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COMMISSION DECISION

of 29.11.2019

on the notification pursuant to Article 210 of Regulation (EU) No 1308/2013 by the Centre national interprofessionnel de l'économie laitière (CNIEL) - Dashboard and observatory of economic indicators for the French milk and milk products sector

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THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007¹, and in particular Article 210 thereof,

Having regard to the notification to the European Commission by the Centre national interprofessionnel de l'économie laitière (CNIEL) pursuant to Article 210 of Regulation (EU) No 1308/2013,

Whereas:

1. PROCEDURE

- (1) By letter of 1 April 2019, the French interbranch organisation, CNIEL, an interbranch organisation in the milk and milk products sector, notified the Commission pursuant to Article 210 of Regulation (EU) No 1308/2013 of its intention to create and disseminate a dashboard of economic indicators for the milk and milk products sector and to create and disseminate an observatory of economic indicators for the milk sector in France² (hereafter 'CNIEL notification'). The Commission acknowledged receipt of this notification by letter of 4 April 2019³.
- (2) The Commission sent a request for additional information to the CNIEL on 16 May 2019⁴. The CNIEL replied on 12 July 2019, providing further information and clarifying that the observatory also forms part of the notification⁵. The Commission acknowledged receipt of this additional information by letter of 19 July 2019⁶.
- (3) The Commission sent a request for additional information to the CNIEL on 6 September 2019⁷. The CNIEL replied on 9⁸ and 14⁹ October 2019. The Commission acknowledged receipt of this additional information by letter of 16 October 2019¹⁰.

¹ OJ L 347, 20.12.2013, p. 671.

² Ares(2019)2358019.

³ Ares(2019)2401568.

⁴ Ares(2019)3247868.

⁵ Ares(2019)4666299.

⁶ Ares(2019)4719754.

⁷ Ares(2019)5611866.

⁸ Ares (2019)6251490 and Ares(2019)6269463, (answer to the request for information and Annexes I to III).

⁹ Ares (2019)6348858, revised answer to the request for information and Annex I.

¹⁰ Ares(2019)6408683.

2. DESCRIPTION OF THE NOTIFIED MEASURE

2.1. Object of the notified measure

- (4) The CNIEL notified a dashboard comprising 26 economic indicators on volume, price, cost and margins of milk and milk products at different stages of the supply chain ('the dashboard'), which includes indicators from a national market observatory developed by the CNIEL comprising indicators on production costs and the cost price¹¹ (prix de revient) for conventional, organic and mountain milk ('the observatory')¹².
- (5) The CNIEL wishes to develop and disseminate the indicators of the dashboard and the observatory with a view to reducing the information asymmetry amongst operators in the French milk supply chain and increasing market transparency by publishing these indicators on its website on a monthly basis¹³.
- (6) According to the CNIEL, the absence of reliable indicators allowing producers to set the selling price of their products based on objective elements and to retain adequate indicators to fix the fluctuation of the prices of the products during the execution of the contract, is a constraint on contractualisation. As a result, the use of relevant and objective indicators would be useful to promote greater predictability in the milk and milk products sector where market prices are particularly volatile. The development and dissemination of the set of indicators proposed by the CNIEL could enrich the indexing criteria used in the contracts concluded between the operators and will thus give more possibilities of individualisation of prices¹⁴.
- (7) According to the CNIEL, the dashboard and the observatory also form part of the legitimate scope of action of interbranch organisations in the milk and milk products sector¹⁵, to improve knowledge and the transparency of production and the market, in accordance with Article 157(3)(c) of Regulation (EU) 1308/2013. Their development and dissemination also responds to the French Law No 2018-938¹⁶, which calls upon interbranch organisations to develop and disseminate indicators¹⁷.

2.2. Specific features of the French milk market

- (8) In 2017, France produced 24.3 million litres of raw milk, ranking second amongst the European Union's milk producing countries, behind Germany. In 2016, the milk industry generated 17% of the total turnover of the French agri-food industry. In 2017, there were 57 000 milk producers (including mountain milk production) and, in 2016, 743 milk processing plants¹⁸. Raw milk in France is mainly processed into cheese

¹¹ As defined on page 17 of Annex 7 and on page 11 of Annex 5 to the CNIEL notification, the cost price equals the production costs from which direct and indirect aids and revenues from other products are deducted. The production costs are all the costs linked to production (labour costs, cost of buildings, inputs, etc.).

¹² If broken down per product, the dashboard comprises a total of 95 indicators: (i) 89 are indicators already published by other sources; and (ii) six are developed by the CNIEL under the market observatory.

¹³ CNIEL notification, page 5.

¹⁴ CNIEL notification, page 11.

¹⁵ CNIEL notification, pages 3, 4 and 11.

