrial chocolate market, where Cargill's acquisition of ADM's business was made conditional only on the divestment of ADM's largest industrial chocolate plant to a suitable purchaser. The divestment adequately addressed concerns about potential price increases in the geographic area surrounding the parties' German plants⁴³.

31. Second, the Commission has also investigated mergers between agricultural traders, notably, the recent acquisition of Viterra by Bunge. Both parties operate in the origination, trading and processing of oilseeds and grains, raising concerns that the transaction would result in high concentration of the oilseed market in Central Europe. To address these concerns, the Commission approved the merger on the condition that Bunge divest Viterra's entire oilseed businesses in Hungary and Poland. The remedy covered the entire value chain of the affected rapeseed and sunflower seed complexes in central Europe (i.e. from the origination of crops to the refining of vegetable oils) to ensure that prices would not increase at any level of the production process.

32. However, this case also demonstrates the Commission's willingness to intervene in vertical mergers within the food supply chain. In the Bunge/Viterra merger, the transaction as notified would have given Bunge a new upstream access to Viterra's sizeable origination of crops, which is crucial for the production of oilseed meals and oils. This vertical aspect highlights the potential impact on prices that can result from mergers across different levels of the food supply chain, as well as the Commission's enforcement in that area.

⁴² Commission decision of 31 October 2022 in Case M.10699 – *SALMAR/NTS*, C(2022) 8013 final; Commission decision of 24 May 2015 in Case M.7881 – *AB InBev/SABMiller*, C(2016) 3212 final.

⁴³ Commission decision of 17 July 2015 in Case M.7408 – *Cargill/ADM Chocolate Business*, C(2015) 4840 final.

4. Enforcement regarding Choice and Innovation

33. While prices are a critical focus of the Commission's enforcement agenda, it recognises that a healthy competitive landscape also encompasses choice and innovation. These are competitive parameters the Commission has long focused on, as highlighted by its unprecedented 2014 econometric report on choice and innovation in European food supply chains⁴⁴. In recent years, the importance of food choice and innovation has grown, driven by consumers' increasing health and environmental consciousness, as well as the political and ecological instabilities that underscore the need for diversified sources of food supply.

4.1. Antitrust enforcement on choice and innovation

34. Enforcement actions illustrate the Commission's dedication to promoting choice and innovation. It has investigated possible abuses in the form of practices which have limited consumer choice. The Commission opened a preliminary investigation into Coca-Cola in 2021. The Commission had concerns that Coca-Cola and its bottlers could have abused their dominant position by granting a series of conditional rebates to retailers in a number of Member States to foreclose the entry of existing and new drinks into the market. The Commission concluded in 2023 that the evidence collected indicated that there was a low likelihood of finding and establishing an infringement and, on priority grounds, therefore decided not to continue investigating the aforementioned practices. The Commission looked in particular into the role of smaller and nascent competitors in promoting innovation and whether retailers could give them opportunities to reach consumers inside shops, taking into account the fact that most consumers make purchasing decisions inside those shops.

35. When investigating or monitoring the effects of retail alliances, the Commission is aware that retail alliances may adversely affect innovation and choice. While the cases it investigated so far have not revealed such adverse effects, the Commission will continue to carefully assess specific allegations of harm to market innovation and choice as key parameters of consumer welfare.

4.2. Merger enforcement on choice and innovation

36. The Commission also emphasises the importance of monitoring mergers and acquisitions to ensure they do not negatively impact consumer choice and innovation.

37. A landmark case in this respect concerns the acquisition of Monsanto by Bayer⁴⁵. During its investigation of the proposed transaction, the Commission noted that while Bayer was a smaller player in the seed market, its extensive R&D activities were an important source of innovation. It was concerned that the acquisition would reduce the competitive pressure for the companies to invest in R&D in a sector driven by innovation. To address these concerns, Bayer committed to several divestments covering the company's global R&D organisation as well as its research activities. The divested assets and license commitments focused on assets for which innovation competition was particularly important, addressing the Commission's concerns that the sector could continue to develop competitively.

⁴⁴ European Commission, *Case studies report – The economic impact of modern retail on choice and innovation in the EU food sector*, September 2014.

⁴⁵ Commission decision of 21 March 2018 in Case M.8084 – *Bayer/Monsanto*, C(2018) 1709 final.

