

NexTrust Deliverable 6.3 - Competition law aspects of cooperation in the supply chain

Deliverable 6.3

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1. Introduction

A Supply Chain Study of the World Economic Forum of 2009¹ indicated that 24% of goods vehicles in the EU are running empty. In addition, when carrying a load, vehicles are typically only 57% loaded as a percentage of the maximum gross weight. This means that the total inefficiency is 43%. Based on these figures it was estimated that the total overall abatement potential of emissions across the logistics sector could run up to 124 megatons of CO₂ per year globally.

Despite having made a lot of progress already, the European logistics sector still faces many challenges when it comes to efficiency today. The current lack of efficiencies within the logistics supply chain leads to relatively high transport costs and high emission of greenhouse gasses (hereinafter referred to as '**GHG**').

The current organisation of logistics planning tends to be fragmented. This results in too many "less than truck loads" (hereinafter referred to as '**LTL**'). This way of operating is mainly due to cultural and legal uncertainties with regard to cooperation between shippers. This is, however, where huge efficiency-gains can be achieved. A more efficient planning of logistics could e.g. be achieved by bundling shipments of several shippers to create full truck loads (hereinafter referred to as '**FTL**') or to shift the mode of transport (e.g. road to rail transport) by means of multimodal transport. This is where the NexTrust project² and its partners³ are determined to achieve a breakthrough by enhancing cooperation and thereby increasing efficiency and sustainability in the European logistics industry.

1.1. The NexTrust Project

NexTrust is a project, funded by the European Commission (hereinafter referred to as '**EC**'), in which 31 undertakings within logistics have committed to achieve one goal: a more efficient and more sustainable organisation and implementation of logistics. The members of NexTrust are undertakings with different expertise and backgrounds in logistics: from shippers to logistics service providers (hereinafter referred to as '**LSP**'), from academics to E-commerce engineers and IT-engineers, from legal consultants and trustees to standardisation experts. NexTrust works on the basis of so-called interconnected trusted collaborative networks, in which such interested parties including shippers are fully integrated.

In its activities, NexTrust focuses on activities that safeguard a lasting change and impact in the industry. NexTrust works on the basis of pilot cases in live conditions. In these pilot cases, specific

¹ World Economic Forum, *Supply Chain Decarbonization: The Role of Logistics and Transport in Reducing Supply Chain Carbon Emissions* (2009).

² <http://nextrust-project.eu/>

³ Partners include TX Logistik, Vlerick Business School, VU Amsterdam, Wolters Kluwer Transport Services, Wenzel Logistics, Arcese, GS1 Germany, GS1 Belgium & Luxembourg, GS1 Schweiz, Giventis International, Tri-Vizor, Kneppelhout & Korthals Lawyers, Elupeg, 2Degrees, Beiersdorf, Colruyt, Ahold Delhaize, Kimberly Clark, Mondelez, Panasonic, Penguin Foods, Ysco, Evofenedex, CRITT Transport et Logistique, Pastu Consult, Norwegian Logistics, Bluewave, Unilever, Scala Consulting.

logistics business concepts are put into practice under real market conditions for a sustainable period, allowing the undertakings to share valuable experiences and to learn from each other. A unique aspect of the pilot case approach is the central role of a so-called trustee who guides and facilitates the different stages of the pilot cases.

Compliance with all applicable rules and regulations is vital in the NexTrust project, for its partners and the pilot participants. This deliverable concentrates on the competition law aspects of NexTrust. In this regard, the role of the trustee is a key element in ensuring compliant cooperation.

1.2. *Purpose and scope of this document*

Cooperation in the logistics supply chain requires a careful assessment of relevant legal aspects. Assessment of the legal aspects should help in answering the following fundamental questions:

- To which extent is cooperation allowed?
- To the extent cooperation is allowed, which form of cooperation is the most suitable?

The purpose and scope of this document is to provide undertakings that are involved in cooperation in logistics, be it a specific NexTrust pilot case or other project, with general guidance on the relevant competition rules.

It must be noted that in any event a case-by-case assessment is required to verify whether a specific cooperation is allowed in view of the competition rules. Non-compliance with the competition rules may lead to undesired consequences, such as void agreements, high administrative fines⁴, liability for damages suffered by third parties, long and costly legal proceedings and reputational damage.

This document is drafted in particular for managers, (commercial) directors as well as employees directly involved in logistics supply chain cooperation. The document may also be helpful to all kinds of advisors who are involved in cooperation initiatives in the logistics sector.

Below, it is explained why the scope of this document focuses, and is also restricted to, European competition law (hereinafter referred to as '**EU competition law**'), and more specifically the cartel prohibition. The importance of taking care of the risks associated with cooperation initiatives in the logistics sector is also addressed below.

1.2.1. *Focus on the cartel prohibition*

EU competition law can be roughly divided into four topics.

First, the cartel prohibition prohibits agreements and concerted practices between undertakings that restrict competition (enshrined in article 101 Treaty on the Functioning of the European Union (hereinafter referred to as '**TFEU**') and many national equivalents in Member States). Second, dominant undertakings are not allowed to abuse their dominant position on a specific market (article

⁴ The EC can impose fines of - roughly - up to 10% of the group turnover in the previous calendar year. Fines of NCAs vary per country.

102 TFEU). Third, EU competition law provides for a merger control regime, that requires undertakings to notify certain mergers, acquisitions and joint ventures, and obtain the approval from the EC before they implement their transaction.⁵ Fourth, the EC can scrutinise restrictions of competition performed by the state (article 106 TFEU) and also plays a key role in the application of the state aid rules (article 107 TFEU et seq.).

