

“THE HUNGER GAMES”: COMPETITION LAW & THE RIGHT TO FOOD

Introduction

Although the 'right to food' of all people was recognized in the Universal Declaration of Human Rights 1948,¹ it only came into sharp international focus first in 1996 at the World Food Summit (WFS) and then in 2000 when it was included in the declaration of the United Nations' Millennium Development Goals (MDGs). At both the WFS and in declaring the MDGs, there was widespread consensus amongst UN member states² that world hunger, regardless of whether it occurred in developing or developed countries, was a consequence of poverty rather than of food scarcity: whilst in some cases poverty prevented access to food altogether, in others it meant access only to nutritionally inadequate though cheap food. In order to improve accessibility to and adequacy of food and thereby to bridge the hunger gap, the States made a commitment on both occasions, that they would reduce by 2015 the number of undernourished people within their borders to half the then present levels.³

It is of particular interest to note, that following this political momentum, in 2000 the Commission on Human Rights appointed a Special Rapporteur on the Right to Food with the mandate, among others, to present recommendations on possible steps to achieve the full realization of this right. The work of the

¹ Article 25(1): 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.' Universal Declaration of Human Rights 1948 <http://www.un.org/en/universal-declaration-human-rights/> (accessed 30th March 2016).

² Hereinafter 'States'.

³ Rome Declaration on World Food Security <http://www.fao.org/wfs/> (accessed 30th March 2016) and <http://www.unmillenniumproject.org/goals/gti.htm#goal1> (accessed 30th March 2016).

first Rapporteur on the right to food, Professor Olivier de Schutter, has been particularly wide-ranging, including the publication of a number of reports, exploring different dimensions of the right to food.⁴ One of the most prominent—and at first sight, surprising—issues explored by de Schutter’s work on the implementation of the right to food, was the market structure of and concentration in various segments of the food supply chain, including but not limited to the traditional concern over access to land.⁵ The Special

⁴ See, for instance, O. de Schutter, ‘Building resilience: a human rights framework for world food and nutrition security’; Report of the Special Rapporteur on the right to food, Olivier De Schutter, to the 9th session of the Human Rights Council (UN doc. A/HRC/9/23) (8 September 2008); Id., Programme of work of the Special Rapporteur on the right to food, Interim report of the Special Rapporteur on the right to food, Olivier De Schutter, to the 63rd session of the General Assembly (A/63/278) (21 October 2008); Id., ‘The role of development cooperation and food aid in realizing the right to adequate food: moving from charity to obligation’, Report of the Special Rapporteur on the right to food, Olivier De Schutter, to the 10th session of the Human Rights Council (UN doc. A/HRC/10/5) (11. February 2009); Id., ‘Crisis into opportunity: reinforcing multilateralism’, Report of the Special Rapporteur on the right to food, Olivier De Schutter, to the 12th session of the Human Rights Council (UN doc. A/HRC/12/31) (21 July 2009); Id., ‘Seed policies and the right to food’, Interim report of the Special Rapporteur on the right to food, Olivier De Schutter, to the 64th session of the General Assembly (UN doc. A/64/170) (27 July 2009); Id., Agribusiness and the right to food, Report of the Special Rapporteur on the right to food, Olivier De Schutter (UN doc. A/HRC/13/33) (22 December 2009); Id., ‘Report of the Special Rapporteur on the right to food, Olivier De Schutter - Addendum - Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge’, A/HRC/13/33/Add.2 (28 December 2009); Id., Countries tackling hunger with a right to food approach. Significant progress in implementing the right to food at national scale in Africa, Latin America and South Asia”, Briefing Note 1 (14 May 2010); Id., "The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Trade System", Briefing Note 4 (16 November 2011); Id., 'The Adequacy of Diets and the Right to Food: the agriculture-food-health nexus', Report presented at the 19th Session of the United Nations Human Rights Council, UN doc. A/HRC/19/59 (March 2012); Id., "From Charity to Entitlement: Implementing the right to food in Southern and Eastern Africa", Briefing Note 5 (20 June 2012); Id., 'The fisheries sector and the right to food', Interim Report of the Special Rapporteur on the right to food, Olivier De Schutter, to the 67th session of the General Assembly, UN doc. A/67/XX (6 August 2012); Id., "A Rights Revolution: Implementing the right to food in Latin America and the Caribbean", Briefing Note 6 (27 September 2012). For a discussion, see O. de Schutter, *The Right of Everyone to Enjoy the benefits of Scientific Progress and the Right to Food: From Conflict to Complementarity*, (2011) 33 *Human Rights Quarterly* 2.

⁵ O. de Schutter, ‘Access to land and the right to food’, Interim Report of the Special Rapporteur on the right to food, Olivier De Schutter, to the 65th session of the General

Rapporteur was of the view that exploring the economic intricacies of the right to food brought a beneficial, fresh perspective to the problem of the effective implementation of the right to food. Particularly refreshing in this approach was the emphasis put by him on issues of just distribution of the value generated by the food supply chain, which he dubbed more subtly, as food *value* chain, in order to highlight the salience of distributive justice concerns in a meaningful and empowering fulfillment of the right to food. Even more surprisingly, for the non-initiated, the UN Special Rapporteur focused on the contribution of competition law and policy in the implementation of the right to food.⁶

The mingling of economic and social rights, such as the right to food, with competition law and policy is not a unique circumstance. Competition and IP law experts are familiar with the important role played by the right to health in discussions regarding the interpretation of patent law as applied to pharmaceuticals particularly in limiting the rights of patent holders if these jeopardized the right to health.⁷ A similar, yet more subtle, for the time being,

Assembly, UN doc. A/65/281 (11 August 2010); Id., "Food Commodities Speculation and Food Price Crises. Regulation to reduce the risks of price volatility", Briefing Note 2 (23 September 2010); Id., "Addressing Concentration in Food Supply Chains. The Role of Competition Law in Tackling the Abuse of Buyer Power", Briefing Note 3 (1 December 2010); Id., 'Agroecology and the Right to Food', Report presented at the 16th Session of the United Nations Human Rights Council, UN doc. A/HRC/16/49 (March 2011); Id., "Towards more equitable value chains: alternative business models in support of the right to food", Interim Report of the Special Rapporteur on the right to food, Olivier De Schutter, to the 66th session of the General Assembly, UN doc. A/66/262 (4 August 2011).

⁶ O. de Schutter, "Addressing Concentration in Food Supply Chains. The Role of Competition Law in Tackling the Abuse of Buyer Power", Briefing Note 3 (1 December 2010).

⁷ See, the discussions in I. Haracoglou, *Competition Law and Patents: A Follow-on Innovation Perspective in the Pharmaceutical Industry* (Edward Elgar, 2008), Chapter 4; Econ. and Soc. Council. Human rights and intellectual property: Statement by the Committee on Economic, Social and Cultural Rights. UN Doc. E/C.12/2001/15 (Dec. 14, 2001). <http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.15HRI%20intel-property.pdf>; Frederick Abbott et al. *Using Competition Law to Promote Access to Medicines*. United Nations Development Program. (May 16, 2014). <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/using->

influence may be traced in the enforcement of competition law in the pharmaceutical sector.⁸ Although the present or potential impact of human rights' rhetoric informing and empowering competition law enforcement has not yet been examined in depth,⁹ one may enquire if the right to food could not be perceived as giving context and content to competition law enforcement rather than merely limiting its scope. An in-depth analysis of competition policy issues in the food industry may provide a blueprint for rethinking competition law and policy, from the perspective of the right to food. This may break with the usual conceptualization of competition law in which it is held in splendid isolation from other spheres, in particular human rights, and promote its theorization as an instrument for the promotion of plurality of objectives ranging from economic efficiency, innovation, consumer welfare, increased national productivity to the fight against inequality, greater distributive justice, and the fulfillment of the "universally" acclaimed right to food.

The existence of various market actors along the global food value chain (at the wholesale, retail or other level), global retail chains, different forms of commerce competing with each other (modern and more traditional), different

[competition-law-to-promote-access-to-medicine.html](http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/using-competition-law-to-promote-access-to-medicine.html); F. Abbott et al. Using Competition Law to Promote Access to Medicines. United Nations Development Program. (May 16, 2014). <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/using-competition-law-to-promote-access-to-medicine.html>.

⁸ See, for instance, UNDP, Using Competition Law to Promote Access to Health Technologies (May 2014).

