Milk Sector Inquiry
Final Report January 2012
The English version of the Milk Sector Inquiry only contains selected chapters of the German publication. These chapters are highlighted in the table of contents.

Courtesy translation. Only the German version is authentic.
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I. Application of competition law at the producer and dairy market levels

3. Transparency: Market information systems and reference price models

The issues of market transparency\(^1\) and reference price models were already discussed in the interim report on the sector inquiry.\(^2\)

Comments on this part of the interim report have been very diverse. While the Agricultural Market Information Company (Agrarmarkt Informations-Gesellschaft mbh, AMI) and the German Farmers' Association (Deutscher Bauernverband, DBV) point out the positive effects of market transparency\(^3\), the Bavarian Farmers' Association (Bayrischer Bauernverband, BBV) and several producer associations are convinced that the high market transparency leads to indirect price agreements between the dairies and is not beneficial for producers organised in producer associations.\(^4\) BBV has also pointed out that, in its view, powerful dairies tend to take the price paid by weaker dairies for raw milk as a reference price.\(^5\) DBV does not share this view, claiming that there is a significant difference in raw milk prices between the north and south of Germany.\(^6\)

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1 Interim report on the milk sector inquiry, p. 82 ff.
2 Interim report on the milk sector inquiry, p. 57 ff.
3 Vollständige Transparenz bei vollständigem Wettbewerb = vollkommene Märkte, comment by AMI at a hearing on the interim report on the milk sector inquiry on 12 May 2010, comment by DBV on the interim report on the milk sector inquiry of 23 February 2010; along the same lines: comment by Prof Weindlmaier of 22 February 2010, p. 5; differing: BDM young, comment on the interim report on the milk sector inquiry of 15 February 2010, which points out the risk of price cartelisation by the dairies on the one hand, and the advantages for the market participants on the other (such as the provision of information which is relevant for price negotiations). BDM young therefore suggests a publication of prices at a fixed date which will make price cartelisation impossible, comment at the hearing on 12 May 2010, p. 2.
4 Comment by BBV on the interim report on the milk sector inquiry of 26 February 2010, p. 4; comment by the Regional Farmers Association of Saxony-Anhalt of 22 February 2010, p.1, as well as p.1 of the replies to the questions raised in the interim report; comment by Bayern MeG on the interim report of 23 February 2010, p.6, as well as statement at the hearing on the interim report on 12 May 2010, p.5; statement by BDM at the hearing on the interim report on 11 May 2010; statement by EZG Milch - Milchquelle w.V. at the hearing on the interim report on 12 May 2010, p.1; statement by the association of milk producers in Northern Germany ("Heloten") at the hearing on the interim report on 12 May 2010; comment by Unternehmen Milch on the interim report of 1 March 2010, p.2; likewise: comment by FW Landtagsfraktion on the interim report of 24 February 2010, p.4/5.
5 Comment by BBV on the occasion of the hearing on the interim report on the milk sector inquiry on 12 May 2010.
6 Comment by DBV on the interim report on the milk sector inquiry of 23 February 2010, p. 6; Comment by DRV (Deutscher Raiffeisenverband, German Raiffeisen Association, umbrella organisation of agricultural and food management cooperatives in Germany) on the interim report on the milk sector inquiry of 25 February 2010, p. 16.
producers to decide whether or not to switch to another dairy. BDM young, a branch of the German Dairy Farmers Association (Bundesverband Deutscher Milchviehhalter, BDM) claims that in a situation where there is an excess supply of milk, the high market transparency is advantageous not for the milk producers, but for the food retailers (who benefit in their price negotiations with the dairies) and the dairies (who benefit in their price negotiations with the milk producers).

In response to the in parts critical assessment of market information systems in the interim report and the debate on how to assess market transparency under competition law that emerged in the hearing on the report, AMI approached the Bundeskartellamt to discuss the conformity with competition law of a market information system it intended to launch. As a result of the ensuing consultation process, AMI now offers a market information system that, according to the Bundeskartellamt's current evaluation, does not infringe competition law. The Bundeskartellamt has published the main reasons for its assessment of the market information system in a case summary which is available on its website.

After the publication of the case summary, the Bundeskartellamt discussed possible conclusions and further steps to be taken with representatives of dairy cooperatives and non-cooperative dairies, the German Dairy Association (Milchindustrie-Verband e.V., MIV) and producer associations, as well as representatives of the Federal Ministry of Food, Agriculture and Consumer Protection (BMELV) and the European Commission. In addition, the Bundeskartellamt has received a number of inquiries from milk producer associations and dairies asking for an assessment under competition law of reference price clauses used in their milk supply contracts.

Several reactions from the press to the publication of the case summary on AMI's market price information system expressed the view that high market transparency is always conducive to competition and one of the basic requirements for functioning markets and effective competition. According to a survey of the market for raw milk conducted by the

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7 Comment by DBV on the interim report of 23 February 2010, p.6; comment by BDM young of 15 February 2010, p.7; comment by Erzeugergemeinschaft Milch · Milchquelle w.V. on the interim report of 26 February 2010, p.3; comment by the German Dairy Association (Milchindustrie-Verband e.V., MIV) of 26 February 2010, p.4.


9 http://www.bundeskartellamt.de case summary B2-118/10 of 12.05.2011 Competition law friendly design of market information systems for the procurement of raw milk.

University of Göttingen, the structural conditions in the market indicate that prices are set competitively on account of the high market transparency.\textsuperscript{11}

\textbf{a) Competition law assessment}

Market transparency can have both positive and negative effects on competition, depending on the circumstances of a case and the conditions in the respective market. The correlation between market transparency and competition has been a matter of interest for lawyers and economists since the early 1960s.\textsuperscript{12} The Swedish competition authority and the OECD have both held expert meetings on the issue of information exchange between competitors. Both have arrived at the conclusion that market transparency can have positive and negative effects on competition and that it is the circumstances of a case that determine which of the two options applies.\textsuperscript{13}

Potentially appreciable restrictions of competition that are caused or intended by market transparency and are not exemptable are subject to the prohibition of cartels under § 1 GWB (\textit{Gesetz gegen Wettbewerbsbeschränkungen}, Act against Restraints of Competition)/Artikel 101 TFEU. As a rule, companies offering market information systems or participating in such systems by providing data must judge for themselves whether they violate the prohibition of cartels by doing so (system of self assessment). The Bundeskartellamt has discretion to investigate market information systems used among competitors under competition law. In general, it will choose to investigate systems that are particularly significant for the respective market processes.

\textbf{b) Market information systems}


Market information systems are used to systematically exchange market-relevant data. The market information systems examined by the Bundeskartellamt in its milk sector inquiry are used to exchange information on the prices paid by dairies to their suppliers of raw milk. Often, the data provided is based on the invoices of producers and information submitted by the dairies. While in the majority of the cases the information is provided on a voluntary basis, the dairies are obliged to provide BLE with such information. In addition, there are other market information systems which provide price information for sales markets (spot milk, cheese, butter) or specific areas of utilisation (fat/proteins).

**aa) Overview of types of information systems**

Information systems that are permitted by law are published by the Federal Office for Agriculture and Food (*Bundesanstalt für Landwirtschaft und Ernährung*, BLE) and the specialist press which publish information on milk supply volumes, milk prices and production quantities for dairy products, as well as butter and cheese quotations (for the whole of Germany). These publications are rather infrequent and do not contain any data that can be attributed to specific businesses or business transactions. The information provided is aggregated and therefore unidentifiable.

The same applies to the so-called *Kieler Rohstoffindex* (Kiel commodity index) which is published by the *ife Informations- und Forschungszentrum für Ernährungswirtschaft* (information and research centre for the food industry) in Kiel. The Kieler Rohstoffindex contains data on protein and fat utilisation and indicates general trends in the sector.\(^{14}\)

In addition, trade journals publish spot milk prices on a weekly basis. Spot milk prices are prices for milk that is traded between the dairies. The published price refers to milk with 3.7% fat content ex dairy ramp. The data published is highly aggregated and indicates data for the "south" and the "north/west" of Germany without naming individual dairies. The market information systems mentioned above are unproblematic under competition law.

A detailed, and in most cases also company-specific publication of raw milk prices can be found both in trade journals as well as on the websites of associations. This includes data on the current milk price paid by dairies for organic milk and for conventional milk. The spectrum of the data published ranges from the milk prices paid by all the dairies active in one federal state to those paid by all major dairies operating within Germany. Factors which are typical for the sector, such as the 'stop factor' (costs charged by dairies for the collection of milk at the producers' production sites) or surcharges for the quality class S or more

\(^{14}\) The value of the commodity milk is indicated as revenue butter ct./kg, revenue skimmed milk powder ct./kg, fat value and non-fat value, as a monthly value and with a statement on general trends. In addition the index publishes a raw milk value free ramp and a raw milk value ex farm.
frequent collections, are also considered.\textsuperscript{15} In some cases arithmetical averages are calculated of the dairies' payout prices. Also, the weighted monthly payout prices paid in the individual federal states are published. A number of information systems also publish a comparison of milk prices paid by individual dairies, including information on the price paid in the previous month or the same month of the previous year. A moving average of the last 12 months is published as well. This information is predominantly published on a monthly basis and includes the names of the individual dairies or production sites. Such market information systems can be problematic under competition law.