NexTrust is about cooperation between two or more undertakings⁶ in logistics. This may concern arrangements between undertakings that operate at different levels in the supply chain (i.e. a vertical relation), as well as between undertakings that operate on the same level in the same product market (i.e. a horizontal relation). Both types of relations can be scrutinised under the cartel prohibition. The cartel prohibition and its implications are therefore the central focus of this document. Generally, the other topics only play a role in exceptional circumstances, for instance if one of the parties has a dominant position, if a cooperation is established by a merger or the incorporation of a joint venture, or if governments or subsidies are involved. This document does not encompass these rather exceptional situations.

1.2.2. Focus on EU competition law

This document deals with EU competition law, as formulated in the TFEU, other EU (soft) law, the case law of the European Court of Justice (hereinafter referred to as '**ECJ**') and the General Court (hereinafter referred to as '**GC**'). Furthermore, it covers relevant decisions of the EC.

Any further references to competition law throughout this document to competition law should be interpreted as referring to *EU Competition law*. National competition rules fall outside the scope of this report. There are two reasons for this.

First, national legislators often explicitly seek to harmonise national competition law with EU competition law. National competition laws are therefore often equivalent or at least comparable to EU competition law. According to the ECJ, it is clearly in the interest of the EU that, in order to prevent differences of interpretation, provisions or concepts taken from EU competition law should be interpreted uniformly across Member States, irrespective of the circumstances in which they are to apply.⁷

Second, the NexTrust pilot cases mainly concern opportunities and cooperation with cross-border elements. That is because efficiency and sustainability gains tend to be larger when the scope of a cooperation increases, e.g. when transport routes are longer. Regarding cooperation that concerns international transport, it can thus be assumed that EU competition law rather than national competition law(s) applies to the NexTrust cooperation because of the cross-border element. That said and notwithstanding the above, several NexTrust pilot cases cover only one country, a specific region within a country or even a city, so it cannot be excluded that for certain types of cooperation national competition law instead of EU competition law applies. As explained, a case-by-case

⁵ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal L 24, 29 January 2004.

⁶ The rules on abuse of dominance only apply to the unilateral behaviour of one undertaking. This is not relevant for NexTrust in general nor the pilot cases.

⁷ ECJ 14 March 2013, C-32/11 (Allianz Hungária), par. 20.

analysis is always required to assess whether a cooperation is permissible under EU (or national) competition law.

1.3. *Enforcement of competition law*

The EC and/or national competition authorities (the latter hereinafter referred to as ‘NCA’ or ‘NCAs’) have a statutory task of monitoring and supervising compliance of undertakings with competition law. When an infringement is suspected, for example via a tip or complaint, a whistle-blower or via an undertaking that suspects or confesses its own involvement in a cartel⁸, the EC and/or NCAs may start an investigation into an alleged infringement of the cartel prohibition.

The EC (and also NCAs, however based on national legislation) has far-reaching investigative powers.⁹ Amongst others, they include the powers to pay an unannounced visit to the premises of an undertaking (‘dawn raid’), to search premises, to question individuals, to request for information and to impose fines in the event undertakings do not cooperate with an investigation in a duly manner.

Also EU and national (of the Member States) courts are competent to apply (EU) competition law. Therefore, an infringement of competition law can be established by the EC, NCA’s, EU courts and national courts.

1.4. *Set-up document*

This document is structured as follows:

- Chapter 2, ‘Competition law in general’, contains a brief and general introduction to competition law. This should enable the reader to place the rules into the right perspective.
- Chapter 3, ‘The cartel prohibition’, provides an in-depth explanation of the cartel prohibition and the general conditions for its application.
- Chapter 4, ‘Exceptions to the application of the cartel prohibition’, sets out which exceptions may apply to cooperation that *prima facie* falls under the scope of the cartel prohibition.
- Chapter 5, ‘Bottlenecks in cooperation in logistics: exchange of information’, describes the potential risks involved with the exchange of information that takes place in the context of cooperation in the logistics supply chain. This chapter should enable the reader to verify whether and when information exchange may raise concerns.

⁸ Often under a leniency policy. The EC leniency policy can be found via <<http://ec.europa.eu/competition/cartels/leniency/leniency.html>> [last consulted on 12 December 2017]. Many NCAs also adopted a leniency policy.

⁹ The EC derives its investigative powers from Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 001, 4 January 2003, p. 1-25.

- Chapter 6, 'Solution to prevent exchange commercially sensitive information: Trustee model', the central role of the trustee is addressed. A Trustee Model as the one used in NexTrust, can serve as a solution to potential information exchange issues.
- Chapter 7, 'Bottlenecks in cooperation in logistics: joint purchasing and other agreements', deals with the possible other bottlenecks in cooperation that take the form of joint purchasing and subcontracting.
- The last chapter of this document, chapter 8, offers some concluding remarks and recommendations for cooperation in logistics.

1.5. Takeaways for NexTrust

This document aims to offer both a thorough overview of the relevant aspects of competition law for cooperation in logistics, as well as practical examples, suggestions and notes for undertakings that actually are or will be involved in cooperation in logistics. The practical examples, suggestions or notes are mentioned as 'Takeaways for NexTrust' throughout this document.

1.6. Accountability

In accordance with the Grant Agreement covering the NexTrust project and the general terms and conditions of KKL, KKL declares that it has not been involved as a legal advisor or lawyer for any NexTrust participant directly in project related matters. This document does not serve as legal advice in a particular situation or case. Undertakings themselves are responsible for compliance with competition law and all other applicable rules and legislation, and are advised to seek appropriate legal advice in order to safeguard such compliance.

2. An introduction to competition law

This chapter provides a brief and general introduction into competition law, its objective and the importance to always assess both the legal framework and economic circumstances in which a cooperation takes place.