5. Addressing The Position of Farms in the Food Supply Chain

38. The European agricultural sector, made up of 9 million mostly small-scale farms, operates in a fragile economic environment. With 22% of farm income reliant on subsidies and relationships with suppliers and buyers often unbalanced, especially smaller farms face considerable difficulties in maintaining profitable operations.

39. In response, the Commission's competition agenda has focused on improving the position of farms in the food supply chain. It has pursued a two-tiered approach aimed at empowering farms by easing antitrust rules and addressing competitive distortions in the supply of farmer inputs and the purchase of their outputs.

5.1. Specific antitrust rules for cooperation between farms

40. Competition rules for the agricultural sector are designed within the framework of the Common Agricultural Policy, which has five objectives⁴⁶: increasing the productivity of farming, ensuring a fair standard of living for the agricultural community ensuring supplies, stabilising markets, and ensuring reasonable prices. Competition rules for the agricultural sector are subject to a specific regulation, called the Common Market Organisation Regulation (hereafter, the CMO regulation⁴⁷). The legislator laid out in that regulation a number of specific antitrust rules for the agricultural sector. This note describes six of those rules that encourage, through providing exclusions from competition rules, cooperation between farms to address the remuneration challenges referred to above.

- First, Article 152 of the CMO Regulation provides a structure-based tool for the establishment and development of so-called producer organisations (hereinafter, POs), such as cooperatives, to enhance the competitiveness of European farms. These organisations pool resources, reducing costs through economies of scale and shared access to information, expertise, equipment (e.g. machines, storage, transport), technical support, and sometimes R&D. By building on these common services and facilities and negotiating on behalf of a collective of farms, POs can substantially enhance the bargaining power of farms, helping them secure better prices and conditions for their input, lowering their costs of production and supply, ensuring supply that is more in accordance with market demand and ultimately ensuring better revenues from the market. In derogation to the standard rules on horizontal agreements, Article 152 of the CMO Regulation allows producer members of a PO to agree *inter alia* on prices and quantities produced and supplied, provided that the PO negotiates the sale of the output on behalf of its members and provided that it carries out at least one of the activities described above that enhances the position of farms. Importantly, this provision includes built-in safeguards: the Commission and national competition authorities can intervene if they consider it necessary to prevent competition from being excluded or to avoid jeopardising the Common Agricultural Policy objectives. This rule also does not preclude the application of the rule on the prohibition of an abuse of a dominant position.

⁴⁶ Article 39 of the Treaty on the Functioning of the European Union.

⁴⁷ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, OJ L 347.

- Second, Article 166a of the CMO Regulation allows producers benefiting from quality scheme labels, such as a Protected Designation of Origin (PDO) or a Protected Geographical Indication (PGI)⁴⁸, to collectively agree on production quantities. This rule not only supports compliance with quality assurance standards but also fosters a more reliable supply of products perceived as high-quality products and enhances these producers' bargaining power vis-à-vis downstream buyers. This rule is subject to specific conditions and safeguards: inter alia, the producers concerned must represent a majority of the production under appellation, there should be no excessive unavailability of supply and no prevention of entry into such production.
- Third, the CMO Regulation provides for access to information and value-sharing tools under Articles 210 and 172a. Article 210 allows an inter-branch organisation (grouping representatives of the farming level and representatives of other levels in the chain, such as processing, wholesale and retail) to produce and distribute information to farmers, subject to the requirement that the exchange does not lead to price or quantity fixing, market allocation, or discrimination. So far, the provision has been used to share aggregated price and supply information, facilitating negotiations between farms and different levels of the supply chain. Article 172 allows farmers to agree collectively on "Value sharing clauses" that determine how "any evolution of relevant market prices for the products concerned or other commodity markets is to be allocated between" operators. This allows the design of templates of such clauses that can be applied to individual situations.
- Fourth, the Regulation includes several product-specific rules in the wine, olive oil, sugar, and milk sectors. These rules derogate from standard rules on horizontal agreements in sensitive agricultural sectors by regulating quantities, facilitating collective agreements, and offering guidance on prices.
- Fifth, Article 222 CMO Regulation provides for specific antitrust rules in times of crisis enabling cooperation between producers to address severe imbalances in markets. The objective is usually to manage situations of extreme oversupply in markets where the fragmentation of producers/suppliers delays significantly actions to reduce supply. This provision, which can be triggered by the Commission and can be applied for a period of six months (which can be extended once), allows producers to jointly limit supply (by limiting output or withdrawing supply from markets), stimulate demand and, where appropriate, purchase inputs (e.g. in relation to a sanitary crisis). There is no limit on market coverage for such collective actions. To date, the provision has been used twice: in the dairy industry in 2016 and during the Covid-19 pandemic for flowers, milk, potatoes, and wine.
- Finally, Article 210a derogates from antitrust rules explicitly, shielding collective agreements from Article 101 TFEU when they involve agricultural producers and