\textbf{bb) Conformity of market information systems with the provisions of § 1 GWB/Article 101 TFEU}

Under § 1 GWB agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition are prohibited. Accordingly, § 1 GWB is violated by a market information system if the said system intends to restrict or distort competition or if it results in such a restriction or distortion. Whether this is the case depends on the actual market situation and the type of information exchanged. § 1 GWB is applicable even if the participants of the market information system do not automatically commit themselves to a certain behaviour by participating in the information system. The 'mere' publication of milk prices in a trade journal, on the homepage of an association or the collection and distribution of company-related information by the association to its members can constitute a concerted practice within the meaning of § 1 GWB/Article 101 TFEU. This is the case if, for example, several dairies use the respective medium for a monthly exchange of information on the milk price they pay to their producers. The competition restraint consists here in the intended or ensuing elimination of 'secret competition' and the resulting stabilisation of the price level which is objectively foreseeable: If hitherto secret information which is relevant for business strategies is exchanged between companies (here: the dairies) or made public, this artificially increases the transparency on the market affected (here: the market for the procurement of raw milk). This heightened transparency can make coordinated actions of the competitors (here: the dairies) easier. Insofar as such transparency aims at a significant distortion of competition or has that effect, e.g. by coordinating a certain price level, this constitutes a violation of § 1 GWB/Article 101 TFEU. It is the objective of § 1 GWB to prevent a loss of competition

\textsuperscript{15} In some cases, the information published includes data on special or supplementary payments or dividend payouts for business shares.
intensity resulting from such behaviour.\textsuperscript{16} This applies equally to sales markets and procurement markets.\textsuperscript{17}

The case practice of the Bundeskartellamt and the case law of the German courts, as well as the horizontal guidelines of the European Commission\textsuperscript{18} and the case law of the European courts provide references as to when a market information system is likely to intend or cause a competition restraint within the meaning of § 1 GWB or Article 101 TFEU.

\textbf{Constellations in which information exchange is likely to infringe competition law}

Payout prices are reported on a voluntary basis unless there is a legal obligation to report them to the competent authority of the federal state or the BLE. For a violation of § 1 GWB or Article 101 TFEU, it is irrelevant whether these price notifications are voluntary or mandatory. Voluntary notifications can have the same negative effects on competition as mandatory notifications.\textsuperscript{19} Nevertheless, in its discretion to take up a case, the Bundeskartellamt would take into account whether a company violated § 1 GWB by participating in a mandatory notification system. Depending on the case in question, it would usually not institute proceedings, and in any case no fine proceedings.

Identifying market information systems that make it possible to relate competition-relevant data to individual market participants usually raise more competition concerns than information systems where this is not possible.\textsuperscript{20} Identifying price information systems are particularly problematic if homogeneous products are concerned, because for such products the price is the only defining competition parameter.\textsuperscript{21} Raw milk is a homogeneous product. According to the Bundeskartellamt's investigations, the majority of the information systems available in the milk sector are identifying systems. In addition to aggregated data they also contain data on the milk prices paid by individual dairies. This is not altered by the fact that the notifications do not expressly state the individual price a specific milk producer is paid for its raw milk. Systems are already identifying if they allow for inferences on individual

\textsuperscript{16} Federal Court of Justice, decision of 29.1.1975 in WuW/E BGH 1337, 1347 (Aluminium Halbleger), Düsseldorf Higher Regional Court, decision of 26.7.2002 in WuW/E DE_R 949, 959 (Transportbeton Sachsen).


\textsuperscript{18} Market information systems are the subject of Chapter 2 (paras 55 ff.) of the horizontal guidelines.

\textsuperscript{19} Federal Court of Justice, decision of 18.11.1986 in WuW/E BGH 2317 (Baumarkt Statistik).

\textsuperscript{20} Düsseldorf Higher Regional Court of 26.07.2002 in WuW/E DE_R 949 (Transportbeton Sachsen).

transactions. The publication of payout prices as categorised standard values is usually sufficient for this. The fact that the data are standardised makes it even easier for competing dairies to compare their payout prices.

Where dairies use market information systems to adjust their payout prices to those of other dairies indicated in so-called reference price models (see letter b)), this constitutes an exchange of information on future price setting behaviour. This is because the payout price of the dairies participating in a reference price model can only be determined after the data indicated in the reference price model are available. Such exchange of information is considered a restriction of competition 'by object' in the Commission's horizontal guidelines and therefore seen as violating Article 101 TFEU, provided it is based on a concerted action of the dairies involved. The competition restraint is intended if according to experience the concerted practice leads by its very nature to negative effects on the market concerned. In such a case, it is not necessary to prove actual negative effects in the individual cases.

Even where information on milk prices is not included in reference price models, the publication of current data is not unproblematic per se. Whether the publication of data in the market information systems restricts competition in an individual case depends on the economic conditions in the relevant markets and the characteristics of the information exchanged.

An exchange of information is more likely to have restrictive effects on competition if the markets affected are transparent and concentrated. Restrictive effects are less likely in the case of non-transparent and fragmented markets. Most of the regional milk markets are transparent for all market participants with regard to the collected milk quantities, producer structures and dairy structures in the respective market. Publications of, for example, the BLE, AMI and ZMB (Zentrale Milchmarkt Berichterstattung GmbH, central dairy market information system), as well as the ife provide a lot of information on raw milk prices and quantity developments that is unobjectionable under competition law but nevertheless

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22 In the European Commission's view, the exchange of intended price setting activities provides a reference point for price coordination. This reference point enables competitors (here: the participating dairies) to react flexibly to intended price moves of the other competitors (dairies) by lowering or increasing their payout price.

23 Para 74 of the horizontal guidelines.

24 Bunte in Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht (Commentary on German and European Competition Law) 10th Edition, Vol. 1 para 218 on § 1 GWB.

25 Para 75 of the Horizontal Guidelines.

26 Para 78 of the Horizontal Guidelines.

leads to a rather high level of market transparency. The concentration level differs in the individual regional markets and is higher in the markets in the north, north-east and west of Germany than in the south. This can lead to a market information system being acceptable in one region but not in another.

Collusion is more likely under stable demand and supply conditions. The combination of

- the milk quota regime (valid until 2015)
- the long-term supply relations between dairies and milk producers combined with an obligation to supply/purchase the full volume of produced milk,
- the until now extremely low number of milk producers in the regional procurement markets who have switched to another dairy
- as well as the above-mentioned obligation to supply/purchase the full volume of produced milk

leads to very stable demand and supply structures in the procurement markets for raw milk.

As a rule, the exchange of information on prices constitutes an exchange of strategically relevant information. The published payout price for raw milk is a highly significant competitive parameter in the competition for raw milk. In the vast majority of the cases, the published prices are current prices. The Bundeskartellamt would like to point out that it is not aware of the use of any comparable identifying market information systems in any other agricultural sector.

The exchange of information is more likely to restrict competition if the participating companies cover a sufficiently large part of the relevant market. The market information systems used in the milk sector differ significantly and comprise between 3 and 100 dairies. Some information systems publish a milk price that refers explicitly to one region only. In such a case, the publication of the price paid by relatively few dairies can still account for a sufficiently large part of the geographically relevant regional market.

The more frequently information on the milk price is exchanged, the greater are the competition concerns raised by these information systems. The majority of the milk price information systems assessed by the Bundeskartellamt are published on a monthly basis. In the Bundeskartellamt's view this constitutes a frequent exchange of information.

Constellations in which information exchange on milk prices is usually unobjectionable under competition law

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28 Para 86 of the Horizontal Guidelines.
29 Para 87 of the Horizontal Guidelines.
30 Para 91 of the Horizontal Guidelines.
The publication of historic data usually does not provide an incentive for coordinated practices and is therefore generally unobjectionable under competition law. This does not apply, however, if the data allow for inferences about future behaviour of the market participants or are used to monitor explicit or implicit cartel agreements.

The question of when market data are historic has to be answered on a case-by-case basis, depending on the specific characteristics of the relevant market. The Commission’s horizontal guidelines relate the age of the data to the frequency of price re-negotiations or, respectively, the average length of contracts used in the respective sector. In this relation, the data published has to be 'several times older'. So far, case-law and the European Commission have rated information dating back more than one year as 'historic'.

In its preliminary assessment of the AMI market information system, the Bundeskartellamt has classified payout prices that are older than six months as 'historic'. The reason for this decision were the price structures in the milk sector, which are far more volatile than in other sectors on account of the impact the world market has on milk prices. Thus, the Bundeskartellamt applies a significantly lower standard to the milk market than to other sectors as regards the 'age' of business data required to make their publication acceptable under competition law. It intends to review this practice in 2012 and examine whether a six month period takes sufficient account of the actual market situation and conditions of competition in the sector.