¹⁶ Law No 2018-938 of 30 October 2018 to balance trade relationships in the agricultural and food sector and provide food which is healthy, sustainable and accessible to all (JORF n°0253 du 1 novembre 2018 texte n° 1).

¹⁷ Article L. 631-24 of the Rural and Maritime Fisheries Code as amended by Act No 2018-938.

¹⁸ CNIEL notification, Annex 3, page 1

(34.3%), fresh products – drinking milk, yoghurt and cream – (24%), butter and dairy fats (19.8%) and milk powders (15.8%)¹⁹.

- (9) In 2017, French exports (both to third countries and intra-EU trade) of dairy products reached EUR 7.2 billion, while imports amounted to EUR 4 billion, generating a positive trade balance of EUR 3.2 billion. Of the products exported, cheeses account for 42%, and other products of general consumption such as yogurts, butter and cream, for 17%²⁰.

2.3. The CNIEL

- (10) The CNIEL is an interbranch organisation in the milk and milk products sector, which was created on 21 March 1974 (Law No 74-639²¹) and recognised under Article 163 of Regulation (EU) No 1308/2013 by France on 2 June 2014²². It is composed of the main associations representing the French dairy sector: the milk producers (Fédération Nationale des Producteurs de lait (FNPL), Confédération paysanne (CP), Coordination rurale (CR), the milk cooperatives (COOP de France) and the milk industry (Fédération Nationale de l'Industrie Laitière (FNIL))²³.
- (11) The CNIEL's role is to facilitate the relations between the different levels of the milk and milk products sector, as well as to promote and defend the image of milk and milk products in order to increase its demand in France and abroad. It carries out collective actions in diverse fields, such as economic knowledge of the sector, quality of raw milk, the quality procedures, monitoring and research, advertising, promotion, information on milk and milk products²⁴.
- (12) Article 2 of the CNIEL Statutes dated 7 February 2018 ('the Statutes') lists the CNIEL's objectives. This list includes in point (b) the objective of improving and promoting the knowledge and transparency of production and the market, through, inter alia, the publication of statistical data, the conduct of analyses of potential future market developments at regional, national or international level, and the creation and development of a permanent information and economic forecast system²⁵.
- (13) In terms of organisation, according to Article 5 of the Statutes, the CNIEL is composed of three colleges representing milk producers, milk cooperatives and the milk industry. Pursuant to Article 7 of the Statutes, decisions of the CNIEL can only be taken by unanimous vote of the three colleges²⁶. The CNIEL is currently working on the creation of a fourth college, representing the trade and distribution segment of the French milk and milk products sector. However, according to the CNIEL, this

¹⁹ CNIEL notification, Annex 3, page 2.

²⁰ CNIEL notification, Annex 3, page 2.

²¹ Law No 74-639 of 12 July 1974 on the dairy interbranch organisation.

²² Page 1 of additional information provided by the CNIEL on 12 July 2019, including a reference to a confirmation by the French Ministry for Agriculture, Agrifood and Forestry that CNIEL fulfils the recognition criteria of the then applicable Council Regulation (EU) 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation). Article 163 of Regulation (EU) No 1308/2013 provides that interbranch organisations that have been recognised before 2 April 2012 on the basis of national law and which fulfil the conditions laid down in paragraph 1 are to be considered to be recognised as interbranch organisations under Article 157(3) of Regulation (EU) No 1308/2013.

²³ CNIEL notification, page 2.

²⁴ CNIEL notification, page 3.

²⁵ CNIEL notification, Annex 2.

²⁶ CNIEL notification, Annex 2.

should not affect the scope of the notified measure, as many of the indicators of the dashboard already cover that part of the chain²⁷.

- (14) The CNIEL works with eight regional centers, Centres Régionaux Interprofessionnels de l'Économie laitière ('CRIEL'), which are legally autonomous structures composed of representative organisations from the milk producers, the milk cooperatives and the milk industry in their own territorial areas. The CRIELs implement the CNIEL's policies and decisions at a regional level²⁸. Under the notified measure, the CRIEL is involved in the dissemination, but not in the creation, of any indicator, which is done exclusively by the CNIEL. As to the dissemination at regional level, it is envisaged that the CRIELs will contact operators by email to inform them about the data published on the CNIEL website²⁹.

