



HOW EU COMPETITION POLICY HELPS DAIRY FARMERS IN EUROPE*

The Common Agricultural Policy has taken a market-oriented approach with a view to helping dairy farmers to better respond to market signals.

The steep fall of milk farmgate prices in 2008 and 2009, combined with higher input prices (from energy to animal feed), put many dairy farmers in a difficult financial situation. Moreover, dairy farmers as sellers are often in a weaker negotiation position vis-à-vis their stronger counterparts, the dairy companies and large retailers. And in many respects, dairy farmers also face more difficulties than other farmers. While both need to adjust their production to respond to changes in often volatile markets, dairy farmers have high stranded investment costs in installations and production animals, and milk production is constant and cannot be reduced in the short term.

Milk is a highly standardised product and there is fierce competition on the international milk-products markets. European dairy farmers rightly want to improve both their competitiveness and their bargaining power to secure a better future for their sector. Competition policy is a tool that helps dairy farmers to successfully respond to these challenges by complementing the structural and other support measures that are available to them under the Common Agricultural Policy.

Competition policy can help dairy farmers to devise solutions in two ways. Firstly, competition policy maintains a level playing field throughout the EU, meaning that dairy farmers have equal opportunities to participate in milk markets and expand their businesses beyond their traditional geographic boundaries as well as into activities with higher added value. Proper enforcement of competition rules ensures that dairy farmers are protected against anticompetitive practices which would distort this level playing field and hinder farmers' access to potential customers and markets.

Secondly, by establishing the conditions under which farmers are allowed to cooperate among themselves within producers' organisations and in other types of associations, EU competition policy provides them with a solid legal framework for developing sustainable forms of cooperation and a stimulus to become more efficient, innovative and better-equipped to face competition both within and outside the EU.

* The present document sets out in a Q&A format certain basic information on competition rules applicable to agreements among dairy farmers in the milk sector. This document should not however be viewed as legal advice or as the legal position of the Commission in any specific cases or proceedings concerning competition on agricultural markets. The information contained in this paper refers to horizontal cooperation agreements without prejudice to the assessment of the vertical aspects of these agreements or of any other vertical agreements which farmers and other operators may enter into.

Questions and Answers

1. How does competition policy help dairy farmers in the present difficult market situation?

Competition policy can help dairy farmers in at least two possible ways: firstly by **protecting them against anticompetitive practices** which limit their access to potential customers and deprive them from the benefits of their work and a truly integrated EU market; and secondly by **providing the framework for developing sustainable forms of cooperation** among themselves designed to improve their efficiency, to strengthen their bargaining power and to increase their chances of success.

2. How could dairy farmers be harmed by anticompetitive practices?

There are many situations where dairy farmers' interests may be harmed by anticompetitive practices. For example, if several buyers (processors and/or retailers) were to agree among themselves on a maximum price for the purchase of raw milk, dairy farmers would lose any bargaining edge to negotiate higher prices for their products. Another example could be the imposition by one or more powerful buyers of exclusive supply terms which would prevent farmers from selling their milk to other buyers who, in turn, could lose access to competitive milk supplies. Even certain agreements among dairy farmers could be detrimental for other dairy farmers who are more efficient and who wish to increase their production if this would lead to a segmentation of the single market.

Competition policy can help to prevent these and many other undesirable situations which would lead to harm to farmers and consumers at the same time. The application of competition rules guarantees a level playing field across the EU so that all dairy farmers

can have equal opportunities to participate in the dairy markets and can expand their businesses beyond their traditional boundaries.

3. Do EU competition rules apply to all forms of cooperation among dairy farmers?

No. Member States have a great deal of latitude how to shape and apply competition rules to their dairy sectors. EU competition rules do not apply to a number of cooperation arrangements among farmers as far as such arrangements are not capable "*to appreciably affect trade between Member States*".ⁱ In practice this means that, if a group of farmers with a **combined market share of less than 5%** and an **EU aggregate turnover of less than 40 million euro** were to decide to enter into any types of cooperation agreements, **EU competition rules would simply not apply** to them.

Above these thresholds, a more careful, case by case examination would be required to determine to what extent an agreement is capable of having a minimum level of cross-border effects within the European Union. Absent of such effects, however, even far-reaching forms of cooperation, such as the creation of **collective bargaining groups agreeing on prices and quantities** of milk to be sold to downstream processors, **would not fall under EU competition rules.** In such cases, Member States would remain free to determine the legality of such agreements under their own legal regimes, taking into account the specificities and structural conditions of the milk supply chain within their territory.