The publication of aggregated data usually does not raise any competition concerns, either. A prerequisite is, however, that the data is aggregated in such a way that it is impossible to draw inferences about individual business transactions and it cannot be identified which data refer to which of the businesses participating in the information exchange. Large differentiations in product and price class and short intervals between reporting and response can, for example, present problems.

To what extent data have to be aggregated in order to meet these requirements depends on the individual characteristics of the market concerned. In the case of ready-mixed concrete, case-law has held that the aggregation of data of five companies does not raise any concerns.

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31 Para 90 of the Horizontal Guidelines.


33 Para 88 of the Commission’s Horizontal Guidelines; this does not apply however under specific market conditions under which a collusion can be maintained even with the aid of a non-identifiable information exchange system.
under competition law. Just like ready-mixed concrete, raw milk is a homogeneous bulk product, which is why the Bundeskartellamt considers the criteria applied in this case also applicable to the publication of milk prices. Furthermore, both cases concern regional markets.

To prevent a possible identifiability of market data in the milk sector even where they are presented as aggregate data, the Bundeskartellamt places specific demands on the publication of milk prices if they are indicated in volume weighted terms. This takes into account that the dairy sector in Germany is not homogeneous but consists of many small, a number of medium-sized and only a few large dairies. For the issue of market information systems this means: A non-identifying market information system can still raise competition concerns if a substantial change in the average milk price of one dairy has a significant impact on the reported average milk price. This is possible if, for example, one large and several small dairies participate in a specific information system. In such a case, a significant change in the volume-weighted milk price of the large dairy can lead to a substantial change in the indicated average value. All in all, particularly high demands must be placed on the admissibility of non-identifying market information systems under competition law if these systems are used in regional markets with oligopolistic structures, in which market transparency is high in any case.

For this reason the Bundeskartellamt places further demands on the aggregation of the data to prevent an indirect identifiability of milk prices resulting from the fact that changes undertaken by large dairies have a disproportionate impact on the average price. Accordingly, the share of the largest dairy included in the aggregate data must not exceed 33% of the total milk volume of the dairies represented in the sample. The share of the two largest dairies must not exceed 60%. The threshold of 33% reflects the benchmark set by the legislator in § 19 GWB for the assumption of market dominance. Where the data is not presented in volume weighted terms, this additional requirement of a percentage threshold is not necessary. If milk prices are not published as volume weighted prices, the raw milk quantity of a large dairy participating in an information system cannot be used as a means to identify the dairy.

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34 Düsseldorf Higher Regional Court, 26.07.2002 in WuW/E DE-R 949 (Transportbeton Sachsen). In other decisions different requirements have been set depending on the type of the data exchanged: In the case of an information system used in the cardboard industry, the European Commission has demanded aggregated data from at least three companies, and at least ten individual values from their incoming orders statistics for admissibility of the system under competition law, Decision of the European Commission of 13.07.1994 in OJ EC 1996 No. C 310, p. 3 paras 16, 18. The British competition authority (Office of Fair Trading) also demands aggregated data of at least five individual values for admissibility under competition law: Notice of intention to accept binding commitments to modify a data exchange tool used by Motor Insurers, of January 2011, p. 38 and Annex 2, available at http://www.oft.gov.uk/sharedof/consultations/OFT1301.pdf.
c) Reference price models

Already in its interim report on the milk sector inquiry, the Bundeskartellamt viewed those reference price models critically that are based on identifying market information systems for the milk price of dairies that compete against one another in a regional market. In the comments on the interim report, this critical assessment is generally shared. Some statements, however, point out that such pricing mechanisms were introduced at the request of the producers:

In its comment on the interim report, DBV, for example, expresses its ambivalence about a reference price system. According to the association, such a system on the one hand provides orientation to producers in price negotiations, but on the other hand means that the dairies forego potential to negotiate better prices. In any case, DBV states, the reference price system does not reflect the individual efficiency of a dairy and thus provides an incentive to exclude producers from the value-added process of the dairies.\(^\text{35}\)

Several milk producer associations have stated that the reference price model was originally envisioned as a 'price safety net' for the producers. However, the intended minimum price model developed de facto into a model for the payout price for raw milk.\(^\text{36}\)

In a reaction to the publication of the BKartA’s case summary on the market information system of AMI, the Association of Bavarian Private Dairies (\textit{Verband der Bayerischen Privaten Milchwirtschaft e.V.}, VBPM) stated that a prohibition of reference price models would unjustifiably place non-cooperative dairies at a disadvantage vis-à-vis producer organisations and dairies that are organised in a cooperative. According to VBPM, the economic risk placed on these dairies if they were no longer allowed to base their price decisions on the prices of other dairies was unacceptably high, in particular if in combination with short terms of contract. In addition, it claimed, there was an information asymmetry between the non-cooperative dairies and the recognised producer organisations. By negotiating with various dairies, these producer organisations gained an overview of the different payout prices of dairies, which the non-cooperative dairies were denied.\(^\text{37}\)

As a result of the discussions with dairy associations and producer organisations, the Bundeskartellamt has decided to extend its investigations to reference price models that are

\(^{35}\) Comment of DBV on the interim report on the milk sector inquiry of 23 February 2010, p. 4.

\(^{36}\) Amongst others, comment by BDM young on the interim report on the milk sector inquiry of 15 February 2010, p.7; comment by Bayern MeG of 23 February 2010, p.3; comment by EZG Milch - Milchquelle w.V. at the hearing on the interim report on the milk sector inquiry on 12 May 2010.

based on data which are by themselves admissible under competition law because they do not contain any identifying milk price data.

**aa) Types of reference price models**

In the course of its investigations, the Bundeskartellamt became aware of various types of reference price models. Usually, reference price models are operated in such a way that a dairy negotiating prices with producers guarantees the payout prices of other dairies as its minimum payout price. Sometimes, this is based on the payout prices of surrounding dairies, sometimes on a national average and sometimes on a regional average. 38

**bb) Assessment under competition law aspects**

Reference price models can be inadmissible under competition law if they are based on data that are themselves not in conformity with competition law. This applies to all reference price models that are based on current, dairy-specific payout prices for raw milk. Where a dairy applies a reference price system that is based on aggregate or historic data, this in itself is not anti-competitive. This has also been the Bundeskartellamt's response to corresponding inquiries from dairies and producers in the past months.

The situation is different, however, if a 'bundle' of vertical agreements creates a contractual framework which in its entirety constitutes a horizontal agreement or a concerted practice between dairies. 39 This applies in particular to reference price systems if these already have a horizontal element by referring to the prices of competitors. The burden of proof of such concerted practices is on the Bundeskartellamt.

First indications of possible competition restraints can be detected from the following market observations: According to the Bundeskartellamt's investigations to date, contracts based on reference price models are concluded more than just occasionally. In the south of Germany in particular, dairies have entered into a number of such agreements with their suppliers of raw milk. In so far as these agreements are to be based on a comparable reference price model, they can, taken together, form an anti-competitive 'star-shaped agreement', e.g. if producer organisations have a mandate to negotiate with several dairies. Where such a system is aimed at restraining competition by eliminating price competition

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38 In Bavaria, almost half of the members of VBPM use a reference price model. Of these, 10 dairies use the milk price paid by neighbouring dairies as a reference, while the others use the average prices of AMI or the Bavarian Agricultural Research Institute (Bayerische Landesanstalt für Landwirtschaft, LfL); letter of VBPM to the Bundeskartellamt of 14 December 2011, page 3.

39 Düsseldorf Higher Regional Court of 12.6.1990 in WuW/E OLG 4691 (Sternvertrag).
between dairies active in the same regional procurement market, or has that effect, the reference price agreements violate § 1 GWB. If the reference price models result in concerted practices which, in turn, lead to an alignment of the milk price paid by the dairies, this constitutes a distortion of competition within the meaning of § 1 GWB.

An examination whether such practices can be exempted under § 2 GWB or Art. 101 (3) TFEU should be done on a case-by-case basis. In view of the horizontal effects on prices or other competition parameters, however, an exemption of such practices is only perceivable to a very limited extent.

A restraint of competition is also possible if the payout prices for raw milk in a regional market differ on a monthly basis but are aligned at the end of the year on the basis of the annual average prices of the dairies participating in the system. Such models also lead to an alignment of the milk price in the medium term (after prices have been adjusted on the basis of the annual value). Ultimately, it does not make any difference if an alignment of the milk price takes place on a monthly, quarterly or annual basis. What is decisive is whether dairies active in the same regional market use, on account of a verifiable agreement, a uniform value to calculate their payout price, or whether they refer to different dates when calculating individual payout prices in the respective vertical relationship with their suppliers. If the latter is not the case, the dairies involved restrict the competition for the producers' raw milk.