2.4. Background of the notified measure – the French law on the equilibrium of the agricultural and food supply chain

- (15) The French Law No 2018-938 to balance trade relationships in the agricultural and food sector and provide food which is healthy, sustainable and accessible to all followed on from a discussion in the 'États Généraux de l'Alimentation' ('EGalim') that were initiated in 2017. The États Généraux brought together agricultural producers, the agri-food industry, the distribution sector, consumers and the catering sector to develop ideas for modernising the legislative framework with the objective of creating value in the supply chain as this was considered essential to maintain agricultural enterprises and to preserve a fair income for the agricultural community³⁰. Amongst the various actions envisaged to achieve this, the États Généraux encouraged interbranch associations to define indicators adapted to the sectors and that they would make available to contracting parties, which would then be free to adapt, specify, or combine them for determining the price of the contract and for the renegotiation or the revision of clauses³¹.
- (16) Article L. 631-24 of the French Rural and Maritime Fisheries Code, as amended by Law No 2018-938, states that a written contract of sale for an agricultural product to the first buyer must be preceded by an offer of the agricultural producer, which should have as an element the '*price or criteria and modalities for determining the price and a price revision*'. Article L. 631-24, as amended by Law No 2018-938, further specifies that the criteria and modalities for determining the price should take into account one or more indicators on the relevant production costs and their evolution, one or more indicators on the price of the agricultural and food product as evidence on the market in which the buyer operates as well as one or more indications on quantity, quality, composition, origin and traceability of the product. The relevant passage of Article L 631-24 of the French Rural and Maritime Fisheries Code, as amended by Law No 2018-938, reads as follows:

"Les critères et modalités de détermination du prix mentionnés au 1° du présent III prennent en compte un ou plusieurs indicateurs relatifs aux coûts pertinents de production en agriculture et à l'évolution de ces coûts, un ou plusieurs indicateurs relatifs aux prix des produits agricoles et alimentaires constatés sur le ou les marchés

²⁷ CNIEL notification, page 2; additional information provided by the CNIEL on 12 July 2019, page 6.

²⁸ CNIEL notification, page 3.

²⁹ Additional information provided by the CNIEL on 12 July 2019, pages 3 and 4.

³⁰ CNIEL notification, page 4.

³¹ États Généraux de l'Alimentation. Fiche conclusive de l'atelier n°5 (octobre 2017). « Comment rendre les prix d'achat des produits agricoles plus rémunérateurs pour les agriculteurs », as cited in page 4 of the CNIEL notification.

sur lesquels opère l'acheteur et à l'évolution de ces prix ainsi qu'un ou plusieurs indicateurs relatifs aux quantités, à la composition, à la qualité, à l'origine et à la traçabilité des produits ou au respect d'un cahier des charges. Dans le cadre de leurs missions et conformément au règlement (UE) n° 1308/2013 du Parlement européen et du Conseil du 17 décembre 2013 précité, les organisations interprofessionnelles élaborent et diffusent des indicateurs, qui servent d'indicateurs de référence."

- (17) Article L. 631-24-1 of the French Rural and Maritime Fisheries Code, as amended by Law No 2018-938, further provides that once such indicators are chosen in the first contract between the producer and the first purchaser, these indicators should be taken into account for further contracts downwards in the supply chain. Article L 631-24-1 of the French Rural and Maritime Fisheries Code, as amended by Law No 2018-938, reads as follows:

"Lorsque l'acheteur revend des produits agricoles ou des produits alimentaires comportant un ou plusieurs produits agricoles, le contrat de vente prend en compte les indicateurs mentionnés à l'avant-dernier alinéa du III de l'article L. 631-24 figurant dans le contrat d'achat conclu pour l'acquisition de ces produits.

Dans l'hypothèse où le contrat conclu pour l'acquisition de ces produits comporte un prix déterminé, le contrat de vente mentionné au premier alinéa du présent article prend en compte un ou plusieurs indicateurs relatifs aux prix des produits agricoles concernés.

L'acheteur communique à son fournisseur, selon la fréquence convenue entre eux et mentionnée dans le contrat écrit ou l'accord-cadre écrit, l'évolution des indicateurs relatifs aux prix des produits agricoles et alimentaires constatés sur les marchés sur lesquels il opère."

- (18) According to the CNIEL, neither the French legislator nor the competent French authorities has clarified how the indicators are taken into account as laid down in Article L. 631-24-1 of the French Rural and Maritime Fisheries Code, as amended by Law No 2018-938³². The CNIEL states that operators (in the first contract, but also further down in the supply chain) are entirely free to use, modify, supplement or attribute the desired weight to the indicators disseminated by the CNIEL as they see fit for the individual price formula, adding other price components if so desired, according to their own strategy. Moreover, the importance of the indicators may vary according to the individual contract³³.

2.5. Description of the notified measure

Functioning of the dashboard and the observatory

- (19) The CNIEL, as decided unanimously³⁴ by the three colleges referred to in recital (13), notified a dashboard of economic indicators as well as a national market observatory. Both components of the notified measure will be described below.
- (20) **The dashboard** consists of 26 economic indicators that relate to volumes, prices, costs or margins of milk and milk products at different stages of the supply chain (production, processing, distribution and export). If broken down to individual

³² Additional information provided by the CNIEL on 12 July 2019, page 13.