2.1. *The theory behind competition law and its objective*

Competition law is an instrument to protect the structure of the market and the process of fair competition, thereby maximising consumer welfare. By achieving allocative and productive efficiency, the benefits of competition should entail lower prices, better and more innovative products, a wider choice for consumers and greater efficiency.¹⁰ As the aforementioned benefits are actually achieved by a process of competition, it has been ruled by the ECJ that the objective of competition law is not only the protection of consumer welfare or the interests of competitors, but the protection of the structure of the market and thus competition as such.¹¹

Considering the foregoing, it is advisable to parties engaging in cooperation to always apply the competition rules while bearing in mind the ultimate objective of the competition rules.

2.2. *The importance of economics in competition law*

In the course of the years, the application and enforcement of competition law in the EU shifted from a fairly formalistic approach to a more flexible one where the role of economics cannot be underestimated.¹² Competition law should only be enforced where a particular practice could lead to significant harmful effects to the competitive process. Generally, the extent of any (potential) harm is usually related to the degree of market power that undertakings have on the market. Each practice that is believed capable of harming, restricting or lessening competition should therefore be assessed in its economic context.¹³

2.3. *The importance of a properly defined relevant market*

The definition of the relevant market serves as the starting point for every analysis of the (potential) competitive constraints of a cooperation.

Defining the relevant market should, in the first place, enable undertakings to assess whether two or more undertakings can be considered (potential) competitors. When undertakings are not active on

¹⁰ Whish & Bailey 2015, p. 4/5.

¹¹ ECJ 4 June 2009, C-8/08 (T-Mobile), par. 38.

¹² It must be noted, though, that in certain circumstances the EC and the ECJ do take a more formalistic approach. This is the case for certain types of practices or agreements of which experience has shown that they will always have a negative (economic) impact on competition and therefore should be prohibited. This will be further discussed in the next chapters.

¹³ Whish & Bailey 2015, p. 1/3.

the same product market, then in principle they cannot be considered competitors.¹⁴ Whether parties can be considered competitors or not determines the applicable assessment framework for the assessment of their behaviour.

Once the relevant market is correctly defined, undertakings are able to calculate their individual market shares. This is relevant e.g. to determine whether certain (block) exemptions to the cartel prohibition can be relied upon or invoked, as some exceptions are only applicable if certain market share thresholds are not exceeded (see the next chapters). Moreover, based on the scope of the relevant market, parties are better equipped to assess the (possible) economic effects of their behaviour on that market.¹⁵

The EC has developed guidelines for the definition of the relevant market (or markets), i.e. the ‘Notice on the definition of the relevant market for the purpose of Community competition law’¹⁶ (hereinafter referred to as ‘**Notice relevant market**’). The Notice relevant market provides a conceptual framework for market definition and offers techniques that may be used to define the relevant market. The case law of the ECJ and EC decisions have further clarified how to define the relevant market in specific cases.

The definition of the relevant market consists of a product dimension and a geographic dimension, which can - in short - be described as follows:

- The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use.¹⁷
- The relevant geographic market comprises the area in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.¹⁸

As explained by the EC, “[b]asically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products services and of geographic location of suppliers.”

As there is no such thing as a ‘general market definition’, defining the relevant market requires a case-by-case assessment and in many cases requires the expert opinion of an economist. Market definitions are usually made in a specific context and are dynamic - it must be taken into account

¹⁴ However, if it is likely whether an undertaking – on realistic grounds and not just as a theoretical possibility – would enter the market where another undertaking is already active and will undertake, within a short period of time, the necessary additional investments or other necessary costs to successfully enter such market with an economically viable strategy and start to compete with established undertakings, then undertakings are considered potential competitors.

¹⁵ The appreciability of a restriction of competition is relevant for the application of the cartel prohibition (see chapter 3). Whish & Bailey 2015, p. 29.

¹⁶ EC Notice on the definition of the relevant market for the purposes of Community competition law, Official Journal C 375, 9 December 1997, p. 5-13.

¹⁷ Notice relevant market, par. 7.

¹⁸ Idem, par. 8.

that markets may evolve. Market definitions in previous cases may therefore serve as a starting point, but must not automatically be relied on.

3. The cartel prohibition

This chapter offers a general overview of the cartel prohibition and should enable the reader to make a first assessment whether the cartel prohibition could apply to a particular cooperation. It is emphasised that every cooperation should be analysed individually in its own (economic) context.

Article 101, paragraph 1 TFEU enshrines the cartel prohibition. This clause prohibits all agreements and concerted practices between undertakings or decisions by associations of undertakings that may affect trade between Member States and have the object or the appreciable effect the prevention, restriction or distortion of competition within the internal market. The following paragraphs set out the constitutive elements of the cartel prohibition.

Article 101, paragraph 2 TFEU stipulates that agreements, concerted practices or decisions that are caught by the first paragraph, are void and unenforceable.¹⁹ This means that these cannot be invoked by any party - not by the contracting parties and not by third parties.²⁰

In article 101, paragraph 3 TFEU the conditions for a so-called 'individual exception' to the cartel prohibition: agreements, concerted practices and decisions that are caught by the cartel prohibition are nevertheless allowed if they fulfil all four conditions mentioned in that clause. This requires an individual assessment which involves a balancing act between the (economic) efficiencies of a restriction of competition and its negative effects on competition.²¹

Conduct caught by the cartel prohibition can also be exempted if the conditions of a block exemption (as defined in so-called Block Exemption Regulations, hereinafter 'BER' or 'BERs') are satisfied.

Chapter 40 will discuss in more detail the individual exception as well as the BERs that are relevant to cooperation in logistics will be discussed more in detail. First, the five cumulative elements of the cartel prohibition are explained below.