The objections VBPM has raised against a prohibition of reference price models - namely the claim that this discriminates against private dairies who are burdened with an unacceptable economic risk in calculating their payout price - in fact prove that broad-ranged reference price models have an anti-competitive effect. For their main objective is, accordingly, to prevent a competitive calculation of the payout price for raw milk that reflects the economic risks of the dairies and instead establish a pricing mechanism that minimises the 'risk' of differing payout prices of competing dairies and consequently the risk of their suppliers switching to another dairy.

§ 19 (4) no. 1 and 2 GWB

The reference price models used by the non-cooperative dairies could restrain the competitive options of the milk producers without an objective justification. It has to be noted, however, that § 19 (4) no. 1 GWB is only applicable to dominant dairies.

The same is true for § 19 (4) no. 2 GWB. To prove such a restrain of competition, the Bundeskartellamt would first have to establish a geographically comparable market (which could also be a foreign market), on which the competition intensity was higher than on
those regional markets where non-cooperative dairies use reference price models. If such a comparable market could be found, the authority would then examine whether the use of reference price models constituted a case of exploitative abuse. Again, this would only concern dominant dairies.

§ 20 (3) GWB

§ 20 (3) GWB is also applicable to non-cooperative dairies with a relatively strong market position. Calculating the milk price on the basis of a reference price rather than the general market situation and individual negotiations can also constitute an unjustifiable undue advantage. The undue advantage would consist in the dairies being able to insist on purchasing conditions that are not based on vertical contractual relations with their suppliers and the performance of the latter in terms of quantity, quality and other factors (such as collection intervals) but on a cartelised price.

d) General conclusions and next steps

aa) General conclusions

The agricultural sector, including milk production and processing, are also subject to the prohibition of cartels under § 1 GWB. With the provisions of § 28 GWB and § 11 of the Market Structure Act, the legislator has already created extensive exemption areas from the general prohibition of cartels for this sector. It has therefore already taken account of the imbalance of power in the relationship between dairies and milk producers and between dairies and the retail trade. Corresponding exemption regulations will also be applicable in future in other European countries. In addition, the general competition law provisions apply, to which market information systems in the milk sector and reference price models for calculating the raw milk price are also subject.

At national as well as at European level the Bundeskartellamt does not intervene against the collection of market data as such but against their publication, providing that this has as its object or effect the restriction of competition.

The collection of data on the basis of e.g. the German Reporting Ordinance for CAP products (Marktordnungswaren - Meldeverordnung (MarktOWMelV)) by BLE or voluntary reports by (dairy) associations, are generally not objectionable under competition law. This is providing that the collected data is used exclusively for general market observation e.g. by institutions such as AMI or associations in the sector. A further condition is that the data are not published as identifying current market data or are accessible to market participants via other channels.
However, in the Bundeskartellamt’s view, the collection of such extensive volumes of data exerts a certain pressure to publish these data and not to use them solely for internal evaluation and analysis purposes. For this reason the Bundeskartellamt is sceptical about extending existing national and European reporting obligations, even if there is no intention (at the current time) to publish the reported data. It has already expressed this view in its comments on plans to change the reporting ordinance for CAP products.

At relevant fora at European level the Bundeskartellamt has pointed out that market transparency significantly reduces incentives to compete or encourages the formation of cartels and is detrimental to competition, even if it removes information asymmetries.

Equally complex issues are the national market information systems and reference price models which are already in place. Not every market information system in the milk sector and not every reference price model for calculating the level of the milk price is anticompetitive per se. The Bundeskartellamt therefore advocates a differentiated assessment of market transparency which examines and takes adequate account of its specific effects on competition. It should therefore be examined whether the market transparency in the prices paid for raw milk created by some market information systems and reference price models is likely to favour cartelized structures and in this way restrict competition between the dairies.

Concerted practices in the form of market information systems or reference price models used by dairies with the object or effect of restricting competition in the calculation of the payout price for raw milk, are prohibited under German and European competition law.

Cartels on purchase prices are subject to the same prohibition criteria as cartels on sales markets. They do not directly harm the interests of consumers in the short-term. However, the GWB protects functioning competition on all market levels, not merely on the last level. The underlying concept here is that serious restrictions of competition on the upstream markets have medium to long term effects on all following market levels.

In consideration of the principles illustrated under B I 3. b) the Bundeskartellamt takes the view that a not insignificant proportion of information systems in current use reduce secret competition because of their identifying and frequent publication of current payout prices and distort the intensity of competition in the raw milk sector. With their access to these data and other available market data, dairies are able to estimate the prices their competitors pay for raw milk. If market information systems are used to form the basis of reference price models, which are then used throughout an entire region, this can also result in an anticompetitive coordination of payout prices paid by the dairies.
Dairy cooperatives are obliged by their cooperative assignment to pay the milk producers the proceeds from their economic activity. However, in practice their boards have a certain scope in setting the level of the payout price.\(^4\) This is particularly true of those dairies which are only organized as cooperatives on the procurement side and take another legal form on the sales side.\(^4\) The dairy non-cooperatives certainly have the same scope for setting the level of the payout price.\(^4\) Market information available via reporting systems which are objectionable under competition law prevents both dairy cooperatives and non-cooperatives from adapting to market conditions and following their own expectations of market trends in calculating the raw milk price. Instead the object or effect of such reporting systems is to cartelise the raw milk price. This can ultimately offset the advantage offered to recognised producer organisations by the legislator by allowing them to collectively negotiate the milk price with the dairies, thus strengthening their market position.

The dairy associations have stated that market information systems and reference price models have been introduced at the request of the milk producers. This may be true for the past. However, the pros and cons of market information systems and reference price models are increasingly being viewed critically by producers as well. According to the results of the sector inquiry into the milk sector, approval among the producers of market information systems and reference prices is no longer as broad-based as comments in the specialist press would suggest. Comments on the interim results of the milk sector inquiry expressed in the official hearing on the inquiry and received from producer organisations on the case summary\(^4\) have shown that the calculation of the raw milk price based on reference price models, in particular, is overwhelmingly criticised and that market transparency is not seen as a value in itself.

Prohibiting market information systems using current company-specific data strengthens the position of recognised producer organisations, which obtain a picture of the current market situation in their negotiations with various dairies in a legally admissible manner, whereas the dairies have no comparable possibilities. Dairies may also find ways to obtain market information (e.g. from talks with producers or milk tank drivers). They also have the

\(^4\) This is also illustrated by Brümmer, Fahlbusch, Pfeuffer, Spiller and Helberg-Bahr in their essay; *Wirtschaftsdienst* 2011/12, page 2.

\(^4\) The Bundeskartellamt has information according to which a dairy had outsourced its sales to a marketing company, whose capital was then increased by several million euros. This increase was subscribed solely by the registered dairy cooperative, without the corresponding decision of the general members’ meeting of the cooperative. This demonstrates that also in the case of dairy cooperatives the profit gained is not necessarily paid out in full to the members or only used for other purposes with their approval.

\(^4\) Brümmer, Fahlbusch, Pfeuffer, Spiller and Helberg-Bahr. *loc.cit.* p. 3.

\(^4\) B 2 - 118/10: Standard for competition law friendly design of market information systems for the procurement of raw milk
possibility to tender for milk supplies or to obtain a picture of the current market price from requests for supply. An institutionalised form of information exchange with a comparable degree of data accuracy and reliability, however, will no longer be possible.

It is not the Bundeskartellamt's aim to prohibit market information systems per se. The publication of payout prices for milk which are sufficiently aggregated or which, according to the current but not final assessment of the Bundeskartellamt, are historic, i.e. older than six months, are still admissible. Other market information systems can be prohibited after examination on a case by case basis. Reference price models which show no evidence of coordinated conduct in the form of a star-shaped agreement (Sterntertrag) between regionally competing dairies and producer organisations which negotiate with several dairies, are also admissible under competition law. This is provided that the data basis used complies with competition law.

Information systems which are unobjectionable under competition law exist with regard to the payout price for raw milk (e.g. as provided by AMI) and individual processing forms (e.g. the milk commodity value provided by the Federal Dairy Research Centre in Kiel (Kieler Rohstoffwert) as well as other relevant market data (as published by the ZMB). Thus, the producers have a whole range of information which provides them with suitable assistance for important economic decisions.

The market information systems approved by the Bundeskartellamt as compliant with competition law provide producers with information about the payout practice of the dairies which is important for their business strategies. Differences in the general payout policy of a dairy can be more reliably identified in a subsequent annual comparison than in the publication of monthly individual values. This is a less restrictive means of information dissemination serving the purposes of the producers than is the publication of current prices. In order to decide whether a dairy's strategic orientation is better or worse, the producer does not require knowledge about monthly payout prices but about longer-term developments. He can gain such information from e.g. the model agreed with AMI. In addition, market information such as the Kiel commodity value count provide data on price developments which allow for an approximate estimate of price developments and serve producers as guidance in their discussion on the level of payout prices with their dairies. According to the Bundeskartellamt's knowledge, detailed and company-specific information is not available in other areas of the agricultural sector. The additional value gained from insight into current prices paid by other dairies for raw milk in any case does not justify the resulting restriction of competition.