³³ Additional information provided by the CNIEL on 12 July 2019, pages 13 to 16.

³⁴ Additional information provided by the CNIEL on 14 October 2019, page 2.

(sub)products, the total number of indicators is 95 (see footnote 12 above). An overview can be found in Annex I to this decision.

- (21) The data for 24 of the 26 notified indicators stems from public sources. This means that this data is currently disseminated by other bodies and accessible to stakeholders in the agricultural and food supply chain. Such data stems from, for instance, Eurostat, France AgriMer (FAM, the administrative body attached to the French Ministry for Agriculture and Food), or from IDELE (Institut de l'Élevage, a non-profit, non-governmental R&D organisation appointed by the French Ministry for Agriculture and Food as a technical centre).
- (22) The data for two of the notified indicators stems from the private source, IRI, a market research institute. These two indicators concern, respectively, consumer prices and the sales volumes of large and medium-sized retailers for drinking milk, cream, cheese, ultra-fresh and packaged butter³⁵. According to the CNIEL, many operators already have access to the data on which the two indicators are based via the SINAPS platform³⁶. The CNIEL also uses that data for analyses, which can likewise be accessed by operators via the three CNIEL colleges and by a number of other organisations. The CNIEL states that it is not disseminating this data³⁷ with the exception of the publication of the 'gliding' annual evaluation, which the CNIEL currently disseminates to its members³⁸. Moreover, as confirmed by the CNIEL, the gliding evaluation will be different in the dashboard compared to what is currently disseminated, in that not only annual, but also trimestral and monthly data and absolute values will be published³⁹.
- (23) Five of the notified indicators, namely indicators concerning mixed products, valorisation for butter and skimmed milk powder, standard price of milk, standard price of German milk and ratio of food costs/milk price were already the subject of the earlier notification of CNIEL to the Commission of 23 April 2013⁴⁰, which did not raise objections⁴¹. The CNIEL confirms that these indicators will not change in substance. In the future, CNIEL would, however, like to slightly modify an indicator substituting a weekly data source with monthly data⁴².
- (24) The CNIEL submitted a detailed document showing the manner in which each of the 26 indicators will be built and presented⁴³. The indicators will be presented as, for example aggregated values at quarterly or annual level, in either arithmetic or weighted average, as a percentage indicating the variation in monthly, quarterly or annual periods, and, in graphic form⁴⁴.
- (25) However, the CNIEL will calculate itself certain indicators. For instance, the CNIEL will calculate the indicator (as notified already in 2013) for the valorisation of butter and skimmed milk powder itself on the basis of FAM data.

³⁵ Pages 12 and 13 of Annex 7 to the CNIEL notification.

³⁶ Page 13 of Annex 7 to the CNIEL notification and page 5 of the additional information provided by the CNIEL on 12 July 2019.

³⁷ Page 3 of the additional information provided by the CNIEL on 12 July 2019.

³⁸ Via a so-called 'Note de conjuncture', additional information provided by the CNIEL on 12 July 2019, page 3.

³⁹ Additional information provided by the CNIEL on 14 October 2019, page 2.

⁴⁰ Ares(2013)978334.

⁴¹ Letter European Commission to the CNIEL of 30 September 2013, Ares (2013) 3143584.

⁴² Additional information provided by the CNIEL on 12 July 2019, page 11.

⁴³ Additional information provided by the CNIEL on 12 July 2019, Annex 2.

⁴⁴ Additional information provided by the CNIEL on 12 July 2019, page 6.

- (26) The CNIEL is also **notifying an observatory**, which covers the creation by the CNIEL of indicators for the production costs as well as the cost price⁴⁵ of conventional, organic and mountain milk (with the exclusion of the milk in the mountains in the east of France⁴⁶). In total, the CNIEL will create six indicators under the observatory. The CNIEL will create these indicators, based on the Couprod methodology, which was developed by IDELE and which is described in detail in the notification. CNIEL and IDELE will work together in the creation of the indicators of the observatory⁴⁷.
- (27) Depending on the nature of the data, the CNIEL works in three different manners ('lot') for the transmission of data by the management centres and the breeding consultancy organisations to the CNIEL. Under 'lot 1', CNIEL's preferred transmission manner, the partner management centre or breeding consultancy organisation transmits to the CNIEL the technical and accounting data of the individual farms in their portfolio. Under 'lot 2', the partner management centre or breeding consultancy organisation transmits to the CNIEL a set of individual components of the cost of production and cost price calculated according to the above mentioned method Couprod. Under 'lot 3', the partner management centre or breeding consultancy organisation transmits to the CNIEL statistical results of a set of components of the cost of production and price calculated using the COUPROD methodology for one or several holdings in their portfolio. IDELE is then responsible for aggregating these intermediate 'lots' with the rest of the data transmitted by the other management centres and breeding consultancy organisations⁴⁸. Regardless of the transmission method, IDELE would control the data via an algorithm and eliminate outliers⁴⁹.
- (28) In total, the CNIEL expects to have data on 4 187 conventional milk holdings, 1 376 mountain milk holdings and 176 organic milk holdings. The CNIEL points out that this work of the observatory would cover a wider range of holdings compared to the data published by the Commission's Farm Accountancy Data Network ('FADN')⁵⁰. The CNIEL also points out that its indicators would be disseminated ahead of FADN's data⁵¹ (year N +1, calculated in October based on data published in September, instead

⁴⁵ See definition above, footnote 11.