3.1. Introduction to the constitutive elements of article 101, paragraph 1 TFEU

Article 101, paragraph 1 TFEU contains five conditions that have to be met in order for an undertaking to violate the cartel prohibition. The conditions are cumulative, which means that if one condition is not met, the cooperation falls outside the scope of article 101 TFEU. These five conditions are:

- the cooperation must involve two or more undertakings (paragraph 3.2);
- cooperating in the form of an agreement, concerted practice or decision of an association of undertakings (paragraph 3.30);
- the cooperation has the object or effect the prevention, restriction or distortion of competition within the internal market (paragraph 3.4);

¹⁹ Whether the infringement of the cartel prohibition means that an entire agreement is void, depends on whether the part or clause that infringes the cartel prohibition can be separated from the agreement as a whole. ECJ 30 June 1966, 56/65 (Société Technique Minière), *Jur.* 1966/00235, p. 250.

²⁰ ECJ 13 July 2006, C-295/04 (Manfredi), par. 57.

²¹ Jones & Sufrin 2014, p. 124/125.

- the cooperation should prevent, restrict or distort competition appreciably (paragraph 3.5); and
- the cooperation may affect the trade between Member States (paragraph 3.6).

3.2. Undertakings

At least two ‘undertakings’ must be involved as the first element of article 101 TFEU.²²

The ECJ²³ has defined the term undertaking as “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”.²⁴ Performing an economic activity is the key condition in this definition. An economic activity is defined by the ECJ as “any activity consisting in offering goods and services on a given market”.²⁵ This can also be done by individuals (e.g. self-employed persons and/or professionals, such as veterinarians or lawyers).

It is not relevant where the entity is located, as long as it is active on the European market, which includes both the EU and the European Economic Area, and its activities have an effect there.

3.2.1. The concept of a single economic entity

Two or more legally separate entities may be treated as a single undertaking under the competition rules, if their relationship justifies seeing them as one single economic entity or unit.²⁶ This follows from the ‘single economic entity’-doctrine as developed in ECJ case law. If two or more legal entities can be regarded as one single economic entity (i.e. one and the same ‘undertaking’), agreements between them are generally considered an internal matter (to which the cartel prohibition does not apply).²⁷

Under the single economic entity-doctrine, parent companies and subsidiaries may be considered the same undertaking, based on the economic, organisational and legal links between the legal entities. Depending on those links, it can be considered that “the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.”²⁸ There is a legal presumption that such links exist in case of a 100% shareholding.²⁹ It is then presumed that a 100% subsidiary does not act independently and that the parent company actually exercises decisive influence with respect to its

²² Unilateral behaviour of one single undertaking falls outside the scope of article 101 TFEU. Article 102 TFEU may apply however to such behaviour in case of a dominant undertaking.

²³ The case law of the ECJ is leading. National legal definitions of an undertaking are not relevant for the competition law assessment.

²⁴ ECJ 23 April 1991, C-41/90 (Höfner), par. 21.

²⁵ ECJ 16 June 1987, 118/85 (EC v Italy), par. 7, ECJ 18 June 1998, C-35/96 (EC v Italy), par. 36.

²⁶ ECJ 10 September 2009, C-97/08 P (AkzoNobel), par. 56 and ECJ 11 April 2013, C-440/11 P (Portielje), par. 36.

²⁷ Note that article 102 TFEU (on abuse of dominance) may still apply, but only if there is a dominant position on a particular market and if that undertaking is abusing that dominant position.

²⁸ ECJ 10 September 2009, C-97/08 P (AkzoNobel), par. 58 and 72 and ECJ 26 September 2013, C-172/12 P (El du Pont de Nemours), par. 41.

²⁹ ECJ 10 September 2009, C-97/08 P (AkzoNobel), par. 58. A 100% parent company can rebut this presumption, by proving that its subsidiary has actually decided independently upon its own conduct on the market. The standard of proof for such rebuttal is however very high.

commercial policy. The parent company and its subsidiary are then considered one and the same undertaking for competition law purposes.³⁰

It must be noted that also in case a parent company is not a 100% (or almost 100%) shareholder, the parent and its subsidiary may still form a single economic entity if it is established that the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those legal entities.

It is important to note that in case of a single economic entity, the parent company is also liable for the activities of the subsidiary.

Takeaway for NexTrust

As concerns cooperation in logistics and specifically NexTrust and its pilot cases, all participants are offering goods and/or services on a market within the EU. It is therefore assumed that in principle all participants qualify as undertakings.

3.3. An agreement, concerted practice or decision by an association of undertakings

Undertakings can cooperate in different ways. The cartel prohibition applies to any cooperation in the form of an agreement, a concerted practice or by means of a decision of an association of undertakings. Below, these terms will be explained.³¹ It must be noted that these terms, in particular the term ‘concerted practice’, are interpreted so broadly that a cooperation will in principle always fulfil this criterion. Moreover, it does not matter whether cooperation takes place in a horizontal or vertical relation.

3.3.1. Agreement

An agreement exists where (i) two or more undertakings are involved, and (ii) the undertakings have reached consensus. In this respect, it is “*sufficient if the undertakings in question [should] have expressed their joint intention to conduct themselves on the market in a specific way.*”³²

³⁰ It is irrelevant whether the parent company is engaged in an economic activity itself or whether it is ‘just’ a holding company. ECJ 11 April 2013, C-440/11 P (Portielje), par. 43. National definitions of agreements are irrelevant for the assessment whether a cooperation qualifies as an agreement under competition law.

³² GC 17 December 1991, T-7/89 (SA Hercules Chemicals v. EC) par. 256 and Jones & Sufrin 2014, p. 164.