Although the dairy associations initially stated that their members had no interest in maintaining their market information systems and reference price models, it is now the non-
cooperative dairies rather than the producers who consider themselves at a disadvantage. They substantiate their argument with the fact that under Article 11 of the Market Structure Act, the producers are able to pool their milk volumes and negotiate with several dairies which makes it possible for them to acquire information which is not legally available to dairy non-cooperatives. Particularly with regard to potentially increased pooling opportunities resulting from the European Milk Package (see C I 1 b below), they fear significant disadvantages.

189 This strengthening of the producers' position was, however, intended by the legislator and by no means justifies the creation of a 'counter cartel'. On the contrary, if such agreements were allowed, this would jeopardize the intended strengthening of the producers. For although the latter would be able to negotiate prices with several dairies, they would still only receive a uniform price for their products.

190 The Bundeskartellamt has discretion on which violations of § 1 GWB to take up. In exercising its discretion, it takes into account that a cartelisation of procurement costs constitutes a key restriction under § 1 GWB and that the procurement costs for raw milk are an essential competition parameter for the dairies. On average, the procurement of raw milk accounts for more than 55% of all costs incurred by a dairy.\textsuperscript{44} The Bundeskartellamt also takes account of the fact that the milk markets are currently in a phase in which the course is being set for their future development. On the European level, markets are being liberalised with the abolishment of the quota system. In addition, new European provisions are intended to strengthen the position of the producers. This can result in a breaking up of the hitherto very static supply and demand structures on the regional markets for raw milk. This development is enhanced by the volatility of the milk markets which are increasingly affected by world market developments because German dairies are becoming more and more active abroad and foreign dairies are becoming increasingly active on the German market. In such a market phase, it is the Bundeskartellamt's task to prevent competitive processes from being hindered by anticompetitive practices of the market participants.

191 The Bundeskartellamt not only has discretion on whether to examine a particular behaviour under competition law. It is also free in its choice on which competition law tool to apply. In exercising its discretion, the Bundeskartellamt will take into account that it is difficult for market participants to assess whether their practices comply with competition law, and the more so as these practices have been found to be unobjectionable by competition authorities for many years, albeit under different market conditions (see also letter bb)).

\textsuperscript{44} In the case of the dairy cooperatives queried, the average stands at over 60%, in the case of the non-cooperative dairies at over 52%.
Upon request and workload permitting, the Bundeskartellamt also provides assistance with the assessment of individual practices for their compliance with competition law.

**bb) Next steps**

There are several legal options open to the Bundeskartellamt and the competition authorities of the Länder to respond to identified competition restraints. One example is § 32 GWB under which companies can be ordered to terminate illegal agreements with a foreclosure effect. Such agreements can also be prohibited under § 1 GWB. In principle, violations of competition law can also be prosecuted and fined in administrative offence proceedings.

Since it has been common practice in the market for quite a while to publish company-specific current payout prices and use reference price models, and because it depends to a large extent on the specific circumstances of each case whether competition law has been violated, the Bundeskartellamt has decided not to initiate fine proceedings for the time being to sanction the use of potentially anticompetitive systems.

Instead, the BKartA is currently engaged in a dialogue with information system operators and those affected by such systems to gain knowledge of all relevant circumstances for its assessment of said systems under competition law.

Should the BKartA identify information systems or reference price models on the raw milk price that are inadmissible under competition law (according to the criteria described above and based on an analysis of the circumstances of the specific case), it will promptly initiate talks with the operators of these systems.

Where it is not possible to agree on a solution which conforms with competition law, the Bundeskartellamt will take a decision in a formal administrative proceeding. In the course of this proceeding, all parties concerned would be given the right to be heard before the final decision. The BKartA’s decision could then still be appealed.

In addition, the BKartA is engaged in an intense dialogue with the BMELV and the European Commission to assess the relevance under competition law of the existing market transparency in the milk sector in Germany and Europe and, as far as possible, work towards reducing this high market transparency.
C. Status Quo

I. EU Milk Package

1. State of discussion

At a meeting of the Special Committee on Agriculture in early December 2010, the European Parliament, the Council and the European Commission agreed with a qualified majority vote in the so-called trilogue within the Special Committee on Agriculture on a version of the Milk Package as detailed below. The Chairman of the Special Committee on Agriculture was to inform the Chairman of the European Parliament’s AGRI Committee accordingly in order to achieve a first reading agreement in early 2012. In this case the Milk Package would probably be published in the Official Journal in April 2012.

The proposed regulation includes the following points:

a) Inter-branch organisations

A provision is added to Article 123 which provides Member States with the possibility to recognise inter-branch organisations. These can cover all stages of the supply chain. They can, inter alia, improve knowledge about and transparency in the milk sector by publishing statistical data on the development of the milk price level, the volume of raw milk deliveries and the standard contract periods used in the procurement of raw milk. Furthermore, such organisations are entitled to illustrate market trends at the regional, national and international levels, analyse the potential of export markets, publish market studies, provide information on and promote dairy products and develop standard forms of contract for the procurement of raw milk and the sale of dairy products.

The inter-branch organisations are recognised by the Member States in whose territory they are active. The European Commission can, inter alia, stipulate the conditions under which inter-branch organisations which cover several Member States are recognised. Member States must check at regular intervals whether the conditions for recognition of a branch organisation are (still) fulfilled. If not, they can withdraw their recognition.

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46 Committee on Agriculture and Rural Development of the European Parliament.

47 Articles without source reference are Articles of Regulation No 1234/2007 including the amendments.

48 Article 126-ab.

49 Article 126 c.
Inter-branch organisations may not produce milk themselves nor process milk into dairy products or market dairy products.\(^{50}\) The activities of inter-branch organisations may not e.g. result in market sharing; price agreements are inadmissible; only restraints of competition which are essential to achieving the objectives of an inter-branch organisation may be agreed on; and competition may not be eliminated in respect of a substantial proportion of the products in question.\(^{51}\)

If an inter-branch organisation meets these conditions, it is exempted from the ban on cartels under Article 101 TFEU.\(^{52}\)

**b) Producer organisations**

Member States shall recognise producer organisations and associations of producer organisations which meet certain conditions.\(^{53}\) If already recognised producer organisations or associations of producer organisations meet the conditions for recognition, Member States can treat them as recognised producer organisations without having to grant recognition once again.\(^{54}\) Member States must check at regular intervals whether and to what extent the conditions for recognition (still) exist.\(^{55}\)

The producer organisations are entitled to conduct contract negotiations with the dairies on behalf of the producers for all or part of the volume of raw milk supplied by them.\(^{56}\)

However, a producer organisation cannot conduct negotiations for more than a maximum of 3.5% of the EU’s total milk production and 33% of the milk produced and marketed in the Member State in which it is active.\(^{57}\) The competent competition authority can also prohibit negotiations by a producer organisation in cases where the thresholds mentioned above are not exceeded, but where competition would nonetheless be excluded in an individual case.

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\(^{50}\) Article 126 from para 1 (d).

\(^{51}\) Article 177a para. 4.

\(^{52}\) Article 177a.

\(^{53}\) Article 126a in conjunction with Article 22(b) and Article 122 (c).

\(^{54}\) Producer organisations which are recognised as such under national law and do not meet the conditions for recognition under European law, can continue their activities for an interim period of six months from the entry into force of the regulation.

\(^{55}\) If the conditions for recognition are no longer met or if there are other irregularities, the relevant national authorities must decide on penalties and, if necessary, on the withdrawal of recognition as producer organisation.

\(^{56}\) This neither requires a transfer of ownership of the raw milk from the producers to the producer organisation nor the negotiation of a uniform price for all the associated producers, Article 126a para.2 (a) and (b).

\(^{57}\) Article 126a para. 2(c).
by the joint negotiation of the producer organisation or where this would result in significant prejudice to small and medium-sized dairies.  

Furthermore, producers cannot generally be members of more than one organisation. Membership in a producer organisation, or participation in any contractual negotiations conducted by a producer organisation, shall not stand in conflict with any duties under cooperative law.

c) Contracts

It is at the discretion of the Member States to decide whether the conclusion of contracts between milk producers and dairies is to be mandatory or not. If a Member State decides to introduce such an obligation, the contracts must meet certain minimum requirements. For instance, the offer to enter into a contract and the conclusion of a contract must be made in writing and before the producer supplies the raw milk. The contract must include a raw milk price or pricing mechanism and specify the duration of the contract; the volume to be supplied and the timing of deliveries must be agreed in writing.

The dairy cooperatives are exempted from these obligations if their milk supply rules or their statutes already include such provisions.

d) Quantity control for cheese with protected designation of origin or protected geographical indication

At the suggestion of e.g. inter-branch organisations, Member States can issue binding statutory provisions regulating the supply of cheese with protected designation of origin or protected geographical indication for a limited period. This requires the approval of at least two thirds of the farmers who produce the raw material for such types of cheese.