⁴⁶ Milk produced in the mountains in the east of France is largely oriented towards the use in milk products with a denomination of origin (PDO), which can often obtain higher prices than other milk products. The indicators in the dashboard of the CNIEL do not aim at providing information relevant for such products. Additional information provided by the CNIEL of 14 October 2019, page 3.

⁴⁷ CNIEL notification, Annex 5, which contains a detail description of the Couprod method, which, inter alia, allocates certain costs to the production of conventional milk, in particular also for the situation that certain costs have to be allocated between different production activities.

⁴⁸ CNIEL notification, page 10; additional information provided by the CNIEL on 12 July 2019, Annex 3, page 2.

⁴⁹ Additional information provided by the CNIEL on 12 July 2019, Annex 3 and on 14 October 2019, page 5 and Annex III. The robustness and representativeness of data will be checked annually by the economic services within the CNIEL and by IDELE, which is charged by the CNIEL to carry out that work.

⁵⁰ Additional information provided by the CNIEL on 12 July 2019, page 10: 4 187 milk production holdings compared to 855 holdings covered by FADN.

⁵¹ The CNIEL clarified that when, in this context, it refers to FADN data, this actually means data calculated by IDELE, which is then distributed by the French Ministry of Agriculture using the format as defined by the European Commission. See additional information provided by the CNIEL on 12 July 2019, page 8.

of the publication between March and May in year N+2). In addition, the cost price is not calculated by the FADN⁵².

Dissemination

- (29) The dashboard, containing the whole set of above-mentioned indicators, should be published by the CNIEL on a monthly basis, on around the 20th or 25th day of each month. It will be published on the CNIEL website, which any operator, can access free of charge, including operators outside of the European Union⁵³. This also applies to the two indicators which stem from a private source, the marketing institute IRI, which will be available free of charge via the CNIEL website⁵⁴. In addition, the dashboard will also be disseminated to the CRIEL organisations, the CNIEL's members and recognised Producer Organisations⁵⁵.
- (30) A further dissemination will take place via the regional CRIEL organisations, which will send the dashboard via electronic mail to operators in order to ensure wider access. This will be done on a non-discriminatory basis and is supplementary to the dissemination of the same information on the publicly available CNIEL website⁵⁶.
- (31) Regarding the observatory, the indicators on conventional, organic and mountain milk will be distributed through the dashboard⁵⁷. The observatory constitutes a tool to generate the production and cost price indicators for conventional, mountain and organic milk. The six annual indicators will be integrated in the dashboard. The dissemination mechanism for the observatory's indicators will be the same as that of the dashboard. The holdings' data underlying the calculation of the indicators will never be made accessible to any operator⁵⁸.

Aggregation of data

- (32) The CNIEL confirms that all the data used for the indicators will be aggregated and that it will not be possible to see or deduct individual data pertaining to specific operators in the supply chain⁵⁹. In particular, for the indicators of the observatory, the CNIEL will ensure that the data is aggregated sufficiently either by itself, or, as far as the transmission lot is ensured, by the partner management centre⁶⁰.
- (33) For the data sourced from the private marketing institute IRI, the CNIEL highlights its broad level of aggregation – the indicators aggregate three distribution channels, large number of sub-categories of products, several brands and several geographical areas. The CNIEL argues that it is impossible to infer, on the basis of the IRI indicators, individual data on prices or volumes⁶¹. For the data from IDELE, the CNIEL likewise confirms that the level of aggregation does not allow milk producers to know or deduct the production costs of their competitors⁶². In terms of the 'age' of the data

⁵² Additional information provided by the CNIEL on 12 July 2019, pages 8 and 9.

⁵³ Additional information provided by the CNIEL on 12 July 2019, page 4.

⁵⁴ Additional information provided by the CNIEL on 12 July 2019, page 5.

⁵⁵ CNIEL notification, Annex 7, page 10.

⁵⁶ Additional information provided by the CNIEL on 12 July 2019, page 3.

⁵⁷ CNIEL notification, page 8.

⁵⁸ Additional information provided by the CNIEL on 12 July 2019, page 5.

