



Case Summary

26 September 2011

Competition law friendly design of market information systems for the procurement of raw milk

Sector:	Procurement of raw milk; market information systems; milk sector inquiry
Ref:	B2 - 118/10
Date of Decision:	12 May 2011, implementation by AMI mid June 2011

Agrarmarkt Informations-Gesellschaft mbH, Bonn (AMI) is a privately run company. AMI collects and publishes market data which companies in the agri-food sector are required to provide under European law. In addition to this AMI would like to publish additional market reports, inter alia on the monthly price a dairy pays its farmers for their raw milk. In reaction to the concerns about the high market transparency of milk prices expressed by the Bundeskartellamt in its interim report on its milk sector inquiry, AMI approached the Bundeskartellamt before marketing its new information systems in order to ensure conformity with competition law and to make modifications, if necessary. The Bundeskartellamt's assessment revealed that a number of adjustments were necessary. These were implemented by AMI by mid June 2011.

1. Market transparency in the procurement of raw milk

The raw milk procurement and processing sector is already characterized by a high degree of transparency, both in Germany as well as in other European countries. Apart from the obligatory official reports published on raw milk procurement and other data, there are a number of organisations/institutions and companies in Germany and other European countries which collect, process and publish reports on supply volumes of raw milk and the milk prices paid to producers by dairies. This price is the most important competitive parameter for the dairies on the procurement side and the most important cost factor of a dairy in the production and sale of its dairy products.

In its interim report on the milk sector inquiry the Bundeskartellamt already took a closer look at market transparency on the affected markets. Based on its findings the Bundeskartellamt launched proceedings to examine more closely market information systems used in the milk sector. It became clear from these findings that assessments about the admissibility of market information systems in the milk sector cannot be easily applied to other agricultural markets due to the particular structural conditions and competitive situation on the milk markets.

In principle, German as well as European competition law requires companies operating market information systems to judge for themselves whether their publications are compatible with competition law. However, the Bundeskartellamt considers it necessary to gradually ensure that the many market information systems available in the market on milk procurement conform with competition law without at the same time depriving milk producers of the necessary basic information about the payment practice of the dairies. To this effect it has agreed with AMI on the design of a milk price comparison which, although it does not yet have the final approval of the Bundeskartellamt, can still serve as a starting point for other market information systems available in the market.

Furthermore, the Bundeskartellamt wishes to further promote the general discussion on the relevance of market transparency for competition in the milk sector at German and European level.

2. AMI market information on raw milk sector

As part of its reporting on the milk sector, AMI will publish a "milk price comparison survey". This compares the milk prices paid by dairies active in Germany during the year and contains two categories of data: One category is characterized as *identifying* data which refer to individual dairies or production plants of individual dairies but do not contain *any up-to-date data* ("representation at dairy level"). The other category contains up-to-date *data*, which however represent an aggregate level, where the data cannot be attributed to any *individual dairy* or dairy production plant ("representation at aggregate level").

3. Provisional competition law standard for AMI market information system

Market information systems can violate Sec. 1 GWB (Act against Restraints of Competition) or Art. 101 TFEU (Treaty on the Functioning of the European Union) if they lower the level of or eliminate uncertainty about actual market developments and so actually or possibly lead to an appreciable restriction of competition. Market transparency on milk prices paid by dairies can therefore become a problem if it reduces competitive initiative or encourages the formation of a cartel, e.g. between dairies for their procurement of raw milk.

Raw milk is a homogeneous bulk product without much innovation potential. Apart from seasonal (regularly recurrent) fluctuations in supply volumes, the supply of raw milk remains stable because of the EU milk quota regime which is in place until 2015. There is also no significant fluctuation in demand. The market relations between dairies and milk producers are usually characterized by long-term supply contracts which oblige the dairies to buy the total

volume of raw milk produced and the producers to sell their total volume of milk to their respective contracted dairy or their co-operative.

Although the procurement radii for raw milk have expanded due to progressive consolidation at dairy level, the markets are still regional and do not constitute a single national procurement market. The competitive structures in the individual regional markets differ, in some cases considerably, from one another.

The data in the market reports contain strategically important information, i.e. the level of the price paid for raw milk, which is the key cost factor of a dairy in the production and sale of its dairy products. In order to dispel the concerns raised by its preliminary assessment of the market information systems, the Bundeskartellamt has agreed with AMI on the following framework conditions for the publication of these data:

a) Representation at dairy level (identifying data)

AMI plans to publish market or company relevant data which represent relevant competitive parameters. These are identifying data and, according to AMI's business model, are also intended for exchange between competitors, e.g. between the dairies. The Bundeskartellamt takes the view that the resulting market transparency will further reduce competition between the players as it will reveal otherwise secret business information on the markets affected. For example, large non-cooperative dairies had indicated in the sector inquiry that they already calculate the prices they pay for milk according to those paid by regionally neighbouring, often co-operative dairies. In such cases market transparency ultimately leads to an elimination of the already limited competition for the procurement of raw milk. An individualised exchange of milk prices therefore falls under the ban on cartels, unless the data have already become historic.