There has to be “a concurrence of wills”.³³ There is no legal requirement that the agreement should be in writing³⁴ or that it must be legally enforceable. The ECJ has qualified many different types of arrangements as agreements³⁵, including gentlemen’s agreements.³⁶

3.3.2. *Concerted practice*

The term ‘concerted practice’ serves as a safety net in the event that the existence of an agreement cannot be proven. To prove a concerted practice, three elements must be demonstrated: (i) alignment between undertakings, (ii) subsequent market behaviour and (iii) a causal link between the alignment and the specific market behaviour.³⁷

If these conditions are fulfilled, undertakings are considered to have aligned their market behaviour and in doing so, removed the uncertainty about future behaviour of themselves and/or their competitor(s).³⁸ Concerted practices can take place in different forms, e.g. via one or more meetings during which certain topics are discussed, other forms of contact, or via signalling, but also via a third party (such as an advisor or a trustee).

3.3.3. *Decision of an association of undertakings*

A decision of an association of undertakings can be caught by the cartel prohibition as well. Otherwise, undertakings could easily avoid the scope of the cartel prohibition by agreeing on certain anticompetitive practices via an association of undertakings.

An association qualifies as an association of undertakings when its members are undertakings. The association itself is not required to qualify as an undertaking and its legal form is irrelevant.³⁹

The term ‘decision’ is broadly interpreted. It is irrelevant in what form a decision is made or whether a decision is legally binding on members.⁴⁰

An association of undertakings could facilitate a cartel, for example, by deciding or recommending that every member undertaking should calculate a particular price or behave in a certain way, especially in cases where such decision or recommendation is actually implemented by the members.

Takeaway for NexTrust

In general, it is considered highly unlikely that this criterion of the existence of ‘an agreement, a decision by an association of undertakings or a concerted practice’ will not be fulfilled in case of a logistics cooperation. As concerns NexTrust and its pilot cases, it is most likely that cooperation will qualify as an agreement, but depending on how a specific cooperation is designed it could also qualify as concerted practice or a decision of an association of undertakings.

³³ GC 26 October 2000, T-41/96 (Bayer v. EC) par. 69.

³⁴ GC 20 March 2002, T-9/99 (HFB Holding), par. 199-200.

³⁵ Whish & Bailey 2015, p. 104-105.

³⁶ ECJ 20 January 2016, C-373-14 P (Toshiba).

³⁷ ECJ 8 July 1999, C-49/92 P (Anic), par. 118.

³⁸ ECJ 14 July 1972, 48, 49 and 51 till 57/69 (Dyestuffs), par. 64

³⁹ ECJ 19 February 2002, C309/99 (Wouters), par. 50-71.

⁴⁰ ECJ 17 October 1972, 8/72 (Vereeniging van Cementhandelaren), par. 21-24.

3.4. Restriction of competition

A cooperation only falls within the scope of the cartel prohibition if it has either the object or effect to prevent, restrict or distort competition. The cooperation must thus be ‘anticompetitive’. It is important to make a distinction between so-called ‘restrictions by object’ and ‘restrictions by effect’. This distinction is based on the fact that “*certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.*”⁴¹

3.4.1. Restriction by object

If an agreement, concerted practice or a decision by an association of undertakings can be qualified as an object restriction, it is not necessary to demonstrate that it has adverse *effects* on competition.⁴²

Because of the drastic consequences of the qualification as an object restriction, it is very important to know when certain behaviour is qualified as such. The test for qualifying object restrictions is formulated by the ECJ in its case law and entails a context analysis, where regard must be had to the content of the agreement, its objectives and the economic and legal context. When determining such context, it is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.⁴³ In its judgment *Cartes Bancaires*⁴⁴, the ECJ ruled that the term ‘object restriction’ should be interpreted and applied very restrictively.⁴⁵ This implies that the drastic consequences of the qualification of an object restriction should only be reserved for obvious and clear restrictions of competition.

The following arrangements are generally considered to have as their object the restriction of competition:

- to fix prices;
- to exchange (commercially sensitive) information that reduces uncertainty about future market behaviour;
- to share markets or customers;
- to limit output or sales;
- collective exclusive dealing;
- to pay competitors to delay entry of competing products.⁴⁶

⁴¹ ECJ 20 November 2008, C-209/07 (BIDS), par. 17.

⁴² ECJ 16 June 1965, joined cases C-56/64, C-58/64 (Consten and Grundig), ECJ 20 November 2008, C-209/07 (BIDS) par. 15/16, ECJ 6 October 2009 and C-501/06 P (GlaxoSmithKline) par. 55. ECJ 14 March 2013, C-32/11 (Allianz Hungária) par. 36, ECJ 11 September 2014, C-67/13 (Cartes Bancaires) par. 53.

⁴⁴ ECJ 11 September 2014, C-67/13 (Cartes Bancaires).

⁴⁵ Idem, par. 58.

⁴⁶ Whish & Bailey 2015, p. 132.

Specifically as regards vertical cooperation (for example between shippers and LSPs, or shippers and resellers), undertakings should furthermore avoid agreements:

- to impose fixed or minimum resale prices;
- to impose (specific) export bans;
- certain territorial or customer restrictions.

This list can be referred to as the 'object box'.⁴⁷ It is not exhaustive, but may nevertheless give an idea of which type of arrangements should surely be avoided. The EC has also given guidance on which behaviour it qualifies as an object restriction in its policy documents.⁴⁸

3.4.2. *Restriction by effect*

If a cooperation cannot be qualified as an object restriction, the actual and potential anticompetitive effects must be demonstrated to establish an infringement of the cartel prohibition. The assessment of an effect restriction takes place on a case-by-case basis. Anticompetitive effects are likely to occur where parties, individually or collectively, have or obtain market power.⁴⁹ Often an extensive economic analysis of the arrangements in the market context is required.⁵⁰ The importance of such an extensive analysis has been stressed by the ECJ on several occasions.⁵¹

To determine the restrictive effect of an agreement, it is necessary to consider what the situation would have been in the absence of the agreement (a so-called *counterfactual* analysis).⁵² The possibility that an agreement might affect *potential* competition in a certain market must also be taken into account, although such should be realistic and not mere theoretical or speculative.⁵³

Takeaway for NexTrust

Whether a cooperation entails a restriction of competition must be assessed on a case-by-case basis, taking into account *inter alia* the content the arrangements made, the objectives and the economic and legal context in which a cooperation is implemented.