⁹ For the beginning of some discussion, see I. Lianos, Competition Law in the European Union after the Treaty of Lisbon, in D. Ashiagbor, N. Countouris & I. Lianos (eds.), *The European Union After the Treaty of Lisbon* (CUP, 2012), 252. Most studies looking to the intersection between human rights and competition law emphasise the *limits* certain rights, such as property, freedom to choose one's business partner, due process rights etc, set to competition law enforcement, which is of course important, but they ignore the empowerment dynamics of competition law that may be generated by human rights law. See, for instance, A. Andreangeli, *EU Competition Enforcement and Human Rights* (Edward Elgar, 2008); A. Andreangeli, 'Between Economic Freedom and Effective Competition Enforcement: the impact of the antitrust remedies provided by the Modernisation Regulation on investigated parties freedom to contract and to enjoy property', (2010) 2 *Competition Law Review* 225.

means of self-regulation including standard setting and certification, various groups of consumers, various forms of suppliers (e.g. industrial, farmers), presents a complex web of societal relations built in order to guarantee the distribution of food. This web extends beyond the national level and is regulated by transnational supply (and value!) chains, which have so far escaped the systematic scrutiny of competition authorities. It is intriguing that at a time in which international cartels have been the focus of competition law action worldwide and competition law has developed common tools, such as leniency and individual or financial sanctions in order to tackle their welfare effects, global value chains in various sectors have escaped scrutiny. This is partly due to the gradual retreat of competition authorities from regulating “vertical restraints”, which are viewed more positively than “horizontal restraints”, such as cartels and partly due to the emergence of economic efficiency driven competition law, that has relegated issues of distribution to other areas of law or taxation.¹⁰,

However, the societal importance of the food sector and its intrinsic link to politics, both at the national (democracy, political stability) and the global level (the new geopolitics of food) may provide a wake-up call to the proponents of insularity of competition law and help them realize that separating the rhetoric of rights from the rhetoric of economics, to the extent that the latter is perceived as a vehicle of domination of “neoliberal” ideas, may not be the right strategy. Indeed, as some have commented, “(t)he world is in transition from an era of food abundance to one of scarcity. Over the last decade, world grain reserves have fallen by one third. World food prices have more than doubled, triggering a worldwide land rush and ushering in a new geopolitics of food. Food is the new oil. Land is the new gold”.¹¹ The reference to scarcity should suffice to convince even the most fervent devotees of the neoclassical economics religion

¹⁰ The emergence of economic efficiency driven competition law is reminiscent of a similar movement that took place in welfare economics, (the intellectual backbone of competition law), which, in the early days of the 20th century was purged of its distributive justice concerns courtesy of the second welfare theorem.

¹¹ L.R. Brown, *Empty Planet, Empty Plates*, Norton & Company, 2011, p. 3.

that the rights' and entitlements' rhetoric of the 'right to food' needs to be squared with the usual and fundamental focus of welfare economics – at least since Robbins – on the disposal of scarce means.¹²

An assessment of the degree of progress towards these targets carried out in the designated year of reckoning returned mixed results suggesting thereby that the discussions and debates regarding the fulfillment of the right of food are as relevant today as they have ever been. According to '*State of Food Insecurity in the World 2015 Report*', only 72 out of 129 countries had reached the MDG whereas only 29 had also reached the more ambitious WFS target they had set for themselves. This meant that out of a world population of approximately 7.3 billion, 795 million people – over 1 in 9 – remained undernourished. Of these, at least 780 million – nearly 98% – lived in developing regions whereas the remaining 2% were spread throughout the developed world.¹³ It is evident that the problem of hunger and malnutrition though overwhelmingly a developing world issue is not exclusive to it. Given the prevalence of undernourished in the developing world, it is perhaps not surprising that the Report focuses on addressing food security concerns from a developing country perspective. In particular, the Report identifies certain 'drivers of change', which in varying degrees, affect the progress of a country towards eradicating hunger. These include economic growth (especially inclusive economic growth which promotes equitable access to food), increased

¹² According to L. Robbins, *An Essay on the Nature and Significance of Economic Science* (Macmillan & Co., 1932), 16-17:

“The economist studies the disposal of scarce means. He is interested in the way different degrees of scarcity of different goods give rise to different ratios of valuation between them, and he is interested in the way in which changes in conditions of scarcity, whether coming from changes in ends or changes in means- from the demand side or the supply side - affect these ratios. Economics is the science which studies human behavior as a relationship between ends and scarce means which have alternative uses [...] There are no limitations on the subject-matter of Economic Science save this.”

¹³ FAO, IFAD and WFP. 2015. *The State of Food Insecurity in the World 2015. Meeting the 2015 international hunger targets: taking stock of uneven progress*. Rome, FAO. Hereinafter 'the Report'.

labour and land productivity through well-functioning markets,¹⁴ openness to international trade, social protection (particularly in healthcare and education) and a strong political commitment towards fulfilling this goal (especially in the face of crises or natural disasters). The Report also emphasizes the need for coordinated implementation of measures adopted by States for achieving food security.¹⁵ Whilst the insight offered by the Report is instructive for individual countries as well as regions seeking to bridge their hunger gap, it poses two significant dangers: first, it renders invisible the more insidious incidence of hunger and malnutrition in the developed world and second, it ignores the integrated structure of world food markets due to which policies and actions in respect of these markets adopted in one part of the world can and do have a significant impact in another.

We argue in this paper that competition law, with its inherent focus on market regulation and providing a level playing field to market players offers a credible conceptual and institutional response for addressing this challenge along transparent, predictable and sustainable lines. It is our view that not only does the implementation of the right to food stand to benefit from a market-centered approach but also that competition itself becomes a more “holistic” and meaningful tool for social reform by taking into account values inherent in

¹⁴ These drivers of change reiterated the FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the context of National Food Security 2004 <http://www.fao.org/docrep/009/y7937e/y7937e00.htm> (accessed 31st March 2016). See in particular Guidelines 2.4 and 4.2 which state inter alia that states should develop 'appropriate institutions, functioning markets, [and] a conducive legal and regulatory framework', and 'put legislation, policies, procedures and regulatory and other institutions in place to ensure non-discriminatory access to markets and to prevent uncompetitive practices in markets.'

¹⁵ In highlighting the need for intersectoral coordination the Report reaffirmed the UN Fact Sheet on The Right to Adequate Food 2010, UN Fact Sheet No. 34 which had emphasized the necessity for states to put into place 'coordinated intersectoral mechanisms' for concerted implementation, monitoring and evaluation of policies. <http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf> (accessed 31st March 2016).

the progress towards the global right to food¹⁶ by integrating the multi-dimensional reality of the global food supply and retail chain in the assessment of specific commercial practices and/or sectors. We will aim to provide the grammar of a holistic competition policy in this crucial sector for national and global economies and dissect the actual and potential impact of the right to food rhetoric on competition law enforcement.

To illustrate the conceptual and institutional potential of competition as a tool for implementing the values inherent in the right to food we refer recent decisions of the Indian Competition Commission (CCI) in the *Monsanto Cases*.¹⁷ Further, we discuss how the pursuit of social objects is not inherently at odds with the economic objectives of competition law. In order to support this claim, we draw examples from the EU and other jurisdictions to demonstrate the manner in which different competition authorities throughout the world have conjoined economic aims with the object of implementing the right to food.

We begin in section 1 by tracing the legal evolution and full meaning of the right to food with reference to relevant international legal documents. We describe the transnational structure of the Global Food Value Chain¹⁸ and identify the roles likely to be played by developed and developing countries (or their natural or legal citizens) along the Food Chain. We end this section by introducing the core values of the right to food that are relevant in its implementation. In section 2, we address conceptual and institutional features of competition law, which render it an appropriate response for meeting the challenges of implementing the right to food. In section 3, we examine the intersection of the right to food and positive competition law from two

¹⁶ On the perils and advantages of “holistic” competition law, see I. Lianos, *Some Reflections on the Question of the Goals of EU Competition Law*, in *Handbook in EU Competition Law: Substantive Aspects*, I. Lianos and D. Geradin (eds.), (Edward Elgar, 2013), 1-84.

¹⁷ Order of the Competition Commission of India under section 26(1) dated 10.02.2016 in Reference Cases Nos. 2 and 107 of 2015.

¹⁸ Hereinafter ‘the Food Chain’.

different perspectives. First, we analyze the institutions within which and the various methods this interaction may take place from a theoretical perspective. Second, we explore examples from various competition jurisdictions, where the traditional competition law tools were used in order to allow for a rights-based approach that would accommodate the right to food. In the final section, we conclude that the conceptual and institutional appropriateness and utility of competition law as a response to implementing the right to food outweighs any objections that may be raised from a restrictive interpretation of its goals.

1. Understanding the 'Right to Food'

(a) *Basis of the legal obligations of States in relation to the Right to Food*

When the right to food was introduced at the international stage through the Universal Declaration of Human Rights 1948, it was deemed to be a component of everyone's 'right to a standard of living adequate for the health and wellbeing'.¹⁹ The right featured more prominently in Article 11 of the International Covenant on Economic, Social and Cultural Rights 1976 (ICESCR) which recognized the independent 'fundamental right of everyone to be free from hunger' and affirmed the commitment of signatories of the ICESCR individually and through international co-operation, to take all measures necessary to enforce this right.²⁰ Further, with particular regard to children,

¹⁹ See n 1.

²⁰ Article 11 International Covenant on Economic, Social and Cultural Rights 1976:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of

States recognized in terms of Articles 24 and 27 of the Convention on Rights of the Child 1990 (CRC), that the right to 'adequate, nutritious food' was fundamental to a child's right to health and its 'physical, mental, spiritual, moral and social development.'²¹ The right to food is also protected by a number of regional treaties (e.g. and Article 11 of the American Declaration on the Rights and Duties of Man) and national constitutions²² However, an important question remains: does the right to food create legal obligations, and correlative duties, and if it does, what form do they take?

(b) *Nature of the obligations*

The emergence of the right to food raises interesting issues as to the exact content of the right, the nature of obligations it gives birth to and, more generally, its political, moral and/or legal dimension. A follower of the Hohfeld may expect rights to involve a complex set of permissions and

the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (accessed 1 April 2016).