For this reason the Bundeskartellamt has requested AMI only to publish identifying data (i.e. price per dairy or production plant of a dairy) if the data are at least six months old at the time of publication. In its assessment the Bundeskartellamt took into account that the milk prices are determined to a considerable extent by supply and demand on the global markets and are therefore subject to substantial fluctuation. Milk prices which are more than six months old would thus seem not to allow for any significant inference to the current price situation. In a field test the Bundeskartellamt will examine whether this preliminary assessment actually holds or whether a longer time period is needed to limit the exchange of identifying data to purely historic data.

The Bundeskartellamt regards a publication of the milk price in the form of a basic price with the separate identification of surcharges and discounts as problematic for two reasons. Firstly, the

publication of surcharges and discounts as separate amounts will disclose elements of contracts between the dairies and milk producers or agreements between the cooperative and its members. Secondly, the information does not contain historic data because the level of surcharges and discounts is valid for a longer period.

Until further notice the Bundeskartellamt has agreed to the publication of the milk prices with all the relevant surcharges and discounts but without the separate indication of these amounts, provided that the data are published with a time delay of 6 months.

The representation of a moving twelve month average ("moving milk price comparison") is based on the publication of individual monthly data. Competition concerns generally also apply in this case if the continual presentation of changes may make single values traceable, enabling their attributability to individual data and therefore enabling inference to be drawn to current data. The Bundeskartellamt has decided not to act on the moving milk price comparison for the time being but to subject it to the field test.

b) Non-identifying data ("presentation at aggregate level")

Non-identifying market information systems in the milk sector do not raise competition concerns if the data published are sufficiently aggregate. In the present case the Bundeskartellamt has examined whether there are any differentiations in product or price class. It has also examined whether a minimum number of companies participate in the individual analyses and whether in fact only average values are reported, ruling out any inference to individual transactions or dairies. If this were not the case, any significant change in the average milk price paid by a dairy would be reflected to a great extent in the average price reported by a group of dairies. If one large and many small dairies take part in a reporting system, a significant change in the volume-weighted milk price paid by the large dairy can considerably change the average value.

According to the Bundeskartellamt's preliminary assessment, when publishing current milk prices AMI must ensure that the following requirements are cumulatively fulfilled in order to definitely rule out any inference to individual business transactions and dairies.

The following must be represented in each random sample (containing, e.g. a representation of average milk prices according to region, specific area of production or milk supply volume):

- collective representation of at least five dairies, of which the largest should not receive more than 33% of the total volume of milk supplied to the dairies represented in the random sample and
- the two largest dairies should collectively receive less than 60% of the total volume of milk supplied to the dairies represented in the random sample.

Otherwise a volume-weighted representation would be tantamount to an identifiable one because any changes in the milk price paid by the largest dairy or the two largest dairies would be clearly more significant than in the case of the small dairies. Consequently identifiability could be created by choosing the "right" dairies for the sample. This would be possible because the relative size of all dairies in the market is known. The size criteria mentioned in the bullet points above are also examined in the field test.

In accordance with the market knowledge gained so far the Bundeskartellamt considers an evaluation of average milk prices, in which a dairy can choose which other dairies should be taken as comparable dairies, as inadmissible under competition law. Otherwise a dairy could determine the average milk price of the surrounding dairies, which would encourage the formation of a regional price cartel.

c) Field Test

In its first year of implementation, AMI's market information system will undergo a field test to enable the Bundeskartellamt to better estimate the effects of the data exchange and assess them under competition law.

In the field test the Bundeskartellamt will examine the following aspects:

- Does the transmission of identifying elements of the milk price comparison conform with competition law in respect of the selection and actuality of the data? Depending on the results of this practical test and as regards the publication of *individual company data* which are of competitive relevance, AMI's market information system in the milk sector is either to be gradually abandoned in the long term or limited to the exchange of purely historic data (1 year and older).
- In respect of the non-identifying elements of the milk price comparison does the method chosen guarantee an adequate degree of anonymization of the published data? In this regard the Bundeskartellamt will take existing market data transparency into account.

It also reserves the right to examine in pilot proceedings the admissibility under competition law of the conduct of companies, publishing firms, organisations or institutions whose market information systems do not comply with the standard described above.

Finally, the Bundeskartellamt points out once more that the admissibility of market information systems under competition law always depends on the individual case and actual structural conditions in the relevant market. In this respect the standard illustrated here cannot readily be applied to other agricultural markets.