⁵⁹ Additional information provided by the CNIEL on 14 October 2019, page 4. The CNIEL underlines that – with the exception of the indicators based on IDELE and IRI – all other indicators merely relay information that has already been aggregated and made public by other institutions such as Eurostat, France Agrimer, etc.

⁶⁰ Additional information provided by the CNIEL on 14 October 2019, page 4. See also recital (27) above.

⁶¹ CNIEL notification, Annex 7, pages 13 to 15.

⁶² CNIEL notification, Annex 7, page 18.

(historicity), none of the indicators work with data that are more recent than one month⁶³.

Confidentiality

- (34) The CNIEL will ensure that the individuals responsible for the dashboard and the observatory sign a confidentiality declaration in which they undertake not to divulge any confidential information and to use the information only for the purposes of the dashboard and observatory⁶⁴.

Consultation of the competition authority

- (35) The French competition authority has not been consulted by the CNIEL in relation to the notified measure. However, the CNIEL claims that the notified measure is in line with a number of past decisions of the French competition authority, when dealing with transparency measures. For example, the CNIEL states that it followed Opinion n° 18-A-04 of 3 May 2018 of the French competition authority, which covers the publication of relevant indicators by interbranch organisations (in terms of aggregation of data, confidentiality, etc.). In its opinion, the French competition authority found that the mere transmission of indicators to other operators already disseminated by public bodies such as France AgriMer, the market observatory, etc., is unlikely to constitute an exchange of commercially sensitive information. However, greater scrutiny is necessary for indicators developed by an interbranch organisation itself. In this regard, the French competition authority points to the necessity of sufficiently aggregated past data to exclude that the individual operators' information can be identified⁶⁵.
- (36) The CNIEL also refers to Opinion n° 19-A-05 of 6 March 2019⁶⁶, in which the French competition authority stated that, in order to assess whether a price is unfairly low, a judge can take into account other elements apart from indicators on production costs, prices and margins that are public or included in the contract proposal. The CNIEL refers to this opinion, which already deals with the recently adopted EGALIM law, in support of its claim that the parties are free to determine the relevance they attribute to the indicators⁶⁷.

Extension of rules

- (37) The CNIEL points out that it will not issue any guidance on the use of the indicators, and will not publish a standard price formula. The CNIEL will also not adopt a model contract to be extended by the authorities to all operators⁶⁸.

3. LEGAL ASSESSMENT

- (38) Article 210(1) of Regulation (EU) No 1308/2013 provides that Article 101(1) of the Treaty on the Functioning of the European Union ('the Treaty') shall not apply to agreements, decisions and concerted practices of recognised interbranch organisations recognised under Article 157 of the Regulation with the object of carrying out the

⁶³ See overview of indicators of the dashboard and the observatory in Annex I to this Decision.

⁶⁴ CNIEL notification, page 11 and Annex 6 thereto; additional information provided by the CNIEL on 12 July 2019, page 19, as well as additional information provided by the CNIEL on 14 October 2019, page 4.

⁶⁵ Avis n° 18-A-04 du 3 mai 2018 relatif au secteur agricole, paragraph 185 and onwards.

⁶⁶ Avis n° 19-A-05 du 6 mars 2019 relatif à la modification de l'action en responsabilité pour des pratiques d'achat de produits agricoles à prix abusivement bas.

⁶⁷ Additional information provided by the CNIEL on 12 July 2019, pages 14 and 15.

⁶⁸ CNIEL notification, page 13.

activities listed in Article 157(1)(c) and, for the milk and milk products sector, in Article 157(3)(c) of the Regulation.

- (39) In order for an agreement, decision or concerted practice to be exempted from the application of Article 101(1) of the Treaty, Article 210 of Regulation (EU) No 1308/2013 provides that four cumulative conditions must be met: (i) the agreement, decision or concerted practice must be notified to the Commission by an interbranch organisation recognised under Article 157 of the Regulation; (ii) the Commission must not have made a finding, within two months of receipt of all the details required, that the agreement, decision or concerted practice is incompatible with Union rules; (iii) the notified agreement, decision or concerted practice must not have been put into effect before the expiry of the two-month period following their notification to the Commission; and (iv) the agreement, decision or concerted practice must be compatible with Union legislation, in particular the provisions of Article 210(4) of the regulation.

3.1. Recognised interbranch organisation

- (40) For the purposes of Article 210(1) of Regulation (EU) No 1308/2013, the CNIEL is an interbranch organisation in the milk and milk products sector recognised in accordance with Articles 157(3) and 163 of that Regulation.

3.2. Agreement, decision or concerted practice by the interbranch organisation

- (41) The notified measure constitutes a decision adopted by unanimous vote⁶⁹ of the members of the CNIEL organised in three colleges.

