



EMB - EUROPEAN MILK BOARD

„Strengthening the position of milk producers on the dairy market“

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**Block exemption for milk producers
from the European Competition Law**

- Draft -

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PROPOSAL FOR A GROUP EXEMPTION REGULATION FOR MILK PRODUCERS

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For the appendices „Necessity of milk regrouping, German regulation example“ and „Group exemption regulation as a solution model for EU milk producer groups“ please refer to the original German document“.

EXECUTIVE SUMMARY

1. BACKGROUND

The Common Agricultural Policy is one of the core policy areas of the European Union (EU). The Treaty on the Functioning of the EU (TFEU), the basic treaty which was renewed in 2009, states in Art. 39 (1): The objectives of the Common Agricultural Policy shall be [...] to ensure a fair standard of living for the agricultural community, in particular by raising the individual earnings of persons engaged in agriculture; to stabilise markets; to ensure the availability of supplies [...].

Disastrous sales revenues throughout Europe in 2008 and 2009 have created a situation that threatens the livelihood of the majority of dairy farmers in Europe. The current farm-gate price still fails to cover production costs. The same applies both to small and expanding farms – profit or even “raising individual earnings” is out of the question.

2. CAUSES

One of the causes of the price collapse is oversupply. The EU has a rate of self-sufficiency of milk that is in excess of 110%. This oversupply weakens the milk producers' market position. The problem is exacerbated by the goods, raw milk, being highly perishable and produced continually (every day). The milk producers cannot vary the volume of their supply at short notice or store it to market it strategically.

Secondly, the present structure of the milk market and its players is not in the producers' favour. The 950,000 milk producers in the EU (2009) are generally small and micro-enterprises. They barely appear in unison and act only on a regional basis. Opposite them there are some 5,400 dairies (Eurostat 2008:4). The ten biggest dairies process about 30% of milk produced (LEI Wageningen 2006:13). The cross-border transport of raw milk from producers to the dairy or between dairies within the EU is quite common. On top of that the current configuration of milk supply contracts gives the raw milk producers hardly any opportunity to exert direct influence on the milk price, and as they are long term they make it harder for flexible market behaviour.

3. POSSIBLE SOLUTIONS

The German Federal Cartel Office is currently studying the milk market, and in its Interim Report of December 2009 stated that the milk producers in Germany were at a disadvantage vis-à-vis the dairies. The report proposes strengthening the producers' position by greater pooling. The Market Structure Act has been in force in Germany since 1969; it enables the position of the producers to be strengthened in conformity with cartel legislation by the formation of Milk Producer Organisations (MPOs). It is upon this basis that the MEG Milch Board w.V. was established in 2007, enabling producers to unite for the first time on a nationwide basis with the aim of co-determining marketing rules.

Under current EU competition legislation, European MPOs are limited to a 5% or 15% market share. The High Level Group Milk regards this as inadequate. At its meeting on 16 March 2010, the majority of the member states voted in a tour-de-table in favour of a specific exception under cartel legislation for milk sector producers. This demand was also included in the Final Report of 15 June 2010 (2nd Recommendation).

The block exemption regulation provides the ideal legal basis for creating a specific exception from EU competition legislation for horizontal collaboration by milk producers with the possibility of configuring common marketing rules. Such legal exceptions were frequently granted in the past for medium-sized enterprises. As the majority of European milk producers are farms usually run exclusively by family members, they are to be classified as small and medium-sized enterprises (SMEs) as defined in European law. For them, horizontal co-operation represents a major means of adapting to the changing market conditions.

4. SUMMARY

Owing to its structural specificities, the farming sector in general and associations of agricultural producers in particular enjoy special privileges with regard to EU rules on competition. However, the on-going crisis in the dairy sector shows that the existing framework is still inadequate for the milk producers.