⁴⁸ See European Commission, 'Geographical indications and quality schemes explained', available at https://agriculture.ec.europa.eu/farming/geographical-indications-and-quality-schemes/geographical-indications-and-quality-schemes-explained_en#pdo (accessed 29 October 2024); and Regulation (EU) 2024/1143 of the European Parliament and of the Council of 11 April 2024 on geographic indications for wine, spirit drinks and agricultural products, as well as traditional specialities guaranteed and optional quality terms for agricultural products, amending Regulations (EU) No 1308/2013, (EU) 2019/787 and (EU) 2019/1753 and repealing Regulation (EU) No 1151/2012, OJ L 2024/1143.

pertain to defined sustainability parameters. This provision is discussed in greater detail below.

5.2. Antitrust enforcement

41. To complement the flexibility afforded to farms under the CMO Regulation, the Commission has vigorously addressed anticompetitive behaviour that harms farms. For instance, the Commission has in the past acted against cartels among suppliers of essential farm inputs, such as animal feed. For example, the Commission sanctioned a price-fixing and market-sharing cartel among producers of animal feed phosphates. Suspected of lasting more than three decades, the cartel undoubtedly strained the ability for agricultural producers to purchase feed at a lower price⁴⁹. In addition, given that many markets for the sale of agricultural goods are national or local, there has also been a lot of enforcement by National Competition Authorities notably regarding cartels among buyers, for example in the pork and raw milk markets.

5.3. Merger control in bottlenecks of the supply chain

42. Merger enforcement complements these approaches by ensuring that mergers do not impede affordable supply of inputs or by addressing the growth in a buyer's bargaining power.

43. A recent pertinent example is the merger between Bunge and Viterra, which raised concerns regarding the impact that the market consolidation could have on farms which are dependent on concentrated groups of traders and processors – including the Parties – acting as the sector's gatekeepers. Farmers typically focus on growing crops and have very limited ability to store and distribute their production after harvest. To reach the market, they typically hand over their produce to *originators* that are third parties – such as the ABCDs⁵⁰ and other smaller intermediaries – collecting crops from individual farmers and preparing them for marketing. The Commission's investigation into the Bunge/Viterra deal showed that – whether buying directly from farmers or other intermediaries – Bunge and Viterra typically exert market power on the purchasing side of the oilseed markets towards farmers. This is because the scale of their downstream trading and processing activities enables them to purchase high volumes. In turn, high trading volumes allow these companies to secure better terms in the access to international infrastructure networks for the long-distance transport of these commodities (e.g. on railways and overseas shipping), depending on these companies' purchases. To address these concerns, the Commission accepted divestment commitments in part designed to manage buyer power, ultimately benefiting farms upstream. Those commitments involved the divestment of Viterra's entire oilseed business in Poland and Hungary, two very prominent countries for the growing of rapeseed and sunflower in the EU⁵¹.

⁴⁹ Commission decision of 20 July 2010 in Case COMP/38.866 – *Animal feed phosphates*, C 111/19.

⁵⁰ The largest global traders of agricultural commodities are known as ABCDs, from the initials of the main members of this group: ADM, Bunge, Cargill, and Dreyfuss.

⁵¹ European Commission, Press Release, 'Commission clears Bunge's acquisition of Viterra subject to conditions', 1 August 2024, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4103 (accessed 23 October 2024).

44. Another relevant case is the merger between Bayer and Monsanto⁵². While the Commission's investigation focused on innovation, it also revealed that the merger would likely eliminate competition in the non-selective herbicides market and diminish innovation in herbicide development. To address these concerns, Bayer committed to several divestments, particularly in favour of BASF, a competing agribusiness with sufficient financial strength to compete against the newly merged entity. The Commission ultimately approved the merger contingent upon these commitments, determining that they adequately preserved competition on pricing and innovation across both markets.