3.3. No previous implementation

- (42) The CNIEL has not yet implemented the notified measure⁷⁰.
- (43) The indicators that the CNIEL currently disseminates are indicators approved by the 2013 decision of the Commission⁷¹, following the CNIEL's notification of April 2013 under the then applicable legal framework⁷².
- (44) While the CNIEL has already been providing some economic information to its members⁷³, the notification encompasses a new measure in the form of a publicly available dashboard that will present a set of different economic indicators, as well as a new observatory creating six indicators, calculated by the CNIEL on production costs and the cost price of three different types of milk.

3.4. Objective of Article 157 of Regulation (EU) 1308/2013

- (45) Article 210 of Regulation (EU) 1308/2013 provides that the measure notified by the interbranch organisation must have the object of carrying out activities listed, for the milk and milk products sector, in Article 157(3)(c) of that Regulation.
- (46) Decisions by interbranch organisations relating to market transparency form part of the legitimate scope of action of interbranch organisations in accordance with Article 157(3)(c) of Regulation (EU) No 1308/2013. According to Article 2(b) of its Statutes,

⁶⁹ Additional information provided by the CNIEL on 14 October 2019, page 2.

⁷⁰ Additional information provided by the CNIEL on 14 October 2019, page 1.

⁷¹ See letter of the European Commission of 30 September 2013, see above footnote 41.

⁷² Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ L 299, 16.11.2007, p. 1), Articles 177 and 123.

⁷³ Additional information provided by the CNIEL on 12 July 2019, Annex 5.

CNIEL pursues the objective of improving and promoting the knowledge and transparency of production and the market in its work.

- (47) The dashboard and the observatory (comprising the six indicators developed by CNIEL and subsequently disseminated via the dashboard) will increase market transparency as they will offer economic operators in the milk and milk products supply chain a large array of information, in terms of products, variety of economic indicators describing the economic situation of today as well as the evolution compared to prior periods (years, quarters and weeks). Such regularly available economic indicators might enable operators to improve their perception of the market at all stages, which would be useful in a market prone to price volatility. Indeed, the milk sector has experienced such price volatility in recent years (notably in 2009 and 2016). The publication of economic indicators, including on production costs and cost prices, will offer operators the possibility of concluding agreements containing a price formulation that refers to one or more indicators of their choice. Similarly, the notified measure may improve understanding of market trends by all operators in the supply chain, including changing market conditions against which better-informed operators can adjust their production and investment decisions.

3.5. Article 210(4) of Regulation (EU) No 1308/2013

- (48) The notified measure does not satisfy the conditions in Article 210(4) of Regulation (EU) No 1308/2013 and therefore does not need to be declared incompatible with Union law.
- (49) Firstly, CNIEL admits that the notified dashboard constitutes a decision by an association of undertakings within the meaning of Article 101 TFEU⁷⁴. However, the notified measure is not designed in a way likely to impose prices or result in price fixing between operators.
- (50) The CNIEL will not develop or disseminate any standard price or price formula. The notified measure aims at offering greater transparency to operators by distributing aggregated and weighted economic indicators. According to the CNIEL, operators will remain free to determine their own prices and to choose which indicator they refer to in the contract⁷⁵. They can also choose other indicators than those developed or disseminated by the CNIEL. While Article L. 631-24 of the French Rural and Maritime Fisheries Code, as amended by Law No 2018-938, refers to indicators such as costs, cost evolution, prices, quantities, composition, it only requires that the parties should take these indicators '*into account*'.
- (51) Likewise, the CNIEL will not develop any standard contracts in which prices or price formulas are disseminated. The indicators will also not amount to a reference price for operators because they will be based on past data.
- (52) Moreover, the indicators will not disclose any strategic information for the future. For the majority of the indicators, the CNIEL will merely relay information already published by other sources.
- (53) As regards the information that the CNIEL will calculate itself, it will ensure that all information is aggregated and weighted in order to enable indicators to be reliable and has built in various steps within the used algorithms to ensure that the data is

⁷⁴ CNIEL notification, page 1

⁷⁵ Cf. CNIEL notification, in particular Annex 7, page 25, where the CNIEL refers to indicators developed by Danone.

representative⁷⁶. The CNIEL will regularly verify, including by way of an annual evaluation, the representativeness of the data, and will not publish any data that does not satisfy this requirement⁷⁷. In any event, the amount of data gathered under the observatory will be large enough and comprise a sufficient variety of contractual situations to prevent the possibility of inferring any conclusion as to the data of individual operators⁷⁸. Operators will be able, on the basis of that data, to develop their own strategy, without having access to the strategic consideration of other participants in the supply chain.