To balance out the marketing disadvantages with raw milk and to ensure future undistorted competition between milk producers and dairies, a block exemption regula-

tion for milk producers is a suitable measure. With common marketing rules (e.g. regarding recommended price, quality or volume) within an EU milk producers' organisation, milk producers can prevent being played off against one another by large dairy companies. As before, EU legislation on competition will prevent misuse of a dominant market position.

A block exemption regulation for EU milk producer organisations enables intelligent market regulation by the parties involved themselves. It incurs no additional cost either, and renders the politicians' financial emergency schemes superfluous.

D R A F T

Regulation (EU) No. .../2010 OF THE COMMISSION
of [...] 2010

on the Application of Art. 101 paragraph 3 of the Treaty on the Functioning of the European Union to Groups of horizontal Agreements and concerted Practices by Milk Producers

THE EUROPEAN COMMISSION -

Having regard to the Treaty on the Functioning of the European Union

Having regard to Regulation No. 19/65/EEC of 2 March 1965 of the Council on the application of Art. 85 (3) of the Treaty to certain categories of agreements and concerted practices, in particular Art. 1,

After publication of the draft of this regulation

After hearing the Advisory Committee on Restrictive Practices and Dominant Positions

Whereas:

- (1) Under Regulation No. 19/65/EEC, the Commission is authorised to apply Art. 101 (3) of the Treaty on the Functioning of the European Union ("**TFEU**") by regulation to categories of horizontal agreements and correspondingly concerted practices falling under Art. 101 (1) TFEU. Block exemption regulations apply to horizontal agreements that fulfil certain conditions, and can be applicable generally or only to specific sectors.
- (2) Because of its special structures, the agricultural sector in general and agricultural producer organisations in particular have enjoyed a basic – albeit not unrestricted – position of privilege vis-à-vis the EU competition rules.

- (3) Art. 39 (1) of the Treaty on the Functioning of the European Union states that the objectives of the Common Agricultural Policy are to ensure a fair standard of living for the agricultural community, in particular by raising the individual earnings of persons engaged in agriculture, to stabilise markets, and to assure the availability of supplies. Since 2008, non-cost-covering milk revenue has created a situation throughout Europe that threatens the livelihood of the majority of milk producers in Europe. The current farm-gate price still fails to cover production costs. The same applies both to small and expanding farms. Profit or even raising individual earnings has been out of the question for milk producers since 2008.
- (4) Council Regulation No. 1184/2006 (of 24 July 2006, OJ 2006 L 214/7 of 04.08.2006) contains provisions on applying certain competition rules to the production of and the trade in agricultural products. Art. 2 states that the ban on cartels in Art. 81 (1) TEU (now Art. 101 (1) TFEU) in particular does not apply to agreements, decisions and practices of farmers, farmers' associations or associations of such associations belonging to a single member state which concern the production or sale of agricultural products. This regulation, however, contains tight limits on market shares and is also limited to agreements without obligation to charge identical prices. The regulation does therefore not relieve the strain on milk producers, as the market share limits are too tight and also the agreement on common terms and marketing conditions would have to be enabled – including certain minimum prices – in order to permit cost-covering production.
- (5) Art. 176 (1) of Council Regulation No. 1234/2007 (of 22 October 2007, OJ 2007 L 299/1 of 16.11.2007) states that Art. 81 (1) TEU (now Art. 101 (1) TFEU) in particular shall not apply to agreements, decisions and practices of farmers, farmer's associations, or associations of such associations belonging to a single member state which concern the production or sale of agricultural products, unless the Commission finds that competition is thereby excluded or that the objectives of Art. 39 TFEU are jeopardised (what is termed cooperative privilege). Beneficiaries of this privilege are farmers that operate at the primary production stage and/or the first processing stage. Raw-milk producers are therefore included in the scope of application of this derogation. Although the restriction that tight market share limits are provided for and only

agreements without obligation to charge identical prices are allowed also applies here, in the milk producer organisations' interests it would be necessary to increase the market shares and also provide for the adoption of common terms and conditions of sale, including minimum, cost-covering prices.

