



Case summary

8 March 2022

Financing concept for a market-compliant and fair distribution of risks and burdens associated with agricultural transformation processes for milk producers

Sector: Milk production

File number: B2-87/21

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The Bundeskartellamt has found that the financing concept for the distribution of risks and burdens associated with agricultural transformation processes for milk producers presented by the agricultural policy project “Agrardialog Milch”, which is based on a jointly agreed mandatory and index-based price surcharge or price stabilisation mechanism, constitutes sector-wide price fixing violating Section 1 of the German Competition Act (GWB) and Article 101 TFEU. In the milk producers’ view the compensation model presented is necessary because the milk prices are not sufficient to cover their costs. However, a mere economic interest in a higher level of income for milk producers per se cannot justify a privileged treatment of an agreement. Sustainability aspects do not play a role in the financing model.

Milk producers are represented in the agricultural policy project “Agrardialog Milch” by members of BDM Bund Deutscher Milcherzeuger, MEG Milch-Board, Freie Bauern, LsV Land schafft Verbindung and AbL Alternative bäuerliche Landwirtschaft. In September 2021, they contacted the Bundeskartellamt to outline their framework for a concerted distribution of risks and burdens on the part of milk producers. In order to reach its goals, “Agrardialog Milch” intended to include a price surcharge mechanism for raw milk in longer-term supply contracts within the value chain for milk and milk products sold in the grocery retail sector. The concept was based on a framework agreement between farmers, dairies and retailers. As part of the agreement, revolving contract terms of three years were to be agreed with retailers.

A key element of the model is the introduction of standard index-based surcharges on the dairies’ individually negotiated base milk price. The surcharges were to be based on the average costs incurred in milk production. Milk products benefiting from such surcharges were to bear the “Agrardialog Milch” seal to label them accordingly for end consumers in the retail sector. The amount of the surcharge was to be determined on an index based on a representative selection of financial statements of specialised farms listed

in the EU farm accountancy data network whose main activity is the production of milk. The index-based milk production costs calculated on the basis of indices already published or to be published annually or quarterly were to become a binding part of the contractual relationships between farmers, dairies and retailers in order to ensure that the contracts are adjusted regularly. Ultimately, this constituted a jointly agreed price surcharge mechanism based on average costs that was to apply irrespective of the specific demand and price developments in the market and function as a monetary safety net to cover the costs incurred by participating milk producers.

To improve the distribution of risks and burdens, the milk producers' representatives suggested a framework agreement between farmers, dairies and retailers. All parties participating in the project "Agrardialog Milch" were to sign the framework agreement whose implementation was then to become binding. The parties were then supposed to market the milk based on this agreement. The concerted introduction of a mandatory index-based price surcharge mechanism along the value chain resulting from the planned framework agreement constitutes a coordination within the meaning of Section 1 of the German Competition Act (GWB) and Article 101 TFEU based on an agreement between the participants. The planned framework agreement provided for three-year contractual terms with retailers, which were to be renewed on a revolving basis. A key element of the suggested solution was to determine the surcharges on the dairies' base milk price based on indices. In the present case, the contracts between the dairies and the participating farmers result in a horizontal agreement between the participating farmers and dairies in the form of a hub-and-spoke arrangement (*Sternvertrag*). The coordinated mandatory index-based price surcharge mechanism as proposed by the milk producers is a classic case of restriction of price competition by object. The purpose of the agreement at hand is to have a broad dampening effect on price competition along the value chain, which is why the intended framework agreement is likely to cover the market widely.

Pursuant to Section 2(1) GWB and Article 101(3) TFEU, agreements may be exempted from the prohibition of anti-competitive agreements if they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and if they do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. However, in the Bundeskartellamt's view the mandatory index-based price surcharge mechanism does not bring about any improvements in the production or distribution of goods since this requires an efficiency gain related to the production or distribution of milk. The mechanism focuses exclusively on the milk producers' insufficiently covered costs without establishing, or even seeking, a direct connection to any possibly achieved efficiency gains in milk production. The proposal would even increase costs for consumers without them being compensated for this by objective improvements in product quality.

Furthermore, the exemption from the prohibition of anti-competitive agreements under the newly introduced Article 210a CMO does not apply in the present case. Article 210a was introduced in the context of the amendment of Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products (CMO) by Regulation (EU) 2021/2117, which has been in force since 7 December 2021. According to this provision, Article 101(1) TFEU does not apply to agreements, decisions and concerted practices of producers of agricultural products that relate to the production of or trade in agricultural products and that aim to apply a sustainability standard higher than mandated by Union or national law, provided that those agreements, decisions and concerted practices only impose restrictions of competition that are indispensable to the attainment of that standard.

However, the planned framework agreement does not aim to either directly or indirectly introduce a higher sustainability standard within the meaning of Article 210a(3) CMO as amended. A higher level of income for milk producers per se does not directly contribute to protecting the environment, reducing the use of pesticides or increasing animal welfare. The planned framework agreement does not in any way sufficiently relate to a higher sustainability standard, but solely focuses on the commercial aspect of alleviating the financial burden associated with an economic transformation process. Such general (socio-) political objectives are not taken into account under Article 210a CMO.