- (54) While the data, in particular the six indicators forming part of the observatory, will sometimes be disseminated more quickly than currently from other sources, the publication will still be with a delay of more than a year. As can be seen from Annex I to this Decision, the shortest delay in terms of publication is one month, with the exception of the indicator on German cheese production (already approved by the Commission following the CNIEL notification in April 2013), where the data is already published weekly.
- (55) The confidentiality of the data gathered will be maintained. Operators will not have any means of accessing individual data supplied by other operators since they will be gathered by the CNIEL or other entities reporting to it indirectly and anonymously and will then be aggregated and weighted. The CNIEL and IDELE will take measures to ensure the confidentiality of data (privacy statement in the specifications)⁷⁹. The IT systems used to collect data will also guarantee confidentiality⁸⁰.
- (56) The CNIEL will gather data on a voluntary basis⁸¹; there will be no obligation of any agricultural holding to supply it. This is confirmed in the manner in which the CNIEL will allow for different transmission paths to gather the information for the creation of the six indicators under the observatory. While 'lot 1', consisting of direct transmission of individual data, will be the preferred option of the CNIEL, it will accept that, for certain partner management centres or breeding consultancy organisations, the information will already be aggregated at their level as the parties will not agree to directly share the individual data with the CNIEL⁸².
- (57) Secondly, although, the dissemination of the indicators will facilitate exchange of information between competitors, it does not seem likely to facilitate coordination, taking into account the criteria set forth by the Commission's Horizontal Guidelines⁸³. As discussed in recitals (21) – (22), the majority of the indicators emanate from public sources, whereas for those two stemming from the private source IRI, CNIEL notes that many operators have already access to this data source. To the extent that the indicators are based on past data, information is not of strategic nature. With respect to the age of data, as noted in recital (33), indicators will not be more recent than one month. All data will be sufficiently aggregated. The notified dashboard will be freely

⁷⁶ Additional information provided by the CNIEL on 12 July 2019, page 15; additional information provided by the CNIEL on 12 July 2019, Annex 3.

⁷⁷ Additional information provided by the CNIEL on 12 July 2019, page 18.

⁷⁸ Additional information provided by the CNIEL on 14 October, page 5.

⁷⁹ Additional information provided by the CNIEL on 12 July 2019, Annex 6 contains a confidentiality statement for IDELE.

⁸⁰ Additional information provided by the CNIEL on 12 July 2019, page 19, where the CNIEL describes the system of secure electronic submission.

⁸¹ Additional information provided by the CNIEL on 14 October 2019, page 5.

⁸² Additional information provided by the CNIEL on 12 July 2019, Annex 3.

⁸³ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, p.1-72.

accessible via the website of CNIEL and disseminated to the CRIEL organisations, the CNIEL's members and recognised producer organisations.

- (58) Thirdly the notified measure will not lead to the partitioning of markets within the Union in any form. The CNIEL will give access to the dashboard, and the indicators, as developed in the observatory, via its website on an open, free of charge and non-discriminatory basis, which also allows other national and international operators to consult the indicators.
- (59) Fourthly, the notified measure will not affect the sound operation of the market organisation; rather, it will increase its transparency. The notified measure, which will only involve the distribution of aggregated data, will be voluntary and respect the confidentiality of the operators who notify their data. It will therefore not go further than the needs expressed by the CNIEL to achieve the objective of market transparency.
- (60) Fifthly, the notified measure will not create distortions of competition that are not essential to achieving the objectives of the CAP pursued by the interbranch organisation activity. As stated above, the notified measure aims at creating greater transparency, thereby enabling market operators to make better informed decisions in their contractual negotiations. The notified measure may therefore allow operators to understand better the valorisation of the milk products.
- (61) Moreover, the notified measure is careful to ensure confidentiality via sufficient aggregation of data to ensure that market operators cannot use the indicators for collusion purposes.
- (62) In addition, the notified measure is a voluntary offer to market operators, which may refer to these indicators in their contracts if they so wish, without being under an obligation to do so.
- (63) Finally, the notified measure will not create discrimination or eliminate competition in respect of a substantial proportion of the products in question because the participation in creating the indicators and their distribution will be accessible to all contributors.

3.6. Compatibility with other Union rules

- (64) The notified measure is not incompatible with any other Union rule.

HAS DECIDED AS FOLLOWS:

Article 1

Article 101(1) of the Treaty on the Functioning of the European Union does not apply to the decision notified by the Centre national interprofessionnel de l'économie laitière (CNIEL) to the Commission, pursuant to Article 210 of Regulation (EU) No 1308/2013, and the decision is not required to be declared incompatible with Union law pursuant to Article 210(4) of that Regulation.

Article 2

The Directorate-General for Agriculture and Rural Development shall inform the CNIEL of this Commission Decision by means of the letter in Annex II.

Done at Brussels, 29.11.2019

For the Commission
Phil HOGAN
Member of the Commission