⁴⁷ King 2011, p. 269-296 and King 2015.

⁴⁸ See in particular the EC Staff Working Document - Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the *De Minimis* Notice, SWD(2014) 198 final.

⁴⁹ Communication from the EC - Guidelines on the application of Article 81(3) of the Treaty, Official Journal No C 101 of 27 April 2004, par. 25. The degree of market power required for a restriction by effect is however less than required for a finding of dominance under the prohibition on abuse of dominance (article 102 TFEU, which will not be dealt with in this report). Dominance might be established at a market share between 40-50%, but requires a substantial market analysis. There is a presumption of dominance at a market share above 50%.

⁵⁰ ECJ 28 February 1991, C-234/89 (*Delimitis v. Henninger Bräu AG*), par. 13.

⁵¹ ECJ 12 December 1967, 23/67 (*Brasserie De Haecht v. Wilkin*), ECJ 28 May 1998, C-7 and 8/95 P (*John Deere v. EC*), par. 76 and 91, ECJ 21 January 1999, C-215 and 216/96 (*Bagnasco*), par. 33, ECJ 28 January 2013, C-1/12 (*Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência*), par. 70 and Whish & Bailey 2015, p. 133.

⁵² GC 2 May 2006, T-328/03 (*O2 (Germany) v. EC*) par. 65 et seq.

⁵³ GC 8 September 2016, T-472/13 (*Lundbeck v. EC*), par. 99-100, 104.

3.5. *An appreciable effect on competition*

The requirement of an appreciable effect on competition cannot be found in the text of article 101, paragraph 1 TFEU, but follows from ECJ case law.⁵⁴ The ECJ ruled that an agreement falls outside the cartel prohibition when it has only an insignificant effect on the market(s), taking into account the weak position which the undertakings concerned have on the market of the product in question.⁵⁵ Restrictive arrangements could thus fall outside the scope of the cartel prohibition when a cooperation will not have an appreciable effect on competition. The market shares of the undertakings involved are the primary instrument to determine whether an agreement has or could have an appreciable effect on competition.⁵⁶

The EC has clarified in its *De Minimis* notice⁵⁷ that cooperation in horizontal relations is in principle deemed not to appreciably restrict competition if the *aggregate* market share held by the parties to the cooperation does not exceed 10% on any of the relevant markets affected by the agreement. For vertical cooperation, an *individual* market share threshold of 15% is applied by the EC.

For object restrictions, however, an appreciable effect is deemed to exist, irrespective of the parties' market shares.⁵⁸

Takeaway for NexTrust

Whether cooperation between NexTrust participants has an appreciable effect on competition will have to be assessed on a case-by-case basis, taking into account the qualification of the agreement, concerted practice or decision by an association of undertakings as a restriction by object (always appreciable) or effect (depending on market shares of the parties involved).

3.6. *Effect on trade between Member States*

If all previous conditions are met but there is no effect on trade between Member States, the cooperation does not fall within the scope of the European cartel prohibition.⁵⁹

A cooperation is considered to have an effect on interstate trade if it is "*possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of*

⁵⁴ ECJ 9 July 1969, 5/69 (Völk v. Vervaecke).

⁵⁵ ECJ 9 July 1969, 5/69 (Völk v. Vervaecke), par. 5-7.

⁵⁶ In the *Bagnasco* judgment (ECJ 21 January 1999, C-215 and 216/96 (Bagnasco)), the ECJ held that the agreement concerned did not restrict competition appreciably on the basis of a weak market position, but on the basis of other (substantive) factors. This however is an exceptional case.

⁵⁷ Communication from the EC – Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the treaty on the Functioning of the European Union (*De Minimis* Notice), Official Journal C 291, 30 August 2014.

⁵⁸ ECJ 13 December 2012, C-226/11 (Expedia), par. 37.

⁵⁹ This does not exclude the possible applicability of a national cartel prohibition. ECJ 31 May 1979, 22/78 (Hugin Kassaregister). In fact, it is most likely that national competition law applies.

*trade between Member States.*⁶⁰ In this respect, every economic activity, establishment of an undertaking included, is considered ‘trade’.⁶¹ It should be noted that generally in practice an effect on trade between Member States is quite easily assumed.

The EC takes the view that agreements in principle cannot appreciably restrict interstate trade where the combined aggregate market share of the parties involved does not exceed 5% and (for horizontal cooperation) the relevant turnover of the parties achieved by the agreement does not exceed EUR 40 million.⁶²

Takeaway for NexTrust

Cooperation in logistics, especially under the flag of a NexTrust pilot case, often involve cross-border elements and will therefore generally have an effect on trade between Member States.

⁶⁰ ECJ 30 June 1966, 56/65 (Société Technique Minière), par. 249.

⁶¹ ECJ 14 July 1981, 172/80 (Züchner), par. 80.

⁶² EC notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, Official Journal C 101, 27 April 2004, par. 57.

4. Exceptions to the application of the cartel prohibition

Not all forms of cooperation that fall within the scope of the cartel prohibition are prohibited. In specific cases and under strict conditions, agreements that restrict competition can be (block) exempted from the cartel prohibition (by a BER) or may be economically (individually) justified. This chapter provides guidance on the framework applicable to such exceptions, specifically where relevant to the NexTrust project.