Secondly, it must be recalled that, **when they do apply, EU competition rules allow several sustainable forms of cooperation** among dairy farmers as long as they create

efficiencies and do not limit competition to the detriment of consumers.

4. What if dairy farmers want to market their raw milk collectively and their organisation has such a size and scope as to appreciably affect trade between Member States?

EU competition rules will allow under certain conditions **joint commercialisation** of raw milk, including through intermediate organisations or associations.

In general, such agreements are **accepted if** the agreement **does not involve, directly or indirectly, any price fixing** and the farmers who participate in the agreement have **an aggregated share of the relevant market not exceeding 15%**ⁱⁱ. Above such a market share threshold, the agreement is not presumed to be illegal, but a case-by-case assessment is necessary.

5. Could you provide an example of a commercialisation agreement not involving price fixing which could be acceptable under EU competition rules?

Yes. An example could be the appointment by farmers of a joint structure or a broker to act as **commercial agent** on their behalf. In this scenario, producers would retain the ownership of their milk until it is sold to the buyers, and each one of them individually would inform the agent of the reserve price which he wants to obtain. The agent, who would not bear any significant financial or commercial risk in relation to the contracts concluded and/or negotiated on behalf of the participating farmers, would pool together the volumes of all the producers and negotiate the best possible price with each interested buyer. The milk would be then sold at the best price negotiated with each buyer. If the selling price is below the reserve price of one or more individual producers (which can however

change over time according to the conditions agreed in the contract with each producer concerned), the corresponding volumes would remain unsold.

Such type of arrangements could be allowed under EU competition rules as long as farmers do **not exchange price information** with each other and the agent is **not used as a mere cover for colluding on pricing and marketing strategies**. In general, a case-by-case assessment may be necessary, taking into account the market power of the agent, entry/exit barriers, the position of other competitors on the same market, the countervailing power of customers, etc. The objective of this analysis would be to **ensure that competition between milk suppliers is preserved** and that farmers have alternative supply channels to turn to if they so wish.

6. What if the farmers wish to market and sell their milk jointly and also agree on a common price for their milk?

When an agreement between competitors involves price fixing and affects trade between Member States (see Question 3), this would normally be **considered as a form of cartel prohibited by EU competition rules**. Cartels do not contribute to the improvement of production and marketing structures and, ultimately, to the long-term success of dairy farmers on liberalised dairy markets. Rather, price fixing arrangements produce the opposite effect: by limiting competition, they stifle modernisation of production, which leads to higher prices for consumers, worse products and ultimately to a less competitive dairy sector. Therefore cartels can never be a solution for the problems faced by the sector.

Nevertheless, there are **exceptional cases** in which a commercialisation agreement affecting trade between Member States and involving price fixing may be acceptable insofar as it is considered as indispensable for

the implementation of the agreement. Such limited exceptions arise in two casesⁱⁱⁱ:

(i) if a **large buyer** does not want to deal with a multitude of prices and **requests a single supply price**;

(ii) if **farmers agree on jointly launching a new product, such as a common brand** of milk, and such an initiative can only be credibly achieved if all aspects of marketing, including price, are standardised.

However, this favourable assessment applies only if the collective entity does not hold a significant market power, which is normally the case if its market share does not exceed 15%.

It must be also noted that if the farmers decide to cooperate in the area of production, collection or processing of their milk, EU competition rules will likely allow, as pointed out in the following answers, that they also market their milk with a common price.

7. Are more extended forms of cooperation among dairy farmers, such as those involving joint processing of raw milk and possibly joint commercialisation of dairy products within agricultural cooperatives, allowed under EU competition law?

Yes, EU competition rules recognise the substantial economic benefits stemming from this type of **joint production agreements** and provide for a flexible approach when assessing such forms of cooperation between competitors. For instance, if **parties agree on the output** directly concerned by the production agreement **and/or the setting of sales prices** for the products that are distributed jointly, there will be no presumption that the agreement is illegal, insofar as such joint decisions on prices and

output are deemed indispensable for the implementation of the agreement.