6. Promoting Sustainability in the Food Supply Chain

45. Finally, sustainability – a comparatively new consideration – has been integrated into the Commission's enforcement agenda. This development reflects the existential threat that climate change and environmental degradation represent both in Europe and globally. It also responds to the slow progression of sustainability regulation and the setbacks encountered in its development, which have placed pressure on private initiatives to accelerate their efforts. However, this drive for sustainability collaboration can create conflicts with competition rules. Sustainability initiatives can raise concerns regarding the level of cooperation among producers if it can lead to higher prices or reduced output, introducing tension between competition policy objectives and the EU's sustainability aspirations.

46. To address this difficulty, the legislator and Commission have sought to adapt antitrust rules to accommodate sustainability goals. This adaptation has the potential to encourage greater cooperation between private operators, fostering innovation and collective advancements in sustainability. While cooperation might lower costs through joint investments or economies of scale, this is not always the case, and the overall impact on consumer prices remains uncertain.

6.1. Sustainability at the farming level

47. The legislator introduced an agricultural exception under Article 210a of the CMO Regulation. Effective from December 8, 2021, Article 210a allows agricultural producers and other operators in the agri-food supply chain to collectively implement sustainability standards that go beyond what is currently required by existing EU and national legislation provided that the higher standards pursue certain sustainability objectives (environmental, reduced use of pesticides and antimicrobials, animal health, or animal welfare) and provided that this collective action is indispensable to achieve the standard (i.e. individual action is not sufficient). In practice, this can lead to collective actions by farmers, including on price elements to recover costs and related risks and on reducing output to achieve sustainability standards that exceed mandatory standards. This rule applies only to agricultural products (i.e. not processed food such as biscuits) but can apply to agreements between agricultural producers and other levels of the chain (processors, manufacturers, wholesalers, and retailers). On 7 December 2023 the Commission adopted the Guidelines on Article 210a to help agricultural producers implement the rule⁵³.

⁵² *Bayer/Monsanto*, supra note 34.

⁵³ Communication from the Commission, Commission guidelines on the exclusion from Article 101 of the Treaty on the Functioning of the European Union for sustainability agreements of

48. Agricultural producers may request an opinion from the Commission concerning the compatibility of sustainability agreements with Article 210a. The Commission is in discussion with certain farmers' collectives to provide guidance on sustainability initiatives.

6.2. Sustainability at other levels of the supply chain

49. Beyond the farming sector, the Commission provides a general framework for companies to self-assess the compatibility of their joint sustainability initiatives with the EU competition rules that applies to all sectors, including other levels of the food supply chain. This framework is set out in Chapter 9 of the new Horizontal Guidelines published in July 2023 which covers all agreements between competitors that pursue a sustainability objective⁵⁴. It recognises that “cooperation agreements may address residual market failures that are not or not fully addressed by public policies and regulation”⁽⁵⁵⁾. The guidance lists various examples of sustainability agreements that generally fall outside the scope of Article 101(1) TFEU. The new rules also provide a soft safe harbour for sustainability standardisation agreements that meet certain conditions and clarify how a sustainability agreement can be exempted under Article 101(3) by describing types of benefits that may be taken into account.

50. Ultimately, these initiatives illustrate the Commission's commitment to balancing competition policy with the wider sustainability goals of the European Green Deal, ensuring that the agrifood sector can thrive and food prices can remain stable, while meeting the pressing demands of climate change and environmental degradation.

7. Conclusion

51. The Commission's emphasis on the food supply chain reflects the importance of this sector for consumers, employers and employees, the overall economy and society at large. Its agenda prioritises three key objectives: ensuring fair prices, choice, and innovation for European consumers; improving the position of farms within the supply chain; and promoting sustainability. To achieve these aims, the Commission focuses its enforcement not only on the anticompetitive practices of dominant or collaborating undertakings, but also on the scrutinising mergers which could have detrimental effects on one of these metrics. Finally, it complements this competitive policy with regulations that reinforce its strategic objective, for instance by promoting collaboration between agricultural producers.

agricultural producers pursuant to Article 210a of Regulation (EU) No 1308/2013, C/2023/8306 final.

⁵⁴ Horizontal Guidelines, supra note 39.

⁵⁵ Ibid., paragraph 520.