Some groups or types of agreements are generally considered to have great positive economic effects. Therefore, special regulations (BERs) have been made which offer a so-called safe haven: when an agreement fulfils all conditions of a BER, then such agreement falls outside the scope of the cartel prohibition, despite the fact that it may have restrictive effects. It must be noted as a preliminary remark however that certain object restrictions are explicitly excluded from the scope of BERs.⁶³

There are BERs for cooperation both in horizontal and vertical relations. These relevant BERs will be discussed in paragraphs 4.1 and 4.2 respectively. There is a specific BER for the transport sector (hereinafter referred to as '**Transport BER**'), which will be discussed separately in paragraph 4.3, as this BER may be of particular relevance to cooperation in logistics.⁶⁴

If an agreement cannot profit from a BER, it must be assessed whether that agreement fulfils the four cumulative conditions of article 101, paragraph 3 TFEU. This individual exception to the cartel prohibition is discussed in paragraph 4.4.

4.1. *Block exemptions for horizontal cooperation*

A cooperation is considered horizontal when two or more (potential) competitors are involved. Undertakings are considered competitors when they are active on the same product market.⁶⁵ For example, a cooperation between car manufacturers is horizontal because they are both active in the field of manufacturing cars. Cooperation between non-competitors, for example, between two undertakings active in the same product markets but in different geographic markets without being potential competitors, is also considered horizontal.⁶⁶ Horizontal cooperation may, for instance, take the form of the joint purchase or joint production of specific products and/or services.

Cooperation in a horizontal setting is generally considered to involve risks for competition. It is therefore important to take a cautious approach when developing horizontal cooperation and to analyse the potential positive and negative effects on competition on a case-by-case basis.

⁶³ BERs generally exclude so-called 'hardcore restrictions' from the scope of BER. The term 'hardcore restriction' is only used by the EC for policy and guidance purposes and by several authors. In practice there is little to no difference between the terms 'hardcore restriction' and 'object restriction'.

⁶⁴ Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway, Official Journal L 61 of 5 March 2009, p. 1-5.

⁶⁵ Communication from the EC, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Official Journal C11, 14 January 2011, p. 1, par. 1.

⁶⁶ Idem.

Especially where the (collective) market power of the undertakings involved would increase as a result of the cooperation, such is generally considered to have negative effects on prices, product quantity, product quality, diversity and innovation, thus being harmful to competition.⁶⁷

Horizontal cooperation can, nevertheless, have procompetitive effects, e.g. if the undertakings bundle (complementary) activities, skills or assets which enables them to share risks, to save costs or to invest in R&D, which may have a positive effect on the quality of the products and a price-lowering effect.⁶⁸

Therefore, horizontal cooperation is not per se forbidden and certain categories of horizontal cooperation agreements are even explicitly allowed. The EC has introduced several BERs that allow horizontal agreements to be exempted from the cartel prohibition, if the conditions in those BERs are fulfilled. In addition, the EC has published its Guidelines on the applicability of article 101 TFEU to horizontal co-operation agreements (hereinafter referred to as “**Horizontal Cooperation Guidelines**”⁶⁹), which provide guidance on the analytical framework applied by the EC for the most common types of horizontal cooperation, including those covered by the BERs, such as joint production, R&D cooperation, joint purchase, commercialisation and standardisation agreements.

The relevant BERs relate to categories of specialisation agreements (the ‘**Specialisation BER**’)⁷⁰, research and development agreements (the ‘**R&D BER**’)⁷¹ and to technology transfer agreements (hereinafter referred to as ‘**Technology Transfer BER**’).⁷² All BERs include market share thresholds which may not be exceeded by the undertakings involved in order to profit from the block exemption. The height of the market share threshold depends on the BER. For instance, the market share threshold for specialisation agreements in the Specialisation BER is 20% as a total aggregate market share of all parties involved in the specialisation agreement.

Furthermore, most BERs explicitly list a number of so-called ‘hardcore restrictions’, such as arrangements on prices, market sharing or customer allocation. In the event such restrictions are part of the cooperation, that BER does not apply.

In the event that the specific conditions of a particular BER cannot be fulfilled, a cooperation may still be permissible under the competition rules, but a case-by-case assessment (under article 101, paragraph 3 TFEU) is required. Paragraph 4.4 further explains the individual exception.

⁶⁷ Communication from the EC, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Official Journal C11, 14 January 2011, p. 1, par 3.

⁶⁸ Idem, par 2.

⁶⁹ Communication from the EC, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Official Journal C 11, 14 January 2011, p. 1.

⁷⁰ EC Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories specialisation agreements, Official Journal L 335 of 18 December 2010, p. 43-47.

⁷¹ EC Regulation (EU) No 1217/2010 of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, Official Journal L335 of 18 December 2010, p. 36-42.

⁷² EC Regulation (EU) No 316/2014 of 21 March 2014 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union tot categories of technology transfer agreements, Official Journal L 93 of 28 March 2014, p. 17-23.

4.2. Block exemption for vertical cooperation

Another BER applies to vertical cooperation agreements as defined in the general BER for vertical cooperation agreements (the '**Vertical BER**')⁷³: *“an agreement or concerted practice entered into between two or more undertakings each of which operates at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.”*⁷⁴

Typical vertical agreements relate to the supply and purchase of goods and/or services, distribution, agency and franchise. Also agreements on the rental or processing of goods may fall under the scope of the Vertical BER.⁷⁵

Just like horizontal agreements, vertical agreements can have both procompetitive and anticompetitive effects. Unlike horizontal agreements, vertical agreements are generally considered to have procompetitive effects, as vertical cooperation implies that every undertaking in the chain is able to focus and specialise on its own activities in the chain (for example on production, distribution or marketing) which is presumed to generate efficiencies, such as positive effects on prices, product quantity, quality, diversity or innovation. It is for this reason that the Vertical BER provides a *general* exemption for *all* vertical agreements, providing a *safe haven* for all vertical agreements (provided that the conditions stipulated in the Vertical BER are met).