- (6) The Commission is of the opinion that the current derogations do not suffice insofar as they affect milk producer organisations. The milk producers have been exposed to disastrous, livelihood-threatening competition since 2008, due in particular to the powerful dairies and even more so the food retailers controlled by large groups simply not being prepared to pay a cost-covering producer price. At present the milk producers have no chance of defending themselves against such a state of affairs. In particular, their inadequate degree of organisation makes it impossible for them to assert common terms and conditions of sale and thus to make sure that at least full-cost-covering prices are paid for raw milk.
- (7) The Commission endorses the High Level Group Milk recommendations stated in the Final Report of 15 June 2010. In this report, the Commission's High Level Group Milk recommends by a majority decision that through a legislative initiative a provision be drafted that enables milk producer organisations to negotiate their milk supply contracts, including the price, jointly for some of or all their members, stipulating fair and reasonable market limits. Furthermore, it would have to be clarified whether such a provision ought to apply permanently or for a limited period. At any rate, the provision ought to be reviewed after a certain period of time. Such a provision would constitute a derogation from the general ban on cartels under Art. 101 (3) TFEU, the validity of which is limited to 10 years.
- (8) Because of the particular features of the dairy sector and given the already applicable exceptions, it seems to make sense to set the market share thresholds relating to the entire EU market at 30% in accordance with this regulation and to stipulate that milk producer organisations with a larger EU-wide market share do not enjoy the benefit of this regulation, because that will imply that the remaining competition is disproportionately limited. The same limitation applies if competition is totally limited for other reasons as a result of the application of this regulation or if individual market participants were denied access to raw milk.

- (9) The Commission will monitor developments in the dairy sector continually and take suitable remedial action in the event of competition problems arising in connection with this regulation owing to the practices of the milk producer organisations to the detriment of consumers.

- (10) To assess the impact of this regulation on competition in the dairy sector it seems appropriate and in line with the High Level Group Milk's recommendation to draw up an evaluation report on the application of this regulation in good time before it expires.

Has adopted the following regulation:

Art. 1

Definitions of terms

- (1) The following definitions of terms apply for the purposes of this regulation:
- a) "horizontal agreement" is an agreement or concerted practice existing between two or more companies of which each operates for the purposes of the agreement or the concerted practice on the same level of the production or distribution chain and to which the terms and conditions relate whereby the companies involved are permitted to order, sell or resell goods or services;
 - b) "milk producers" are farms and companies in the milk sector whose business is producing raw milk;
 - c) "raw milk" is milk extracted from dairy cows and not processed.
- (2) For the purposes of this regulation, the terms "milk producer", "provider", "manufacturer" and "purchaser" include the companies associated therewith.

Art. 2

Exemption

According to Art. 101 (3) TFEU and by virtue of this regulation, Art. 101 (1) TFEU does not apply to horizontal agreements, decisions and practices of milk producers or associations of milk producers or associations of such milk producer associations belonging to a single member state which concern the terms and conditions under which the milk producers offer, sell or otherwise dispose of raw milk, unless the core limitations stated in Art. 3 of this regulation are fulfilled.

Art. 3

Restrictions resulting in the exclusion of the benefit of the block exemption regulation – core restrictions

The exemption under Art. 2 does not apply to the milk producers' horizontal agreements if:

- a) the milk producer organisation has an EU-wide market share in excess of 30%;

- b) the agreements contain terms and conditions of sale that result in a total exclusion of competition between the milk producers;
- c) the agreements contain terms and conditions of sale that permanently deny certain market participants access to raw milk.

Art. 4

Monitoring and Evaluation Report

The Commission will monitor the application of this regulation and draw up a report by 30 November 2018 at the latest; in this report, it will take into consideration the conditions of Art. 101 (3) TFEU in particular.

Art. 5

Period of validity

This regulation enters into force on 1 December 2010.

It is valid until 30 November 2020.

Brussels, [date] [...] 2010

On behalf of the Commission [...]