Only the supply quantity of these types of cheese may be regulated. The state regulation shall not apply for more than three years. Price agreements are also inadmissible. The state regulation may not result in the non-availability of a large part of the quantity produced

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58 Article 126 a para. 5.
59 In specific individual cases Member States can provide for exemptions from this rule.
60 Article 185 (f) para. 2.
61 Article 185 (f) para. 3.
62 Article 126 (b) paras. 1 and 2.
63 If the regulation is to apply beyond the said period, the inter-branch organisation must submit a new application; the approval of the producers concerned should again be obtained.
which would otherwise be available. Member States must examine whether the preconditions for regulation still apply after such rules have been issued. If this is not the case, the Member State which issued a regulation under Article 126 (b) can withdraw this.

e) Other provisions

The European Commission shall have the right to issue implementing rules. By 31 December 2012 the Commission shall submit a report on the development of the market situation to the Parliament and the Council and, if necessary, make recommendations for the smooth phasing-out of the milk quota system. By 30 June 2014 and 31 December 2018 it shall also submit reports to the Parliament and the Council in order to assess, inter alia, the effects of these regulations on producers in disadvantaged regions.

2. Competitive assessment

Last year, at the invitation of the Directorate General for Competition, the Bundeskartellamt was involved in an advisory capacity in the discussions on the structure of the Milk Package in the ECN Subgroup on Milk. However, neither the Bundeskartellamt nor the European Commission’s Directorate General for Competition played a leading role in the development of the Milk Package.

a) Inter-branch organisations

The Bundeskartellamt welcomes the fact that the establishment of inter-branch organisations is at the discretion of the respective Member State. Where inter-branch organisations only promote the consumption of dairy products, for example through public information and export marketing research, this should basically be unobjectionable under competition law. However, they may not assist in setting purchase or sales prices and price components or in regulating the market by means of quantity control. Also, an inter-branch organisation shall not act as a forum for the exchange of such information.

The implementation of information systems on milk payout prices, supply volumes and contract periods would have to be considered as critical under competition law if current company-specific data were to be published. However, there are no indications so far that the publication of current company-specific data is intended by the legislator. The

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64 Article 126 (b) para. 4.
65 Article 126 (b) para. 6. The European Commission shall have an independent right of withdrawal under Article 126 (b) para. 8.
66 Article 177 (a) para. 7.
67 Supplement to Article 184 para. 6.
explanatory statement on the intended regulation once again clarifies that the setting up of inter-branch organisations must not result in any distortion of competition. 68

The experience of other states in which inter-branch organisations already exist in the milk sector show that such organisations are not necessarily in a position to bridge the sometimes very divergent interests. In Switzerland, the inter-branch organisation "BO Milch" launched after the liberalisation of the milk market has had virtually no effect so far: Since June 2009, this inter-branch organisation has enabled producers, dairies, cheese dairies and trading companies to pool their interests. Initially it had been the task of the inter-branch organisation to introduce a three-stage model for the quantity control of dairy milk. 69 As no consensus could be achieved on this model, BO Milch developed a package of measures 70 and a standard contract both of which provide for the product-specific payment for raw milk depending on the added value achieved at the point of sale. 71 As an alternative to the (failed) binding quantity regulation, this provision is to provide incentives for market-oriented milk marketing. 72 Moreover, the Swiss Parliament can declare milk production control measures as generally binding. 73 The fact that there are "numerous grounds for conflict" in the Swiss milk sector has, however, led to a situation where BO Milch is constantly operating on the edge of breaking point and none of the decisions made are implemented. 74 In October 2011, the Swiss association of milk producers, SMP, therefore decided to leave the inter-branch organisation. 75

b) Producer organisations

68 Para. 12 of the Introduction to the draft of 7 December 2011.

69 Contract milk ("Vertragsmilch"), exchange milk ("Börsenmilch"; milk entering the market in quantities exceeding the contractually stipulated quantity) and market clearance milk ("Abräummilch"; this is defined as such if the price of exchange milk drops below a certain minimum price, the price for market clearance milk is set by the world market).

70 Package of measures to stabilize the milk market of 24 November 2010, set of rules established by the inter-branch organisation "Branchenorganisation Milch", available at http://www.ip-lait.ch/site/.

71 This model is referred to as "segmentation". The segmentation refers to A-milk (for the protected and subsidised domestic market), B-milk (for export to the EU) and C-milk (for non-subsidised export to states outside the EU).


73 Declaring milk production control measures as generally binding under the Swiss Agriculture Act would result in an exemption from the prohibition of cartels, cf. WEKO in Recht und Politik des Wettbewerbs 2010/1 page 9. For example, at BO Milch’s request, the Swiss Federal Council has declared as generally binding the standard contract developed by BO Milch, which contains the segmentation. These contractual provisions are thus binding for all stakeholders in the Swiss milk sector, i.e. also companies which are not members of BO milk.


From a competition point of view, particularly the high thresholds for the recognition of producer organisations on the basis of the Milk Package are to be viewed critically. The draft mainly provides for a uniform regulation for all Member States of the European Union and thus does not take sufficient account of the fact that real market conditions vary significantly from one Member State to another.

In Germany e.g. this is evident from the fact that the Milk Package's provision on the size of producer organisations sets a nationwide limit, a national milk volume, whereas in reality milk is procured in regional markets. While a national approach may be appropriate in other (smaller) Member States with different market structures, in Germany this could lead to a situation where only one producer organisation would be active in individual regional markets and where this would be unobjectionable under the European provisions. In Germany a producer organisation would in fact be allowed to pool approx. 5 billion kg of milk.

One of the largest German milk producer organisations, Bayern MeG, currently pools merely around 1.7 billion kg of milk. This corresponds to approx. one third of the milk volume bought in Bavaria by dairies which are not organised as cooperatives. Should Bayern MeG succeed in actually reaching the maximum pooling limit under European law, it would practically be able to pool the total milk volume bought by Bavarian dairies. Today the milk producers organised in Bayern MeG already supply a large proportion of those Bavarian dairies which are not organised as cooperatives. Should it be suspected that competition has been eliminated by a producer organisation, and should its recognition have to be withdrawn, this would require a complex examination procedure to define the geographic market as well as any pooling effects which might eliminate competition. The possible divergences in competitive assessment resulting from national thresholds and regional market conditions could also lead to considerable legal uncertainty for the producer organisations for which the provisions are per se advantageous.

The possibility of milk price negotiations by associations of producer organisations legalizes what has so far been a grey area of actual practice. On the basis of the Market Structure Act, associations of producer organisations have so far not been allowed to negotiate milk prices themselves. However, representatives of associations of producer organisations have de facto been present at price negotiations conducted by member producer organisations. With the adoption of the Milk Package regulation the associations of producer organisations will not only be able to attend the negotiations, but also to take an active role. This would strengthen the anti-competitive effects of large producer organisations.

Whether the rules will significantly change conditions on the German market is questionable. The major part of the milk produced in Germany is purchased and processed
by dairy cooperatives. Producers which are members of a dairy cooperative cannot negotiate the volume of milk they supply to their cooperative within the framework of a recognised producer organisation. As producers (must) generally deliver their total milk volume, the provisions strengthening the role of producer organisations remain without effect for most of the milk supplied in Germany.

In this respect the Bundeskartellamt believes that the provision includes a contradiction in terms. Although organised dairies are exempted from the provision, it stipulates that producers are to negotiate the price/pricing procedure with the dairy before the raw milk is delivered. The latter provision also applies to dairy cooperatives which so far have not paid the milk price on the basis of negotiations, but according to their respective revenue situation.

c) Contracts

The Member States can also adopt these provisions for contractual arrangements between producers and dairies. According to information available to the Bundeskartellamt, Germany currently has no plans to adopt these provisions.76

Should Germany decide to adopt the provisions, problems could arise in the implementation with regard to the payment of the milk price, in particular for members of dairy cooperatives.

In contrast to some other Member States, most of the raw milk in Germany is acquired on the basis of written agreements.

However, the majority of these agreements are not "contracts". The supply conditions in dairy cooperatives are stipulated by the dairies' milk supply regulations. Provided that the necessary majority is obtained at the general meeting, the members of a cooperative can decide themselves on the content of their milk supply regulation and thus on essential supply conditions. Therefore, dairy cooperatives are specifically exempted from the provisions if their statutes or milk supply regulations contain such regulations.

The actual level of the milk price is set independently by the board of the dairy cooperative after the raw milk has been delivered. Whether this contradicts the intended European regulation on written contracts is still unclear in detail. The intended regulation stipulates that all essential elements, including the price or at least a pricing formula, shall be fixed at the beginning of a supply relationship. As it is the board's own responsibility in dairy cooperatives to set the level of the milk price, it might at least become necessary to adjust

76 dmz No. 25 of 8 December 2011, page 13.
the rules on milk supply to allow for a fixed pricing formula in order to take sufficient account of the European provisions. This might make it necessary to amend the Cooperative Societies Act.