²¹ Convention on the Rights of the Child 1990. See in particular Article 24(2)(c) 'To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;' and Article 27(3) 'States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.' Emphasis Added. <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed 1 April 2016).

²² Section 27(1)(b) of the Constitution of the Republic of South Africa states that, "everyone has the right to have access to sufficient food and water". Further, in the landmark case of *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) the court laid the foundation for progressively realizing the economic and social rights of those in desperate need.

constraints regarding the actions of the right-holder, either providing him “privileges” linked to a certain freedom or permission to act (“freedom right”), or imposing correlative duties on others, which give rise to “claims” on the part of the right-holder (“claim rights”).²³ On the basis of these privileges and claims (first-order rights), right-holders may derive powers, defined as “one's affirmative ‘control’ over a given legal relation as against another” (the opposite being disability), and immunities, which determine “one's freedom from the legal power or ‘control’ of another as regards some legal relation” (the opposite being liability).²⁴ These “second-order” rights support legal rights concerning the alteration of the first-order rights. Rights can also be negative or positive: the holder of a negative right being entitled to non-interference, while the holder of a positive right being entitled to provision of some good or service.

In order to understand the legal nature of the right to food, it is important to first to establish its definitional meaning which remained unclear to the States despite the repeated commitments made by them in the Universal Declaration of Human Rights, the ICESCR and the CRC as well as the affirmations made by them at the WFS.²⁵ In response to a request made in course of the WFS for ‘a better definition of the rights relating to food in article 11’ of ICESCR, the UN Committee on Economic, Social and Cultural Rights in its 20th meeting held in April 1999, adopted the General Comment No. 12 on the Right to Adequate Food with the express object of giving ‘particular attention to the [WFS] Plan of Action in monitoring the implementation of the specific measures provided for in article 11 of the [ICESCR]’.²⁶

²³ W. Hohfeld, *Some Fundamental Legal Conceptions As Applied to Legal Reasoning* (1913) 23 *Yale Law Journal* 16.

²⁴ *Ibid*, 55.

²⁵ See n. 2 and text thereto.

²⁶ This definition of food security is derived from General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant) http://www.fao.org/fileadmin/templates/righttofood/documents/RTF_publicatio

In terms of the General Comment, the right to food is universal, fundamental to all other human rights and has to be interpreted broadly as being more than the right to ‘a minimum package of calories, proteins and other specific nutrients’. Further in terms of the General Comment, although the right to food can only be realized progressively, States have a minimum obligation to take necessary action to mitigate and alleviate hunger even in times of natural and other disasters.²⁷ The General Comment also clarifies that the right to *adequate* food though distinct from is linked closely to *food security*: whilst adequacy is largely determined by the prevailing ‘social, economic, cultural, climactic, ecological and other conditions’, security also includes the long term accessibility and availability of food.²⁸ The General Comment, therefore, maintains that the right to food, at its core, is about the availability of food in a quantity and quality sufficient to satisfy the dietary²⁹ needs of individuals free from adverse substances³⁰ and acceptable within a given culture³¹ as well as the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

The three most important concepts in relation to food introduced in this explanation are ‘availability’, ‘accessibility’ and ‘adequacy’. The General

ns/EN/General_Comment_12_EN.pdf (accessed 1 April 2016). Hereinafter ‘the General Comment’.

²⁷ Ibid. Para 6.

²⁸ Ibid. Para 7.

²⁹ The term ‘dietary’ means that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation. Ibid. para 9.

³⁰ ‘Free from adverse substances’ sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain. Ibid para 10.

³¹ Cultural or consumer acceptability implies the need also to take into account, as far as possible, perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies. Ibid para 11.

Comment defines 'availability' to mean the possibility of a person either feeding him or herself directly from the productive land or other natural resources or from well-functioning, distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with the demand;³² 'accessibility' includes the ability or capacity of persons to gain economic as well as physical access. Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet are at a level that fulfilling them does not threaten or compromise the attainment and satisfaction of the households' other basic needs whereas physical accessibility implies that adequate food is accessible to everyone, including infants and young children, elderly people, the physically disabled and the terminally or mentally ill.³³ Adequacy refers to the nutritional appropriateness of the food.³⁴

The General Comment further states that the obligations of states with regard to the realization of the right to food are threefold: (a) to respect existing access to the right to food, (b) to protect individuals from being deprived of their access to adequate food by enterprises or individuals, and (c) to facilitate individuals in gaining access to and utilization of resources and means for ensuring their livelihood and where people are deprived of access due to natural or other disasters to fulfill this right directly.³⁵ A State is deemed to be in violation of its obligations when it fails to ensure the satisfaction of even the minimum essential level of access to food required for its citizens to be free from hunger. The General Comment recommends that to fulfill their obligations to ensure food and nutrition security for all, States may adopt a national strategy and formulate policies and corresponding benchmarks and

³² Ibid para 12.

³³ Ibid para 13.

³⁴ N. 29, 30 and 31 and text thereto.

³⁵ Ibid para 15.

implement these systematically as part of a coordinated effort of ministries, regional and local authorities.³⁶

Moving a step further, or back, depending on the viewpoint, the right to food has been contextualized as a dimension of consumer rights. Protecting the rights of consumers of food is central to any strategies that may be adopted for fulfilling the right to food. It is important, therefore, to establish consumer rights that are specifically relevant in relation to the right to food. The right to food itself is included in the UN Guidelines for Consumer Protection 1985 which recognize the rights of consumers to basic needs (including the right to food and water), the right to redress, the right to consumer education and the right to a healthy environment in addition to the consumer rights to safety, to be informed, to choose and to be heard which had been introduced through the 1962 United States Consumer Bill of Rights.³⁷ In turn, the right to food gives rise to the right of a consumer to have access to adequate and affordable food, which has been produced through environmentally viable and economically efficient means. The UN Guidelines also recognize this right, albeit obliquely, as the right of consumers to 'just, equitable and sustainable economic and social development'. In practice, a large number of countries that have adopted consumer protection legislation focus on price of a consumer product and ensuring that the product sold is in accordance with what was advertised. In implementing the right to food, however, it is necessary to adopt the broader concept of consumer rights, which takes into account the social as well as ecological dimensions of these rights, but also the possible conflicts with other rights or interests of the various actors in the food value chain, this not being confined to the final consumer, as the above definition of the right to food insinuates.

³⁶ Ibid para 21 and 22.

³⁷ http://unctad.org/en/PublicationsLibrary/UN-DESA_GCP1999_en.pdf (accessed 6 April 2016). UNCTAD is expected to publish a revised version of these guidelines shortly.

(c) *Food value chain and “Interessenjurisprudenz”*³⁸

The existence of various national and international market actors at the production, wholesale or retail levels and the different commerce options available to countries (ranging from the traditional corner store, to e-commerce) as well as the different types of consumers and suppliers that may co-exist within a country itself, creates a complex web of societal relations that govern the global distribution and consumption of food. A somewhat simplistic representation of the Food Chain is as follows:

Figure 1: The Global Food Value Chain



Each successive link in the Food Chain is essentially a food market: the Factor Providers sell inputs such as seeds, pesticides, fertilizers etc to Agricultural Producers; Agricultural Producers may sell their produce to Wholesalers and so on and so forth until finally the Retailers sell to the Consumers. However, the linearity of the Food Chain is misleading in at least two important respects: first, it depicts each group as distinct from the other whereas in actual fact there may be significant overlap between groups (eg Factor Providers may also be Processors; the same entities may be economic actors in the Processing and Retail sectors whereas actors in all sectors are also end-consumers). Second, it fails to indicate that each of these sectors may have facilities set up in different

³⁸ ‘The Jurisprudence of Interests’. See Remus Titiriga ‘The “Jurisprudence of Interests” (Interessenjurisprudenz) from Germany: History, Accomplishments, Evaluation’ *International Journal of Law, Language and Discourse* Volume 3.1, June 2013, pp. 55-78.

countries and connected to each other through complex group company structures. These multiple dimensions of the Food Chain have the effect of creating a super-structure, which defies neat classification along geographical or developmental lines. This sketch of the Food Chain and the identification of the various actors involved in it at different levels – both those that are acting today as well as those that may be integrated in the future--also shows that examining the Food Chain from the point of view of the consumer alone is limiting at best and in fact renders a distorted picture of the more complex interests, conflicts, rights and entitlements that lurk just below the surface of links of these transnational chains. By way of illustration we list below a few of these conflicting interests, rights and entitlements:

(i) *Promoting Intellectual Property Rights (IP Rights)*

The promotion and strengthening of IP Rights plays an important role in the governance of Food Chains. IP Rights in agricultural production became increasingly relevant since the decisions of the United States Supreme Court in *Diamond v. Chakraborty* (1980) and *Ex parte Hibberd* (1985) in terms of which individuals were allowed the option of seeking a utility patent to protect a novel plant variety under the Plant Patent Act of 1930 or the Plant Variety Protection Act 1970.³⁹ The historic rationale for promoting IP Rights in the agricultural sector has been to stimulate research, development and innovation. However, it has also had the effect of rendering agricultural inputs private property rather than communal, public resources as they had traditionally been. Strengthening IP Rights is still considered important for promoting and rewarding innovation by the private sector and for helping farmers to produce higher yields, preserving agro-biodiversity and crop genetic diversity and providing solutions for cash-strapped farmers in difficult environments. However, strong IP Rights coupled with the increasing

³⁹ Intellectual Property in Plants
<https://www.princeton.edu/~ota/disk1/1989/8924/892407.PDF> (accessed 27th April 2016).

concentration particularly in the Factor-Providing sector (eg seed and pesticide) may also threaten the possibility of expansion or even maintenance of farmers' own seed systems, block further research not authorized by the IP Right-holder and in case of research led by the private sector, serve the needs of the high value markets rather than those of poor marginalized farmers. Therefore, the challenge for countries in upholding this IP Rights in the food sector is to strike an appropriate balance between the need for protecting IP Rights and ensuring that farming does not become so expensive for the poorest of farmers that they slip deeper into poverty and further away from fulfillment of the very right to food which the IP Rights are understood to support.⁴⁰ It is also important to note, however, that IP Rights are not unique to Factor Providers and occur at all levels of the Food Chain. It follows that in all food markets in which IP rights occur their utility needs to be balanced with their cost at all levels of the Food Chain (see section iv below for links between IP Rights and higher costs for consumers).

