

Bundeskartellamt

Market Power in the Milk Sector – Interim Results of a Sector Inquiry by the Bundeskartellamt

(Overview)

1. Background:

In 2008 the 2nd Decision Division of the Bundeskartellamt launched a milk sector inquiry (from the cow to the shop counter) because complaints from market participants at various market levels suggested that there was, if any, only limited competition in the sector.

The complaints were broad-based, including e.g. the suspicion of price fixing and sales below cost price in the retail sector; the allegation of the unfair calculation and level of the milk price, which threatened the existence of the milk producers; difficulties in switching to another dairy; disadvantages of long-term supply contracts with dairies.

In the sector inquiry dairies were questioned which jointly account for 75% of the market volume and companies from the retail sector accounting for 90 % of the market volume. The inquiry was conducted based on formal decisions requesting information and was followed up by a number of talks with market participants, institutions and competition authorities of other EU Member States.

On 11 January 2010 the Decision Division published first results and evaluations in an interim report. This report serves as a basis for dialogue with the market participants and other interested groups.

2. Relationship between milk producers and dairies

In spite of the vertical integration of many producers in cooperative dairies, the Decision Division has detected an imbalance of power in the relationship between dairies and milk producers, to the detriment of the producers. In some cases larger cooperative dairies, in particular, are no longer regarded as representing the interests of “their” producers.

According to the Decision Division’s assessment so far, competition for raw milk between the dairies (markets for the acquisition of raw milk) is deficient. Among the factors dampening competition are the way in which the milk price is calculated by the cooperative and private dairies, the frequency of long-term supply contracts and the high market transparency. It is still unclear as to what extent these practices can be considered problematic under competition law.

Another factor to be considered in the discussion about a „fair“ milk price is that little use has yet been made by the producers of possibilities in line with competition law to raise the competitive pressure on the dairies. The milk producers have to date made at best only rudimentary use of the exemptions created by the legislator from the general ban on cartels for recognised producer associations. The Market Structure Act, for example, allows producer associations to agree on regional prices and quantities.

In contrast, the variables for raising the milk price so far proposed (in particular agreements across market levels on prices and quantities or a national basic milk price) are incompatible with national and European law. Based on the examples from other European states, they are apparently also not practicable.

3. Relationship between dairies and retail sector

3.1 Negotiating position of dairies vis-à-vis the retail trade

There is no general answer as to whether competition at the dairy/retail level is limited by the retailers exerting inadmissible market power.

A high share of supply to retailers proportional to the turnover of the dairies is an indicator of dependencies, a factor which has to be considered in assessing the dairies' negotiating position vis-à-vis the retail sector. For many dairies the retail sector acts as a bottleneck for the sale of their products. The high transparency of the market also strengthens the retailers' negotiating position towards the dairies.

However, the product portfolio and the degree of innovation of the dairies (premium brand products - private label products, organic products – conventional milk products, the significance of “must have products”) are also important factors in this. The self-assessment of the dairies questioned is accordingly diverse.

3.2 Results of the examination of the complaints against the pricing policy of the retailers

So far, the Decision Division has not found sufficient evidence of anti-competitive conduct on the part of the retailers in individual segments of the retail sector.

- A random examination revealed that price advantages achieved from improved conditions are generally passed on to the consumers both in the branded product and private label segments.
- To date there have been no substantiated findings of anticompetitive price agreements on dairy products.

As regards sales below cost price, it remains to be seen how general conditions (in particular advertising subsidies) can be deducted from the cost price in future (Düsseldorf Higher Regional Court decision in the Rossmann case). This will have an impact on the future scope of application of the provision covering the ban on sales below cost price.

4. Interim conclusion

It seems inevitable that the structural change in the milk production and processing sector will continue.

A (critical) analysis of the relationship between milk producers and cooperative dairies should not be considered an “off-limits” issue.

The debate on the relevance under competition law and the actual effects of long-term supply contracts and high market transparency on the market position of milk producers should form a central theme in the planned consultation.

The same applies to the current calculation of the milk price paid to producers according to the calculation parameters of the negotiating partners (top to bottom) or average prices of surrounding dairies.

Regional milk producer associations can improve the negotiating position of the producers and are compatible with competition law.

Stronger product differentiation and the realisation of economies of scale in the production of basic milk products could improve the negotiating position of the dairies vis-à-vis the retail sector.

The Decision Division will continue to examine the abuse potential of the retail sector, although the sector inquiry as such did not deliver any substantial indications of anticompetitive conduct by retailers in their trade with dairy products.

Agreements on prices and quantities across market levels and at national level constitute a blatant violation of national and European competition law.