In any case, there have been no uniform rules in German contracts and/or milk supply regulations and statutes of dairies so far. The use of standard contracts would therefore involve the risk that the contracts' contents would also be standardised. This would raise competition law concerns, in particular if such contracts provided for a uniform price or uniform price formation at national or regional level or led to such a standardisation. The wide-spread usage of standardised contracts would result not only in vertical price formation, i.e. in the relationship between the dairies and the milk producers, but also horizontal price formation, i.e. both at the producer and dairy level. Such a vertical price formation and/or horizontal price agreement would constitute an illegal hardcore restriction under German and European competition law.

d) Quantity control for cheese

The possibility for a dairy to limit its production volume for certain types of cheese with protected geographical indication (with approval of the manufacturers concerned) would also be available to a dairy cooperative under § 28 of the ARC. However, the exemption under § 28 ARC does not apply to non-organised dairies or agreements between several dairies. The state quantity control admissible under the Milk Package would therefore clearly exceed the previous scope for exemption under national law.

The Bundeskartellamt considers the possibility of state quantity control to be incompatible with the general objectives of the milk market regime, even if the control is only applicable to certain types of cheese with a protected geographical indication. It is the primary objective of the European provisions to increase competitiveness in the dairy sector as a whole and to achieve better market orientation.\textsuperscript{77} In the Bundeskartellamt’s view this cannot be effectively achieved by state rules which restrict competition and are not orientated towards the actual market processes and the interaction of demand and supply.

Moreover, it seems questionable whether the envisaged provisions will serve the intended purpose of protecting rural regions. Dairies generally do not use milk produced in these areas for the production of cheese with a protected geographical indication. Due to the existing supply obligations, the total milk volume cannot be easily controlled by a dairy without the consent of the producer. The investigations conducted within the framework of the sector inquiry, which involved the dairies that are active in Germany, have shown that

\textsuperscript{77} Para. 1 of the introduction to the draft of 7 December 2011.
the dairies interviewed did not intend to limit the quantity of milk supplied to them. The milk not used for the production of cheese with a protected geographical indication would therefore have to be used for a different purpose, which would result in the risk of surplus supply and reductions in revenue for both the dairy and the producers. In any case, state-imposed quantity control represents a serious intervention in the competitive conditions on the markets concerned and the entrepreneurial freedom of the individual dairies.

Several years ago, Switzerland already provided for the possibility to decide on quantity control for cheese with a protected geographical indication. This is implemented by product-specific marketing organisations ("Sortenorganisationen") in which cheese dairies/dairies and trading companies are members. The regulation has had various effects:

The Swiss retail prices for all domestic types of cheese clearly exceed the retail prices for comparable types of cheese in Germany. However, a direct comparison is not possible as the types of cheese concerned may not be produced in Germany due to their protected geographical indication status.

The producers of raw milk from which Emmental cheese is manufactured receive a milk price of 50 centimes/rappen/kg. This is below the milk price received by producers whose raw milk is processed into industrial milk.\(^78\) The producers whose raw milk is processed into Gruyère cheese receive 80 centimes/rappen/Kg. The reasons for the different price developments are apparently also due to the fact that only the marketing organisation 'Sortenorganisation Emmentaler Switzerland' tried to impose a further quantity restriction on its members after demand for Emmental cheese had dropped.\(^79\) In early 2011, only 70% of possible production capacity was to be utilised. The attempt failed because some cheese dairies which were not members of the marketing organisation did not adhere to the quantity restriction. In mid-2011, the marketing organisation thus saw itself forced to lift the quantity regulation imposed.

On the whole, the Bundeskartellamt considers these regulations to be problematic from a competition law perspective and also inappropriate. Furthermore, it believes that the introduction of a state cartelisation at dairy level for cheese products with a protected geographical indication could provide a gateway for having further dairy products exempted from competition law. After comprehensive exemptions from competition law have already been created for the producers' level, this should not be allowed to happen at the next

\(^{78}\) Producers whose raw milk is processed into industrial milk currently receive 60 centimes/rappen/Kg.

\(^{79}\) The membership of the marketing organisation 'Sortenorganisation Emmentaler Switzerland' is made up of approx. 190 cheese dairies and 13 trading companies (inter alia Emmi and Cremo); these companies produce and market 80% of the Emmental AOC cheese; cf. NZZ Online of 4 April 2011 and 22 December 2011.
market level as well. Otherwise a largely cartelised producers' level would be confronted with a largely cartelised dairy market level which in turn would face a highly concentrated retail level. Such a situation would further aggravate the negative effects of the Milk Package on consumer welfare and the international competitiveness of the whole sector.
D. Conclusion and Prospects

In its sector inquiry the Bundeskartellamt has conducted an extensive analysis of the milk sector, ranging from the procurement of raw milk through the dairy industry to the food retail sector (the most important buyer of dairy products). Whereas the interim report focused on competition structures and power relationships between the individual market levels, the final report classifies the competition problems identified in these areas. Hence the final report mainly covers those areas of complaint which could be dealt with under competition law.

The sector inquiry is not targeted at individual companies or associations. Instead, it classifies the competition problems beyond potential individual violations of competition law. Its general aim is to give market participants and political decision-makers an in-depth insight into the competition situation in the milk sector and the relevant framework for its assessment under competition law. Where the findings of the inquiry provide concrete indications of individual competition law violations, these are to be examined in individual proceedings, in which the procedural rights of the companies involved are guaranteed. The final report therefore does not make any conclusive assessment of or statements about the competition situation in individual cases.

In this context, the final report pursues three specific aims:

Firstly, it shows in which constellations action may be required and which constellations are unproblematic under competition law. In assessing these general constellations the Bundeskartellamt takes into account the sector-specific legal framework and economic conditions at German and European level. Secondly, the final report provides the market participants in the milk sector with a framework for self-assessment under competition law, to enable them to evaluate their own entrepreneurial actions under competition law and to understand better the Bundeskartellamt’s case practice in the milk sector. Thirdly, the report gives guidance on how proposals on the design of the legal framework in the milk sector as discussed in the relevant national and European fora are to be assessed under competition law. In the light of advancing liberalisation in the milk sector, the Bundeskartellamt also intends its report as an appeal to political decision-makers to continue to support basic conditions in the market which are both pro-competitive and market-consistent. The impetus for more competition in the sale of milk resulting from liberalisation should not be undermined by the continuous creation of new exemptions under general competition law.

Results in detail:
The illustration of the current case practice in merger control and the assessment of cooperations between dairies is intended to help market participants understand better the Bundeskartellamt’s decision practice. The sector inquiry describes the analytical approach used by the Bundeskartellamt to assess mergers and cooperations in the milk sector. This approach reflects in particular the authority’s case practice and experience, the practice of the European Commission and other relevant case-law.

In merger control, the only criterion under which the Bundeskartellamt may assess a case is if the merger leads to the creation or strengthening of a dominant position on the respective market(s). If this is the case, and only then, will the Bundeskartellamt have to prohibit the merger or clear it subject to obligations and conditions. The bases for its decision in individual cases are the product market and geographic market definitions as well as a competitive assessment of the respective markets. In assessing a merger for its effects on competition the Bundeskartellamt considers all the essential structural conditions under which the market participants operate. The object of protection is not "the producers" or "the consumer" but the proper functioning of competition in the regional procurement markets for raw milk and the relevant sales markets for the various dairy products. With regard to the acquisition of raw milk in particular, in some regions of Germany the level of concentration has increased to such an extent that further merger projects must be examined in more detail if they result in (further) overlaps in the respective trading areas of the parties to the merger.

Cooperations between dairies can generate efficiency gains and, in particular, improve the competitiveness of smaller dairies, e.g. via the joint procurement of raw milk or by optimising capacity utilisation by means of milk exchange agreements. These can, however, have a negative impact on competition if the specialisation "de facto" leads to a market sharing arrangement or the cooperation results in a general coordination of conduct of the dairies concerned.

Although cooperations between dairies are normally not subject to merger control, they have to observe the prohibition of cartels under § 1 GWB (Act against Restraints of Competition) or Article 101 of the Treaty on the Functioning of the European Union if they cannot be exempted under German or European law. It is up to the companies involved to assess for themselves whether this is the case. The report gives several general indications of what factors can be relevant in the assessment of planned cooperations. As a general rule, the Bundeskartellamt is more likely to take a closer look at cooperations between large dairies in Germany or cooperations on highly concentrated sales markets and examine their competitive effects than cooperations between small dairies. In principal, however, no form of cooperation may lead to the exchange of confidential price information or other business
secrets. The Bundeskartellamt is available for consultation with (potential) cooperation partners. Before such action is taken, plans for a cooperation should be sufficiently defined and the parties should have carried out an initial thorough self-assessment.

In the Bundeskartellamt's assessment it is doubtful whether the exemption for dairy cooperatives under § 28 ARC also applies if the cooperative includes companies or other natural persons which are not active members of the cooperative. The findings of the sector inquiry have shown that this is the case in a number of dairies. The privileged status offered by § 28 ARC is also unlikely to apply to bought-in milk purchased (by non-members). Here the proportion is also high in a number of dairy cooperatives.