(ii) Preserving biodiversity and conserving the environment for future generations

The need for preservation of biodiversity though closely linked to, is distinct from the protection of IP Rights. Biodiversity and IP Rights overlap in cases where the use of technology promotes agro-biodiversity and crop genetic diversity particularly for farmers working in difficult conditions, but diverge when the protection of IP Rights discourages the maintenance, use and expansion of traditional farmer owned varieties (see section (i) above). Preserving and promoting this latter form of bio-diversity is important from the right to food perspective because it helps combat the adverse effects of poverty, lack of organized support for small-scale subsistence farming and climate change by mitigating risk from extreme weather events as well as from

⁴⁰ Olivier De Schutter 'The Right of Everyone to Enjoy the Benefits of Scientific Progress and the Right to Food: From Conflict to Complementarity' 33 Hum. Rts. Q. 304 2011.

the invasion of new pests, weeds and diseases that are likely to germinate in their wake. It also creates opportunities for increased income for farmers by weakening their dependence on an increasingly concentrated market of Factor Providers.⁴¹ This divergence between IP Rights and biodiversity renders it necessary for the latter to be examined and upheld as an independent value. It is further important to note that progress towards the right to food is futile in the long run unless the strategies adopted for this purpose are also environmentally friendly. This means avoiding strategies of production, which encourage or require an inefficient and at times damaging use of soil, water and other environmental resources irrespective of any other value that may be attached to these strategies. Depletion of the environment not only has a negative impact on farmers' income and therefore on their access to adequate food but also on the overall quality and variety of food products and thereby on the long-term adequacy of food for non-farming consumers also.⁴²

(iii) *Achieving Economic Efficiency or, to put things in a more politically correct way, inclusive growth*

Economic efficiency, with its direct and close link with economic growth, is considered an essential value for fulfilling the right of food. However, economic efficiency is a multi-dimensional concept: it can refer to *productive efficiency* (ie when maximum amount of goods and services are produced with a given set of inputs and for the lowest average cost), *allocative efficiency* (ie when goods and services are distributed according to consumer preferences), *efficiency of scale* (ie when a firm reaches an optimum size which allows it to produce at below its average cost) *dynamic efficiency* (ie efficiency created by the introduction of new technology and working practices over time which reduce the cost of production) or any combination of the above. For the purposes of fulfilling the right to food it is also important to consider *social* and *distributive*

⁴¹ Ibid.

⁴² Ibid.

efficiency, which ensure that economic growth is inclusive and sustainable and both of which are closely linked to the concept of Pareto efficiency.⁴³ Social efficiency relates to the optimal distribution of resources in society, taking into account all external costs and benefits as well as internal costs and benefits⁴⁴ whereas distributive efficiency is concerned with allocating goods and services equitably according to who needs them most. However, the existence of these efficiencies is not always reflected through prices. It requires analysis of data relating to externalities and distribution, which may not be readily available. This poses a challenge for countries seeking to take these into account.⁴⁵

2. Competition Law as a Response to Implementing the Right to Food

There are two dimensions to the appropriateness of competition law as an instrument for the fulfillment of the right to food: the first is the micro or conceptual dimension and the second is the macro or institutional dimension. We discuss these in turn as follows:

(a) *The conceptual dimension of the competition law response*

The potential role of competition law in responding to the challenges of implementing the right to food is linked directly to the Food Chain being structured essentially as a succession of markets in which economic actors interact with each other and thereby shape not only their individual relationships but also the dynamics of the market in which they operate.

⁴³ This denotes a situation of perfect resource allocation in which nobody can be made better off without making anyone else worse off.

⁴⁴ Social efficiency occurs at an output where Marginal Social Benefit (MSB) = Marginal Social Cost (MSC). In a free market, consumers ignore the external costs of consumption. Therefore, at the point of equilibrium in a free market equilibrium the MSC is greater than the MSB, which means that by consuming at this point, the cost to society is greater than benefit.

⁴⁵ Definitions of economic terms referred to in this section are derived from <http://www.economicshelp.org/microessays/costs/efficiency/> (accessed 28th April 2016).

Competition law regimes are specifically designed for and equipped to regulate markets. The means at their disposal for this purpose include the power to check abuse of a dominant market position, to prohibit agreements that have the object or effect of reducing competition in the market and to monitor and approve mergers. Competition regulatory authorities established in pursuance of these regimes exercise their powers in regulating practices in all market sectors (unless these are specifically excluded from their jurisdiction) and regardless of the country from which these practices originate provided that the impact of the practice is felt within the jurisdiction of the relevant competition regulatory authority.

Given their inherent powers, competition regimes can and do check market abuses in food markets in exactly the same manner as they may do in other markets. For example competition law may address the concerns arising from the increasing concentration in the Factor Provider, Processing or Retail sectors and ensure that firms already dominant in these sectors do not abuse their market power and those that are not already dominant only merge or combine after strict scrutiny of the possible impact of the merger or combination on competition in the market. Competition regimes may also examine vertical agreements including but not limited to exclusive dealing, two-part tariffs, slotting fees, over-riders, discounts, resale price maintenance to ensure that these do not either actually or potentially reduce the level of competition in the market. These regimes may also examine the impact on competition of introduction of private labels by retailers to compete with products of other suppliers. Further, competition regimes may allow and enable competition regulatory authorities to examine these practices regardless of where they originate provided that their impact is felt within the territory over which the authority has jurisdiction.

Such an approach towards regulating food markets is evident in the recent

decision of the CCI in the *Monsanto Cases*⁴⁶ brought against Mahyco Monsanto Biotech India Limited (MMBL) by its sub-licensees. MMBL is the Indian subsidiary of Monsanto Inc. USA (MIU) and the license holder of MIU's cottonseed technology, BG-1 (not patented in India) and BG-II (patent protected in India in 2002). MMBL had, in turn, entered into a number of sub-licensing agreements with seed manufacturers in India for a non-refundable upfront fee plus a recurring fee or Trait Value (TV), calculated as a percentage of the minimum retail price of the seed and charged at each renewal of the sub-license. According to the allegations made by the sub-licensees MMBL had violated the provisions of the Indian Competition Act 2010 by using the threat of terminating/not renewing sub-licenses to force seed companies to pay excessive and extortionary TV; exploiting government permissions and creating a monopoly through restrictive agreements; forcing seed manufacturers to enter into one-sided, arbitrary and onerous sub-license agreements which included provisions restricting seed manufacturers from acquiring new technology even if it was available at a lower cost, linking the TV payable by them to minimum retail price of the seed without any economic justification and threatening to terminate the sub-licensing agreement if the seed manufactures failed to comply with these conditions.

In its preliminary decision, CCI found that MMBL had prima facie violated the Competition Act on two counts: it had abused its dominant position in the upstream market for 'provision of Bt cotton technology in India'⁴⁷ and had entered into anti-competitive sub-licensing agreements with seed manufacturers in India. CCI was of the view that given the technological dependence of the seed manufacturers on MMBL, the conditions prescribed by MMBL in the sub-licensing agreements restricting seed manufacturers' from dealing with its competitors and requiring the payment of TV and threatening to terminate or actually terminating the agreements for failure of seed

⁴⁶ n **Error! Bookmark not defined.**

⁴⁷ Ibid.

manufacturing companies to comply with these provisions, were 'stringent and unfair' and tantamount to 'denial of market access' and also had the effect of 'curbing innovation'. CCI was also of the view that MMBL appeared to be using its position in the upstream market to protect its group companies in the downstream market. In respect of the vertical restraints imposed by MMBL on its sub-licensees, CCI was of the view that these were in the nature of exclusive supply agreements and amounted to a refusal to deal on the part of MMBL. The Commission was further of the view that MMBL's power to terminate the sub-license agreement was unduly harsh and not commensurate with the need to protect its IP Rights. Accordingly, CCI ordered its Director General Investigations to carry out a detailed inquiry into these violations in consultation with the relevant stakeholders.