Joint production, whatever its scope and form, **always involves an integration of economic activities, capacities or assets** between participating companies. In the milk and dairy sector, joint production agreements **can be structured in different forms and levels**, going from cooperation at the upstream phase of the milk supply chain (i.e. joint collection of raw milk) to downstream integration into joint processing and marketing of dairy products such as butter, cheese, milk powder, long-life milk.

Such is typically the case of **agricultural cooperatives** whereby farmers group together their complementary milk outputs with the aim of producing processed dairy products (i.e. fresh and long-life milk, butter, milk powder, cheese, etc.). These products are sold at a price decided by the cooperative and this means that the same price is paid to farmers for the same quality of supplies.

European Courts have expressly recognised cooperative organisations as pro-competitive structures which **contribute to the modernization and rationalization of the agricultural sector** by enabling a large number of small producers to participate in the economic process on a wider geographical basis.

However, EU competition rules view such agreements favourably if the farmers involved in these forms of cooperation do not collectively hold a level of market power such as to restrict competition in the market to the detriment of consumers (See Question 9).

8. If a number of dairy farmers were to organise the collection of their raw milk through the joint use of common facilities (e.g. trucks, tanks), either directly or through an association or a collection cooperative, would EU competition rules allow them to jointly decide on sales targets and milk prices?

The answer is very likely yes, although a case by case analysis is necessary. The joint collection of milk involves efficiency gains since it allows small farmers to group together their individual milk outputs in larger quantities, thereby meeting the needs of large buyers who may not want to deal with a wide number of suppliers. Moreover, such agreements may help strengthen farmers' bargaining power vis-à-vis their buyers.

EU competition rules recognise the efficiency gains stemming from the integration of milk collecting activities, which may imply an overall favourable assessment. This positive view may also be extended to any decisions on sales targets and farmgate and sales prices, insofar as these decisions are deemed directly related to and necessary for the implementation of the joint collection agreement as such. However, as pointed out in the previous question, EU competition rules view such agreements favourably if the farmers involved in these forms of cooperation do not collectively hold a significant market power (See also Question 9).

9. What if dairy cooperatives become too big? Wouldn't such large cooperatives be anticompetitive?

The favourable treatment which EU competition rules generally grant to cooperatives is subject to certain limits aimed at ensuring the existence of effective competition in the market. Large

cooperatives with a strong market power could, in certain circumstances, prevent consumers from benefiting from a healthy competitive process. Such a situation is however unlikely to arise if the market share of the cooperative does not exceed 20% (unless this entity is only limited to joint commercialisation activities, in which case see Question 4).

Above such a threshold there is no presumption of illegality but the potential restrictive and efficiency-enhancing effects of the cooperative will have to be assessed on a case-by case basis.

Furthermore, in order to ensure that effective competition is maintained among competing cooperatives, EU competition rules might intervene with a view to restoring farmers' freedom to switch from one organisation to another and/or to sell part of their production through competing channels.

10. Can dairy farmers also cooperate with other actors in the milk chain, such as, for example, with processors and wholesalers?

Yes. Member States can decide, on the basis of national law, to recognise the so-called interbranch organisations in the milk sector (such examples exist in France (CNIEL), Hungary (HAD), Spain (INLAC) etc.), which bring together firms and/or associations that carry out economic activities linked to the production, trade and processing activities of milk and other dairy products. The EU Single Common Market Organisation rules allow for the creation of interbranch organisations in certain other sectors (fruit and vegetables, wine, olive oil, tobacco and cotton), but such rules do not enable the parties operating in these sectors to fix prices, share markets or limit production volumes.

Absent significant market power, EU competition rules would not interfere with the functioning of interbranch organisations in so far as such entities are not used as a mere cover for anticompetitive price fixing/ market partitioning/ output restrictions. Such highly anticompetitive agreements would stifle innovation and prevent efficient operators from reaping the benefits of their good work.

Information as of 16/02/2010

ⁱ The concept "affectation of trade" is defined in the Guidelines on the effect of trade concept contained in Articles 101 and 102 of the Treaty (OJ C 101/81 of 27.4.2004).

ⁱⁱ Guidelines on the applicability of Art. 81 of the EC Treaty to Horizontal Cooperation Agreements ("Horizontal Guidelines"), OJ C3/2 of 6.01.2001, parag. 148 and following.

ⁱⁱⁱ *Idem*, parag. 151 and following.