With regard to the privileged status accorded to producers under § 11 of the Market Structure Act, the Bundeskartellamt points out once more that the current investigations into the definition of geographically relevant procurement markets for raw milk have shown no indication of the existence of a uniform national market. The question whether competition is eliminated by a producers' association, resulting in the non-application of the privileged status under § 11 of the Market Structure Act, is therefore to be assessed according to the respective relevant regional market.

The statements on contract periods, terms of notice and supply obligations and the manner in which the milk price is calculated are intended to make it easier for participants in the milk sector to better assess competition issues.

Basically, it is up to the respective market participants how they organize their supply relationships. However, the duration of the supply relationships, especially in combination with the traditional obligation to supply all the milk exclusively to only one dairy and in some cases other circumstances, (e.g. entry fees, forfeiture of bonuses), which make it difficult for the producers to change their dairy, can lead to a market foreclosure. As such they may be subject to the ex-post control of abusive practices (§§ 19 and 20 ARC). This can be the case if the market entry of competing dairies or the sales possibilities of producers are systematically impeded.

The addressees of § 19 and § 20 ARC can be cooperative and non-cooperative dairies. The general prerequisite is that the dairy which is subject to the control of abusive practices is either dominant (§ 19 ARC) or has superior market power (§ 20 ARC) on a (regional) market for the procurement of raw milk. The Bundeskartellamt would also have to prove that the dairy's contract clauses had anticompetitive effects. Moreover, in individual cases the application of the contract clauses described above can be justified. Irrespective of the chances of success of formal proceedings against these terms of contract and supply, milk producers represented in cooperative dairies have the possibility to formulate conditions of
supply to their benefit by way of majority decision. This possibility is not open to producers supplying dairies which are not organised on a cooperative basis.

In its milk sector inquiry the Bundeskartellamt has identified competition problems in the area of market transparency created by market information systems and reference price models on the markets for the procurement of raw milk. These have so far triggered two administrative proceedings. The final report illustrates the circumstances in which the Bundeskartellamt sees need for action and the general legal basis of its assessment so far.

The authority's actions are based both on its previous case practice concerning market information systems in other markets and on German court decisions as well as on the principles of the European Union regarding the competitive assessment of the information exchange of competitively sensitive data. Other national competition authorities and the OECD also share the Bundeskartellamt's analytical approach. According to this, not every form of market transparency is anticompetitive. However, one which reduces the incentives of companies to compete or encourages the formation of a cartel, is clearly harmful to competition.

On the basis of this analytical approach the Bundeskartellamt has identified a number of market information systems relating to the raw milk price in Germany which are potentially anticompetitive. Such information systems disclose current company-specific data and thereby encourage agreements on the price paid by neighbouring dairies for raw milk. This further reduces the already weak incentive to compete for raw milk.

The publication of payout prices (purchase prices for raw milk) which are sufficiently aggregate or historical remains admissible. Reference price models which cannot be proven to reflect a coordination of conduct on the part of the dairies concerned and which are based on a data basis which in itself conforms with competition law, also remain admissible.

If the Bundeskartellamt identifies any market information systems or reference price models based on the criteria illustrated in its final report which prove anti-competitive on examination of the individual case, it will seek talks with the parties involved in these information systems or reference price models in order to agree on a form which conforms with competition law. Should this not be possible, the Bundeskartellamt can take a decision in a formal proceeding. This decision would be subject to judicial review.

The results of the Bundeskartellamt's inquiry have since become the subject of controversial discussion by dairies and milk producers alike. In particular, the calculation of the milk price on the basis of reference price models is being increasingly criticized by market participants.
The Bundeskartellamt has found indications of (possible) agreements between dairies aimed at preventing milk producers from switching their dairy or refusing to accept producers which are members of certain producer associations. However, these are at present not sufficient to justify the initiation of a proceeding.

The initial estimation in the interim report on the assessment under competition law of the negotiating power of food retail companies has been confirmed by further investigations. The question whether dairies are dependent on powerful companies in the food retail sector can only be answered if a dairy's supply of a specific product to a food retail company is known as well as the dairy's specific product portfolio and its distribution alternatives. With regard to the relationship between the dairies and the food retail sector, the final report contains a number of differentiated conclusions which are supported by the companies' responses to market surveys.

These investigations have revealed signs of a possible abuse of a dominant position or superior market power by retail companies in the form of unreasonably long payment terms. In a considerable number of cases the payment terms clearly exceeded the products' storage period in the retail outlets. Any "dependency" of the dairies concerned on certain retail companies based on the criteria mentioned would constitute a violation of § 20 (3) GWB.

In order to examine whether an agreement on a specific payment period can be classified as an advantage without any valid justification, in most cases the context of the contract as a whole will have to be taken into consideration. Not every term of payment which exceeds the product's storage time in the shop is to be categorized as an infringement of § 20 (3) GWB. Demanding long payment periods by which the dairies concerned are meant to systematically grant the retail company supplier credits, is an indication of the abuse of buyer power by the respective retail company. In exceptional cases it may even be possible to conduct an isolated examination of this element of the contract. The Bundeskartellamt will carry out further analyses of the competitive relevance of demands for longer payment periods in the course of its separate sectoral inquiry into the retail sector.

In contrast, there are no substantiated indications of agreements between the food retail companies on retail prices for dairy products. The high price transparency created in particular by market research companies and the media renders coordinated conduct by the retail companies more or less superfluous.

With regard to the prohibition of sales below cost price, jurisdiction in the Rossmann case prevents an effective application of the prohibition under § 20 (4) GWB by the competition authorities. As a consequence of this judgement, the cost price cannot be sufficiently
precisely determined at the time of the sale of the product which is essential for the authority's timely intervention.

The statements in the final report on the European "Milk Package" and on the state of discussion in the High Level Group in the food sector serve as guidance to political decision-makers on how to assess the various proposals on the design of a modified legal framework in the milk sector from a competition law perspective.

The provisions of the Milk Package will extend the exemptions from competition law for the milk sector, to the detriment of liberalisation in the milk markets. The Bundeskartellamt also considers regulations at European level as inappropriate which do not take adequate consideration of the special national characteristics of milk production and processing in the respective countries.

Endeavours to create more market transparency, for example by introducing standard contracts between dairies and milk producers, are problematic under competition law if they result in the disclosure of important contractual elements which are competitively relevant. The widespread usage of contracts with standardized conditions or price components would result not only in vertical resale price maintenance, i.e. between the dairies and the milk producers, but also in horizontal price coordination, i.e. at the level of the contract partners and their respective competitors. Such vertical resale price maintenance and/or horizontal price agreements between companies would constitute an illegal hardcore restriction under German and European competition law.

The measures intended to strengthen the producer organisations will increase opportunities for milk producers to engage in cartel agreements. These possibilities are already quite pronounced in Germany as it is. Whether the regulations will significantly change conditions on the German market is questionable. This is because producers which deliver their milk to dairy cooperatives will have no possibility to pool their milk in a producer's organisation as cooperatives are exempted from these rules of the European Milk Package.

Cases in which inter-branch organisations only promote the consumption of dairy products, for example, by way of public information services and export market research, are basically unobjectionable under competition law. The implementation of information systems on milk payout prices, supply volumes and contract periods is to be considered as critical under competition law if current company-specific data are published. However, there are no indications that the legislator plans to allocate duties and responsibilities to the inter-branch organisations which would violate competition law.
In view of the envisaged rules of the European Milk Package, the Bundeskartellamt considers the proposed state quantity control for cheese with a protected designation of origin (PDO) / protected geographical indication (PGI) as a serious intervention in the market process and the entrepreneurial freedom of the individual dairies. Moreover, such quantity control can lead to a surplus supply of dairy products without the above designations and to reductions in revenue both for dairies and milk producers because the milk not used for the production of PDO/PGI cheese has to be used for another purpose. Therefore the proposed rule at best only improves the position of specialized cheese dairies.

Even after publishing its final report on the Milk Sector Inquiry the Bundeskartellamt will continue to monitor developments in the milk sector. With its Milk Sector Inquiry the Bundeskartellamt has further defined its basis for determining and assessing competitive conditions in the milk sector. In particular now that the sector is in a dynamic phase of development, the markets should remain open to ensure effective competition and the success of the intended liberalisation process. Where necessary the authority will support this development with proceedings to remove restraints of competition.

Public interest in the milk sector still continues. The results of the sector inquiry are to serve as an impetus and a basis of discussion for the political assessment of power relations in the milk sector. This requires a differentiated view on the relations between the market players and a clear commitment to an effective competitive system. In pursuit of this aim the Bundeskartellamt will accompany the legislative and regulatory process at national and European level in its advisory capacity.

The ongoing inquiry into the food retail sector will also produce further findings on the relationship between food manufacturers and the retail companies. Here too, the Bundeskartellamt intends to help objectify the debate about the retail trade’s buying power. A sound knowledge of the market and an objective, valid data basis are absolutely necessary for an objective debate about competition law issues.