A decision such as the one taken by the CCI in the *Monsanto Cases* whilst valuable, not only fails to address the specific values of the right to food but may also undermine them in circumstances where the impact of the market abuse or practice does not directly impact consumer welfare (judged, most often, in terms of choice available to and price charged to consumers). Therefore, for competition regimes to further the right of food, it is necessary that they specifically include right to food values in not only considering but also defining market abuses and anti-competitive practices in food markets. For instance if CCI had defined its preliminary decision in the *Monsanto Cases* with an awareness of the right to food considerations it is likely to have considered the combined impact of IP Rights and high concentration in the bio-technology sector on the ability of farmers using the genetically engineered seeds to generate sufficient income for themselves;⁴⁸ on crop diversity, particularly in respect of farmers' indigenous crops, and on the environment. It would have then balanced this impact with the need to protect Monsanto's IP Rights in order to promote further research and innovation. In taking these factors into

⁴⁸ n. 40

account, CCI is also likely to have examined the social efficiency of Monsanto products as well as of the sub-licensing agreements entered into by MMBL in this regard and considered the impact of these agreements on consumer rights in the broad sense of consumer well-being rather than adhering to the narrow version of consumer welfare which focuses on choices available to and prices payable by them in respect of the end-products.⁴⁹ It would be interesting to watch CCI's final decision in these matters to note the extent to which it explicitly addresses the values of the right to food or even the right itself.

The two most important features of this expanded compass of competition law, which takes into consideration the values of the right to food and which are likely to be relevant at all levels of the Food Chain, are greater focus on exercise of buyer power⁵⁰ and extra-territorial reach. The increased focus on buyer power, whether it arises from concentration in a given sector or through vertical integration, allows competition regimes to check abuses of this power particularly when it reduces incomes of agricultural producers, and forces the least efficient ones to exit the market. Traditionally, competition law has refrained from interfering in exercise of buyer power due to its cost reducing impact for consumers. However, this approach ignores the social cost of these practices, which may range from environmental damage, abuse of labour (including lower wages and employment of child labour) and reduced income

⁴⁹ Briefing Note No. 3 of 2010 United Nations Special Rapporteur on the Right to Food http://www.ohchr.org/Documents/Issues/Food/BN3_SRRTF_Competition_ENGLISH.pdf (accessed 7th April 2016).

⁵⁰ Buyer power is defined as “..the situation which exists when a firm or a group of firms, either because it has a dominant position as a purchaser of a product or a service or because it has strategic or leverage advantages as a result of its size or other characteristics, is able to obtain from a supplier more favourable terms than those available to other buyers.” OECD Policy Roundtables: Competition Issues in the Food Chain Industry <https://www.oecd.org/daf/competition/CompetitionIssuesintheFoodChainIndustry.pdf> (accessed 8th April 2016). For the purposes of this paper, the use of the term buyer power includes superior bargaining power or dependency and their abuses. See F. Jenny, *‘Abuse of Dominance’* http://unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0008_en.pdf (accessed 11th April 2016).

for the agricultural producers. Exercise of buyer power combined with dependence on factors protected by IP Rights may also force agricultural producers to produce more of the same product in the hope of earning short-term income because they have no other viable means of doing so. However, this has the counter effect of over-supply and of further depressing the price of the product. In the event that such a cycle is reproduced regularly, it has the effect of driving the agricultural producer out of the market altogether. The 'waterbed effect' is another impact of exercise of buyer power, which may also translate into increased prices for consumers as well as reducing competition in the retail market. This occurs when the powerful buyer in a concentrated market is able to demand such large discounts from the agricultural producer in return for bulk buying, that the producer has no choice but to raise the prices for other buyers.

The ability to exercise extra-territorial reach allows competition regimes to move further away from a pure consumer-centric approach towards market abuses that primarily impact agricultural producers within their jurisdiction. In the traditional approach to competition law, if a dominant buyer engages in conduct that harms producers in one country but consumers in another (because the products are exported), the competition regime in the country where the producers are located is rendered toothless. However, if competition regimes were allowed extra-territorial reach they would be able not only to offer protection to local producers but also thereby to protect the right to food in their jurisdictions. It is important to underscore that the common thread in examining buyer power or exercising extra-territorial reach is the need for balancing the competing values of fulfilling the right to food and to strive towards an outcome that finds the most optimum solution to a competition issue as well as the right to food without compromising the integrity of either.

Of particular interest for this issue is a Briefing Note of the UN Special Rapporteur on the Right to Food, which places a special emphasis on the

“direct link between the ability of competition regimes to address abuses of buyer power in supply chains and the enjoyment of the right to adequate food” and attaches great importance to the global governance of competition law enforcement in the food sector for the fulfillment of the right to food.⁵¹ In addition to the concerns arising from the concentration in the retail sector, which has attracted a lot the attention of competition authorities eager to deal with the bargaining power of large supermarkets, in both developed and developing countries, the Special Rapporteur highlights the important concerns arising from growing concentration in the agribusiness that affects, according to him, the effective realization of the right to adequate food for the poorest and most underprivileged segments of both developing and developed societies.

According to the Briefing Note, the downward pressure on producers’ income forces less efficient producers to merge without, however, the benefit of passing on to consumers any cost savings arising out of these mergers and the consequent economies of scale due to the gatekeeping role of large commodity buyers, processors and retailers. The Briefing Note also acknowledges the practice of large retailers in the developed world to pass on the small farm suppliers the cost of compliance with the retailer’s standards on hygiene, food safety. This in turn increases the costs of smaller farms and leads to the increase of large farms (horizontal concentration) as well as of those farms controlled directly by the exporters (vertical integration).

The social consequences of this concentration and of the downward pressure on farm prices are quite significant, with agricultural wages being depressed, child labour employed and proper environmental precautions dispensed with. Faced with a reality of decreasing revenues, small farmers are pressed to

⁵¹ Briefing Note No. 3 of 2010 United Nations Special Rapporteur on the Right to Food http://www.ohchr.org/Documents/Issues/Food/BN3_SRRTF_Competition_ENGLISH.pdf (accessed 7th April 2016).

produce even more agricultural commodities in order to earn short-term income in an attempt to meet daily expenses, which leads to oversupply and the vicious circle of further depression of prices, sometimes even below the average cost of production. Large buyers in developed countries also demand high volume discounts, obliging the suppliers to raise the prices for other buyers, thus exacerbating the comparative competitive advantage of large retailers and leading to more concentration at the retail side of the market (the waterbed effect). Final consumers are also ultimately harmed by reductions in quality or choice and decreased levels of innovation by producers without enjoying the benefit of significantly lower prices. Consumer sovereignty also suffers from the ability of dominant buyers to dictate to consumers the choice of the products that come to market.

Turning next to issues of global governance, the Special Rapporteur recommends, that “competition law regimes should be improved to comport with general human rights principles of equality and non-discrimination, and to facilitate the realization of human rights, including among others the right to food, the right to work and the right to development”.⁵² More concretely this implies that countries exporting agricultural commodities should not adopt “competition laws focused on consumer welfare on the model proposed by the OECD”, but should instead seek to “ensure that, in the competition law regime that they set up, they offer a sufficient high level of protection of their producers against abuses of dominant positions by commodity buyers, food processors or retailers, as part of their obligation to protect the right to food under their jurisdiction”.⁵³ For the Special Rapporteur, “substantive competition laws should recognize that consumer harms arising from excessive buyer concentration are incipient and therefore indeterminate in character, but that this indeterminacy should not be a reason for failing to control such conduct”, a “more enriched conception of consumer welfare” being needed,

⁵² Ibid., p. 4.

⁵³ Ibid., p. 5.

“one that takes account of consumers’ interests in sustainability – rather than focusing purely upon short-term price changes”.⁵⁴ In view of the inability of major developed countries competition authorities to control excessive buyer power, because of the remoteness of the effects of such power on their consumers, according to the effects doctrine, developing jurisdictions, in which the majority of impoverished farmers are located, should set up “credible competition authorities of their own”. Developed countries should also design competition law regimes that address the negative effects of high concentration and buyer power. Designing an effective global governance is not, however, the only challenge raised by the implementation of the right to food. One should also take into account other institutional alternatives on offer for the assessment of the various interests at play within food value chains.

(b) *The macro-dimension: competition law as an institutional choice*

A discussion on competition law as an appropriate institutional choice must be undertaken against the backdrop of other institutional choices available to countries for addressing the right to food. An argument that may be invoked against the choice of competition law for addressing the values of the right to food, particularly in cases where the right to food is impacted due to exercise of buyer power in an agreement between economic actors along the Food Chain, is that civil courts rather than competition regulatory authorities may be better equipped to deal with contractual disputes even if such disputes have the effect of undermining the foundations of a competitive market system.⁵⁵ However, whilst such an argument may have some weight in developed countries where the court systems form a legitimate and reasonable option for dispute resolution and the tax systems carry out a distributive function, it is unlikely to be a realistic choice in developing countries. It may either be that

⁵⁴ Ibid., p. 5

⁵⁵ F. Jenny, ‘Abuse of Dominance’ http://unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0008_en.pdf (accessed 11th April 2016).

the judicial system in such countries is not 'in a position to handle such claims effectively ...[because] it is underfunded, overworked, corrupt, lacks the necessary expertise, etc.'⁵⁶ or that the agricultural producers and small suppliers do not have knowledge of their rights or of the court system, both of which are necessary for bringing a claim.

However, it is not only in the case of developing countries that competition law may be an appropriate institutional choice for implementing the right to food. In discussing the question of institutional choice in the context of the EU, one of the authors of this paper cautioned against 'commit[ing] the sin of single institutional analysis', that is, emphasizing the defects of one institutional alternative (e.g. human rights law, competition law, self-regulated markets) on some aspects to argue for an expansive role of another, probably equally defective in some other aspects, institutional choice: the adjudicative process' and to arrive at a decision regarding the choice of an optimum institution only after a detailed comparative institutional analysis (ie an analysis which takes into account the pros and cons of each institutional choice).⁵⁷ The rationale behind the comparative institutional analysis is that institutions are alternative mechanisms by which societies carry out their goals, each within their specific limits and imperfections. This also implies that there will be no one perfect institution for all settings and for all times and that even the best institutional choice may be imperfect and the relative merits of institutional may vary according to the context in which they operate.⁵⁸

Institutions that may be included in a comparative institutional analysis may range from legislatures (the political realm), courts (adjudicators) and markets as well as various other intermediary social decision- making processes, such as the State bureaucracy, independent regulators (such as a competition

⁵⁶ Ibid.

⁵⁷ I. Lianos 'Some Questions on the Goals of EU Competition Law', in I. Lianos & D. Geradin (eds.), *Handbook on European Competition Law: Substantive Aspects*

⁵⁸ Ibid.

regulatory authority), private standard setting/self-regulation bodies. And the merits and demerits of these institutions may be examined in welfare terms (regarding the efficiency and distributive consequences of a particular institution) and in participatory terms (regarding the quality and extent of participation in the decision-making processes at issue) rather than with reference to their goals.⁵⁹

In applying this analysis to EU institutions, Lianos focuses on the adjudicative process as carried out by the judiciary versus the process as conducted by the EU Commission. Lianos argues that the judiciary has far superior information about the costs of decision-making and legal uncertainty than they do about dealing with empirical questions. He further argues that judiciary most often applies rules, which have the danger of being either over or under inclusive. Given these limitations of the judiciary, the fact that the EU Commission has designed its adjudicative process along the lines of the judiciary (and therefore allows participation on part of the litigants/complainants through oral arguments and documentary proof) along with its capacity for and mandate to investigate empirical questions, renders it an optimum choice for tackling not only competition issues but also those emanating from the right of food. However, despite these pros, there are two important cons to the choice of the EU Commission as the appropriate institution for this purpose: the adjudicative process as followed by the EU Commission is more truncated than that of the judiciary and the courts and the EU Commission is not fully equipped to deal with the polycentric nature of issues that it may be asked to address.⁶⁰ Lianos further argues that whilst the economic approach towards

⁵⁹ Ibid. As the author explains, the choice of the adequate institutional process should take an empirical and dynamic approach that focuses on the number and the complexity of the matters to be decided by these processes. These choices may, therefore, even shift as the numbers and complexity increases. He quotes Komesar to suggest that institutional choices define the terms of legal analysis not the other way around. P.55.

⁶⁰ Ibid. Lianos defines polycentric as a situation in which the decision may affect many actors, thus leading to a fluid state of affairs if all affected interests are taken into account, as well as situations when a decision over the position of one of the actors

interpreting the competition provisions of the TFEU has accentuated the polycentric dimension of competition law disputes by adding consumers to the equation, it will only grow more so if the EU Competition adopted a more holistic approach towards dispute settlement (section 3 below).

Similar considerations may also apply in a comparative institutional analysis in developing countries, which also focuses on the judiciary and the competition regulator with the difference that in addition to the factors discussed hereinabove, the following factors may also be deemed relevant:

(i) *The impact of institutional choice on the separation of powers.* Whilst the judiciary is an independent organ of the state and derives its authority and jurisdiction from the constitution, the competition regulator, whether designed as a government department or a separate entity, is essentially only an extension of the executive. In developing countries this means that whilst the judiciary may apply objective legal standards and rules free from the influence of the government, the competition regulator is more likely to be guided more strictly by government policy and government interest. Therefore, it may be argued that preferring the competition regulator to the judiciary is likely to strengthen the executive at the expense of the judiciary in derogation of separation of powers in the country.

(ii) *The capacity to deliver.* Judicial systems of a number of developing countries are characterized by procedural difficulties and related costs, which make them virtually inaccessible for ordinary citizens. Even in situations where an aggrieved person succeeds in bringing a case before the courts after solving the procedural puzzle that they present, he is either likely to become mired in the court system's excessive case load and consequent delays, possibly aggravated by corruption in the system or the lack of technical capacity of the judiciary to resolve these cases. A competition regulator, however, has the

would have a different set of repercussions and might require in each instance a redefinition of the parties affected. P 59.

option of adopting simpler rules of procedure, is unlikely to have the same level of case load whilst having the technical capacity to hear and decide such cases.

(iii) *The extent of participation of affected parties.* Like the judiciary, the competition regulator is likely to have the power to invite comments and participation from parties affected by the cases brought before it and to allow them to not only to make a representation but also to defend themselves against accusations made by the other parties. However, despite these important attempts to foster participation, competition regulators are often unable and unwilling to allow for the possibility of cross-examination of witnesses, and, therefore, it may be argued that evidence brought before them is unsafe as it has not been tested for its veracity as it would have been in the ordinary courts. In developing countries, however, where delay in recording evidence may potentially scuttle a case altogether, such an argument is only of theoretical value at best.

(iv) *Opportunity for combining adjudicative processes.* Competition regimes in most countries allow parties aggrieved by the decision of the competition regulator to lodge an appeal to the judiciary. Therefore, there is an opportunity to examine the issue both empirically (when it is before the competition regulator) as well as judicially to ensure that the decision of the regulator is in accordance with the due process norms and mainstream judicial precedents of the country. This combination of adjudicative process afforded by allowing the competition regulator taking cognizance of the matter at the first instance and the judiciary following on, allows the parties concerned to have the advantages of dealing with a regulator as well as the benefit of the wisdom of the judiciary accumulated over the years. However, if the judiciary was the only institutions taking cognizance of a matter at all tiers, this benefit would be lost altogether.

(v) *Potential for inter-institutional co-ordination.* This factor is related to the greater suitability of competition regulators for empirically evaluating matters before them. Due to the nature of market enquiries required to be undertaken by competition regulators they are often empowered to seek information from different institutions including from other regulators from within and even outside their jurisdiction. Whilst the judiciary has this ability in common with the competition regulator, the combined effect of inter-institutional coordination and the competition regulator's technical expertise makes it an almost unique platform for the subsequent empirical evaluation and therefore a more incisive examination of the issues that may be raised in matters before it. The CCI's preliminary decision in the *Monsanto Cases* provides an interesting illustration of the manner in which a competition regulator in a developing country may coordinate amongst different institutions: in arriving at this decision CCI refers to decisions of state governments⁶¹ and government ministries;⁶² cottonseed technology market⁶³ and the judiciary.⁶⁴ As I have noted earlier, the extent to which CCI will include this information in its empirical evaluation or consider its right to food implications will be a matter of interest at the time of the final hearing.

3. Strategies for resolving conflicts

⁶¹ Particularly, the decisions of different state governments to fix prices of cottonseeds.

⁶² Including the decision of the Genetic Engineering Approval Committee of the Ministry of Environment, Forests and Climate Change to approve the commercialization of MIU's seed technology; of the Patent Office in the Ministry of Commerce and Industry to register the BG-II patent and of the Department of Agriculture, Cooperation and Farmers Welfare of the Ministry of Agriculture and Farmers Welfare to file the reference before the CCI.

⁶³ Being the market in which MMBL and cottonseed manufacturers negotiated and entered into the sub-licenses for MIU's cottonseed technology.

⁶⁴ MMBL had filed cases before the Supreme Court of India as well as high courts of various different Indian States to challenge the cottonseed prices that had been fixed by the State governments. However, the courts had only granted interim orders at the time CCI took cognizance of the matter and even these were at variance with each other to the extent that in some states the courts suspended the prices fixed by the state governments whilst in others they upheld these.

Regardless of the extent to which competition law as a concept or as an enforcement institution may be suited for implementing the right to food whether or not it is in fact an appropriate choice in this regard depends upon its flexibility to include long-term sustained growth and social well-being in the compass of its traditionally understood goals of productive and allocative efficiency and consumer welfare, measured narrowly in terms of prices charged and market choices available to them. We will explore this question by first conceptualizing the various strategies of bringing together the right to food rhetoric with the competition law one. We then explore the potential of competition law to accommodate these various strategies on offer.

(a) *The “spheres” of the right to food and competition law: separate or integrated?*

Assuming that the question of the nature of the “right to food” is settled, what is the function of that right? Is it to provide the right-holder control over another’s duty and consequently preserve the control of the right holder over her/his choices, as the theory of rights puts forward, or is it to promote the right holder’s interest, for instance in the context of some utilitarian trade-off? One may expect in some cases that these two functions of rights would coincide, in which case it may be possible that the specific right fulfils both functions and protects interests *and* choices.

Rights of course may seek to provide the starting point for some form of utilitarian calculus, allocating resources to some actors in order to enhance their role in a subsequent exchange, one may think of property rights as an illustration. Rights may also be perceived as being of deontological nature, excluding from the utilitarian calculus and more generally economic analysis certain spheres of justice. Nozick’s non-consequentialist perception of moral rights as absolute “side constraints” on action, may illustrate the point.⁶⁵ His absolute prohibition of trade-offs involving rights, actors acting within the

⁶⁵ R. Nozick, ‘Anarchy, State and Utopia’ (Basic Books, 1974), 28-35.

constraints imposed by rights, provides an absolutist illustration of the separability thesis.

Authors highlighting the existence of alternative “economies of worth”, explain that these encompass a plurality of forms of justification for human action, at the level of different ‘polities’ and ‘common worlds’.⁶⁶ In a same ‘common world’, people share the same worth. Disagreement can find a solution through a ‘test of worth’. But agreements are more difficult to reach when people invoke different orders of worth. Compromises between orders of worth will always remain precarious and at the mercy of revival of a deeply based criticism. Preserving the boundaries of these “spheres of justice” becomes a possible strategy if we are to understand the process through which the members of the ‘community’ develop a diversity of criteria mirroring the diversity of the social goods.⁶⁷ One may not, however, expect an agreement between the members of the same community at a more concrete level, even if there might be an agreement at a certain abstract level of interpretation of the distribution principles for social goods, such as food. What these strategies have in common is their persistence on the separability of the various “spheres of justice” or “economies of worth”, while also emphasizing to different degrees the need for procedures of criticism and conciliation between them.

An alternative strategy is that of integrating the various “spheres” or “economies of worth” into a single theoretical framework, eventually facilitating commensurability and weighing. This is not an easy task and often requires a great level of abstraction and axiomatisation that may not necessarily be implemented by existing institutions, as it may demand new forms of expertise. The ‘right to food’ will have to be integrated into the economic

⁶⁶ L. Boltanski and L. Thévenot, ‘On Justification: Economies of Worth’ (Princeton University Press, Princeton and Oxford, 2006).

⁶⁷ M. Walzer, ‘Spheres of Justice: In Defense of Pluralism and Equality’ (Basic Books, 1983).

welfare perspective taken by modern competition law. There are various approaches one may take on this.

Arthur Cecil Pigou, the successor of Alfred Marshall at the Chair of Economics at the University of Cambridge in the early 20th century, defined economic welfare narrowly as the purely economic or material part of a hierarchy that proceeded from a material end of a scale, which included goods essential for survival and health, such as “food, clothing, house-room and firing”, then followed by other ‘necessaries’ and completed with purely noneconomic or nonmaterial products (professional services) at the other end of the scale.⁶⁸ His measure of the increase of welfare was heavily biased towards re-distribution in favor of the poor, so that they could satisfy more of their material needs, on the assumption that a pound was worth more to a poor person than to a rich one (the extended law of diminishing marginal utility). In his view, policies that would increase the “national dividend” or national product, while not leading to a fall of the absolute share accruing to the poor, or policies that would shift the distribution of the dividend towards the poor, without decreasing its total, would be considered as increasing material welfare. This premise relied on a specific concept of utility, which is different from that of the ordinalist school that has since prevailed in neoclassical economics. The economists of the material welfare school perceived utility objectively, as socially useful for the material well-being of an individual (or people), and thus relating to the *needs* of the individual as defined by the material end of the hierarchy of goods or satisfactions (products essential for survival and health of the human race prior to any other kind of products). On the contrary, ordinalists perceive utility as a subjective concept, what Pareto called *ophelimity*, understood as the capacity to satisfy the *desires* of an individual, whether legitimate, or not.

⁶⁸ A.C. Pigou. *The Economics of Welfare* (Macmillan and Co, 4h ed., 1932).

This led to different views over the possibility of interpersonal comparisons of utility: the likes of Pigou (also called the material welfare school), deemed it possible whilst the ordinalists considered it impossible, in view of the fact that this would have required a comparison of *desires* in one mind with that in another. However, according to the proponents of the material welfare school, given that the transference of income from a relatively rich person to a relatively poor person would enable the latter to satisfy more intense needs, it would have had the effect of increasing the aggregate level of economic welfare. Of course, the material welfare school also acknowledged the need to take into account the deleterious effects of these transfers on incentives. It is also interesting to note that for the material welfare school, these comparisons of utility were not made between specific persons, but between classes of people, sociological categories, such as “poor”, “rich”, “consumers”, “producers” and describing averages rather than individuals. Hence, it was possible to proceed to a comparison of welfare between two individuals, after locating the positions of individuals in a hierarchy, where the welfare of those deprived of “necessaries”, such as food, being weighed more than that of someone deprived of an allegedly less materially important commodity, such as a luxury good or entertainment. Focusing on *desires* and applying the same utility analysis for any type of good, to the extent that these are considered scarce for the purpose of satisfying the individual’s desires, led ordinalists to regard utility as relating to preferences, objectively observed through behavior in the marketplace. Because one cannot observe the satisfaction enjoyed by other people, the extended law of diminishing marginal utility could not be justified as it involved “an element of conventional valuation” and was thus “essentially normative”.⁶⁹

Alternative views emphasizing justice, not just well-being, introduce the concept of “primary social goods” designed to measure the relevant aspect of

⁶⁹ L. Robbins, *An Essay on the Nature and Significance of Economic Science* (Macmillan & Co., 1932). 141.

well-being in a society.⁷⁰ Such goods are defined as ‘all-purpose’, in the sense that these are things a person wants, whatever else he wants, which offer a basis for social agreement, on which one may discuss matters of social responsibility.⁷¹

The right to have access to food, is also an important concern for alternative approaches to welfare than the classic actual or laundered revealed preferences, such as the objective list of preferences (or capabilities) approach. Amartya Sen has put forward a view of well-being mainly in terms of a person’s capabilities and the “functionings” an individual achieves, that is what the person does and experiences.⁷² Being well nourished constitutes a “functioning” that social policy should concern itself directly by providing individuals a “capability” to achieve a certain form of “functioning”. The focus on the promotion of capabilities, rather than on providing resources or assistance to functionings directly leaves an important space to be occupied by individual choice, which seems at first instance compatible with the logic of markets.

Achieving conciliation between the various values pursued may thus take different forms, the choice eventually reflecting a number of considerations, including those of institutional capacity that we have previously highlighted. Tools of analysis of conflicts may range from lexicographic/serial order

⁷⁰ J. Rawls, *A Theory of Justice* (Harvard Univ. Press, 1971).

⁷¹ J. Rawls, *Social Utility and Primary Goods*, in A. Sen & B. Williams (eds.), *Utilitarianism and Beyond* (CUP, 1982), 159.

⁷² A. Sen, *Commodities and Capabilities*, (North-Holland, 1985), advancing the moral significance of individuals’ capability of achieving the kind of lives they have reason to value. For a different objective list approach see, M. Nussbaum, *Creating Capabilities: The Human Development Approach*, (Harvard University Press, 2001). For Sen, well-being depends on the agent using these capabilities, while for Nussbaum this is not essential, her point being that there is cross-cultural agreement enabling us to form an objective list. Being well-nourished is of course an essential component of well-being, in particular ensuring bodily health (see the list in M. Nussbaum, pp. 416-418).

approaches⁷³ to the constitution of “prioritarian social welfare functions” in order to provide with “distributional weights” that will provide more weight to utility changes affecting individuals whose right to food has been denied (because for instance they are malnourished), as compared to individuals at higher utility levels⁷⁴.

These debates show that there are various strategies that may be deployed in implementing the right to food. Some will focus on the need to preserve the boundaries of each of these separate spheres, while ensuring their communication and congruent development. Others will envision procedures or theoretical constructs that will enable the mutual integration of values and eventually the conceptualization of the right to food and competition law as a unified field. We now turn to the way competition law regimes, in Europe, the United States and around the world have proceeded with the management of conflicts between the different values pursued by public policy.

(b) Competition laws as a terrain of experimentation

In recent years, there has been considerable debate with respect to antitrust/competition law systems in both the US and the EU regarding the goals of competition law. The US debate is concentrated on two extreme positions: the first position maintains that antitrust should have economic

⁷³ J. Rawls, *A Theory of Justice*, (Harvard University Press, 1971) 38 defines lexicographical or serial/lexical order as following: “(t)his is an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we can consider the third, and so on. A principle does not come into play until those previous to it are either fully met or do not apply. A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception. We can regard such a ranking as analogous to a sequence of constrained maximum principles. For we can suppose that any principle in the order is to be maximized subject to the condition that the preceding principles are fully satisfied”.

⁷⁴ M.D. Adler. & C. W. Sanchirico, ‘Inequality and Uncertainty: Theory and Legal Applications’, (2006) 155 *University of Pennsylvania Law Review* 279; M.D. Adler, ‘Future Generations: A Prioritarian View’, (2009) 77 *George Washington Law Review* 1478.

efficiency (understood as a total welfare standard) as a single objective whilst the other holds that consumer welfare and distributive justice may also be relevant in this regard. In the EU on the other hand there is considerable political consensus on the benefits of active competition law enforcement, and, therefore, the debate on the goals of is not quite as polarized even though there is still disagreement over the role and extent of welfare analysis in EU competition law.⁷⁵

Given that the EU debate already embraces social welfare in principle, it is better poised to serve as a starting point for the discussion on the inclusion of the right to food as one of the goals that may be adopted by competition law. The discussion regarding EU competition law also has considerable global implications given that the EU competition law has significantly contributed to the philosophical and theoretical foundations of a large number of competition regimes throughout the world.

The debate regarding the goals of EU Competition law comprises three main arguments: first, that the goal of EU Competition Law should solely be to pursue economic welfare; second, that the welfare aim should include non-economic factors in addition to economic welfare and third, that there is no need to identify goals and that all outcomes resulting from a spontaneous competitive order are as a matter of principle normatively superior to any other outcome.⁷⁶ The first and second of these arguments are particularly relevant for the purpose of examining whether or not the goals of competition law may be properly extended to take into account the values of implementing the right to food. The preference of the economic welfare goal for EU competition law derives from the increasing influence of economics on competition law

⁷⁵ I. Lianos 'Some Questions on the Goals of EU Competition Law' n. 57.

⁷⁶ Ibid.

analysis. It is based on the Kaldor-Hicks standard of efficiency,⁷⁷ which concerns itself only with achieving efficiency by maximizing the total surplus in the economy and separating it from the subsequent issue of distribution of the surplus. In actual fact, however, EU Competition law (Article 101(3) TFEU) emphasizes more consumer surplus than producer surplus thereby suggesting that issues of distributions play a fundamentally important role in EU Competition Law.⁷⁸

The argument supporting non-economic goals of the EU Competition Law including but not limited to market integration, consumer protection and freedom to compete is not necessarily at odds with the goal of economic efficiency but examines it in a broader perspective. Of these non-economic goals, the market integration goal is historically significant, given that it is embedded in the history and political aims of EU competition law. However, in recent years the CJEU has moved to a more pragmatic view of market integration and has adopted a welfare approach by linking to potential consumer harm, market practices such as parallel trade which were historically restricted even if these did not have an adverse effect on consumers.⁷⁹ With respect to the consumer protection goal, EU competition law's approach appears to be somewhat inconsistent particularly because the concept is not defined in the law. A closer examination of the provisions of EU competition law, however, suggests that the concept of consumer protection preferred by it leans towards and integrates principles of distributive justice rather than focusing solely on the total welfare/Kaldor-Hicks standard of efficiency. This

⁷⁷ ie if the magnitude of gains from moving one state of economy to another is greater than the losses then social welfare is increased even if no compensation is made.

⁷⁸ As it is highlighted by Lianos, this also goes back to the argument previously made about the role of institutions, because the absence of an EU-wide taxation system is likely to make it more convenient for distribution issues to also be dealt with by the competition regulator.

⁷⁹ *Sot Lelos kai Sia v GlaxoSmithKline* [2008] ECR I-7139.

is evident particularly in the second condition of Article 101(3) TFEU, which requires that a fair share of efficiencies generated by a practice (whether these are allocative, productive or dynamic) be transferred to the consumers. There appears to be some uncertainty with regard to the third non-economic goal of freedom to compete. A resolution for this uncertainty may perhaps be found by reference to the *ordo-liberal* school that had informed and influenced the drafting of Article 102 TFEU. It is argued that contrary to what is popularly believed, freedom to compete rather than being an independent value in the *ordo-liberal* scheme is in fact linked to the overall purpose of finding a humane order for society and therefore is not necessarily opposed to the economic efficiency approach towards EU competition law evident in recent years.⁸⁰

The Treaty of Lisbon 2007 has further bolstered this understanding of the goals of EU Competition law and the possibility of their expansion to specifically include social objects. In terms of the Treaty, the European Charter of Fundamental Rights (which endorses the concept of social market economy rather than free market economy) was made binding for all EU institutions, the EU acceded to the European Convention of Human Rights (this allows parties to challenge decisions of EU institutions before the European Court of Human Rights) and the provision of earlier treaties recognizing free competition as an independent aim of the EU was been repealed. The effect of the changes introduced by the Treaty is that competition becomes a means to achieve the ends of the EU rather than an end unto itself. It is also likely that a possible combined effect of these provisions may be that the courts may develop a more 'holistic' approach in interpreting competition law provisions of the Treaty so that their interpretations are not contrary to the social objectives or fundamental rights protected and endorsed by the Treaty.

The flexibility inherent in the EU competition provisions, particularly their

⁸⁰ See n. 75.

leaning towards distributive justice, combined with the plurality of goals displayed by the EU Commission in interpreting these provisions suggests the possibility that the goals of the EU competition provisions may be expanded to include and specifically address the values of the right to food. Given that there are no decided cases on this issue at present, a parallel may be drawn by reference to cases in which the EU Commission has taken public interest questions into account in determining competition matters. Of particular interest in this regard are the substantial inroads by the EU Commission in the health sector, which had traditionally been the domain of the national governments.⁸¹ An overview of the case law in this area suggests that the EU Commission has applied competition law in cases where health care was undertaken as an 'economic activity' on a commercial basis regardless of whether the health care provider was a private or a government entity. Further, once the EU Commission had decided that competition rules applied it had extended the investigation to discover prohibited conduct including the existence of cartels or abuse of dominant position. In respect of cartels the EU Commission had not applied competition provisions if the prohibited activities were regulated and mandated by law, whereas in case of abuse of dominant position once the EU Commission had established dominance it had taken cognizance of exclusionary or exploitative market practices as necessary.⁸²

Whilst the EU Commission has so far only displayed an ability to take social objectives (and therefore the right to food) into account, the past few years have

⁸¹ It is believed that given that health care has the *potential* to be both commercial and international, it may serve as a test case for the conflict between EU economic policy and the expansion of EU social policy into new areas. Julia Lear et al "*8 EU competition law and health policy.*" (2010). http://www.euro.who.int/_data/assets/pdf_file/0003/138171/E94886_ch08.pdf (accessed 3rd May 2016).

⁸² Ibid. Exploitative abuse in the health care sector includes monopolistic behaviours, including price fixing, selective contracting, reductions in quantity or quality, and refusal to modernize production or service provision. Exclusionary abuse raises barriers to entry, limiting competitors' participation in the market, such as in cases of refusal to deal.

seen a number of attempts by legislative, judicial and quasi-judicial bodies around the world to tackle excessive buyer power in food supply chains and thereby to uphold certain key values of the right to food. Fair trade and competition authorities in South Korea,⁸³ Taiwan⁸⁴ and Thailand⁸⁵ have brought actions against buyers abusing their market strength. Further, certain competition regimes have adopted goals with explicit social objectives. A very good example in this regard is the South African Competition Act 1998, which aims to “promote and maintain competition in the Republic in order... (c) to provide employment and advance the social and economic welfare of South Africans... (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.” In pursuance of these goals, the South African Competition Commission has launched investigations into a number of milk processors for, among other things, allegedly colluding to fix the purchase price of milk, as well as imposing upon dairy farmers contracts requiring them to supply their total milk production and conducted an investigation into the supermarket industry, specifically citing as a concern the exclusion of small producers from access to retail shelves as a result of buyer power concentration. The public interest test in South African merger control may, for instance, provide South African competition authorities the opportunity to integrate the right to food in their competition law assessment

⁸³ Between 1999 and 2001, the Korean Fair Trade Commission (KFTC) prosecuted Walmart and Carrefour for, among others, unfair refusal to receive products, unfair return of products, unfair price reductions, unfair passing on of advertising fees to producers. The KFTC imposed fines on both Walmart-Korea and Carrefour-Korea and, more interestingly, ordered both companies to publicise their abusive conduct by taking out advertisements in newspapers.

⁸⁴ In Taiwan, a commission established pursuant to the Fair Trade Law of 1991 identified six types of unfair retailer practice, ranging from charging improper fees to unreasonable penalties for supply shortages. The Taiwanese commission has since published a set of guidelines for charging additional fees by retail chains.

⁸⁵ In Thailand, a specialised commission was tasked with studying the issue of buyer power after competition authorities received a spate of complaints regarding unfair trade practices.

of mergers.

Conclusion

It is evident from the UN 2030 Agenda for Sustainable Development that global food security remains a matter of urgent and high priority for the foreseeable future and it is therefore, imperative to discuss creative and innovative mechanisms through which the hunger gap in the developing as well as the developed countries may be addressed⁸⁶ Given that the Food Chain is essentially a succession of markets, competition law already plays a role in regulating the Food Chain and the question only remains whether the this role may be extended to incorporate the values which govern and define the Food Chain. This paper has examined this question from three distinct yet related perspectives: the concept of competition law, its institutional structure and its goals. It argued that whilst the conceptual framework of competition law as well its institutional structure lends itself for implementing the right to food in both developing and developed countries the traditional understanding of its goals presented some obstacles. However, a closer look at the goals of EU Competition law suggested that it was entirely possible to introduce a social dimension into these goals as well as to pursue a plurality of goals rather than focusing narrowly on economic efficiency or consumer protection. The tendency of the EU towards social objects especially in the period after the Treaty of Lisbon and the practice in a number of other countries throughout the world demonstrates that competition law has the potential to serve as an instrument of a more integrated social transformation rather than concentrating on a narrowly defined concept of economic efficiency. In doing so, however, competition law does not only support the most fundamental of all human rights, the right to food, but in treating producers, consumers and competition itself on the touchstone of the values of the right to food injects

⁸⁶ Goal 2 of the United Nations' 2030 Agenda for Sustainable Development: 'End hunger, achieve food security and improved nutrition and promote sustainable agriculture.'
http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E
(accessed 30th March 2016).

itself with higher standards of fairness and transparency as well as the capacity to contribute to upholding the rule of law.