On the other hand, it is also possible that a vertical cooperation agreement has anticompetitive effects. The risks for competition of vertical agreements are – generally – the exclusion of other (potential) suppliers or other buyers and the obstruction or hindering of market entrance, the weakening of competition and facilitation of collusion between a supplier or buyer and its competitors, and the fixing of (retail) prices.⁷⁶ Such risks are present, for instance, in case a supplier supplies its goods or services on an exclusive basis to a distributor, or when the supplier demands that a distributor exclusively buys from that supplier. These types of agreements can be problematic (due to risks of foreclosure) in the event one of the parties has a strong position on the market.

In order to profit from the Vertical BER, the individual market shares of the undertakings involved may not exceed 30% of the relevant market. In addition, if the cooperation contains hardcore restrictions (as described in article 4 Vertical BER), the *entire* agreement falls outside the scope of the Vertical BER. This means that the cooperation as a whole is not exempted and may be prohibited by article 101 TFEU.

Besides hardcore restrictions, there are various other vertical restraints listed in the Vertical BER which are considered harmful, but less serious than hardcore restrictions.⁷⁷ If such restrictions are

⁷³ EC Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, Official Journal L 102, 23 April 2010, p. 1–7.

⁷⁴ Idem, article 1(a).

⁷⁵ EC Notice - Guidelines on Vertical Restraints, Official Journal C 130, 19 May 2010, p. 1, par. 26.

⁷⁶ Communication from the EC – Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the treaty on the Functioning of the European Union (De Minimis Notice), Official Journal C 291, 30 August 2014, p. 1, par. 100.

⁷⁷ Vertical BER, article 5.

included in the cooperation agreement, result in the individual restriction only - instead of the whole agreement - to fall outside the scope of the block exemption.

The EC's Guidelines on Vertical Restraints⁷⁸ offer guidance on the applicable assessment framework for the Vertical BER.

In the event that a cooperation cannot profit from the Vertical BER, a case-by-case assessment is required to determine whether the cooperation is prohibited under the cartel prohibition or whether it could be individually justified. Paragraph 4.4 below further elaborates on the individual exception which is laid down in article 101, paragraph 3 TFEU.

4.3. *Block exemption for the transport sector*

The Transport BER provides an exemption for both horizontal and vertical cooperation in the field of rail, road and inland waterway transport. Cooperation in this field is exempted from the cartel prohibition, to the extent necessary for the intended cooperation.⁷⁹ The idea behind the Transport BER is that cooperation in these fields of transport contributes to increased productivity.

As a preliminary remark, it is important to note that there is very little case law and precedents related to the Transport BER. This creates at least some uncertainty about whether and when the Transport BER can be relied upon in practice. It is generally advised to take a cautious approach when assessing whether a cooperation may exempted under the Transport BER.

The Transport BER applies to agreements, decisions and concerted practices having their object or effect:

- the fixing of transport rates and conditions;
- the limitation or control of the supply of transport;
- the sharing of transport markets;
- the application of technical improvements or technical cooperation; or
- the joint financing or acquisition of transport equipment or suppliers.⁸⁰

It is required that such operations are directly related to the provision of transport services and are necessary for the joint operation of services by a grouping of transport undertakings that qualify as small and medium-sized undertakings. The Transport BER also applies to operations of providers of services ancillary to transport which have any of these objects or effects.

The Transport BER provides for two exemptions.

⁷⁸ Guidelines on Vertical Restraints, Official Journal C 130 of 19 May 2010, p. 1-46.

⁷⁹ For more background information on railway specific regulation in relation to competition law, for instance the liberalisation measures in the railway sector and the Single European Railway Area, see Bellamy & Child 2015, nrs. 12.170-173 and <http://eur-lex.europa.eu/summary/chapter/transport/3203.html?root=3203>.

⁸⁰ Transport BER, article 1.

First, the Transport BER exempts from the cartel prohibition (purely) technical agreements, which apply technical improvements or achieve technical cooperation. The exempted agreements are listed in the Transport BER⁸¹ and concern:

- a) the standardisation of equipment, transport supplies, vehicles or fixed installations;
- b) the exchange or pooling, for the purpose of operating transport services, of staff, equipment, vehicles or fixed installations;
- c) the organisation and execution of successive, complementary, substitute or combined transport operations, and the fixing and application of inclusive rates and conditions for such operations, including special competitive rates;
- d) the use, for journeys by a single mode of transport, of the routes which are most rational from the operational point of view;
- e) the coordination of transport timetables for connecting routes;
- f) the grouping of single consignments;
- g) the establishment of uniform rules as to the structure of tariffs and their conditions of application, provided such rules do not lay down transport rates and conditions.

This exception seems quite generous. It is however not very clear to which extent it can be relied upon. The EU case law on the Transport BER is already scarce, and moreover it follows from such case law that this first exception must be interpreted very restrictively. Reference is made to the judgment of the GC in *Deutsche Bahn v. EC*⁸² in which the GC ruled that the disputed agreement could not profit from the BER. The ruling of the GC only gives some guidance on how to interpret the type of agreement specified under article 2 sub c of the Transport BER and more specifically the terms 'inclusive rates' and 'competitive rates'.

Second, the Transport BER also offers a general exemption for groups of small and medium-sized transport undertakings (measured by the carrying capacity), for agreements, decisions and concerted practices concerning:⁸³

- the constitution and operation of groupings of road or inland waterway transport undertakings with a view to carrying on transport activities; or
- the joint financing or acquisition of transport equipment or supplies, where these operations are directly related to the provision of transport services and are necessary for the joint operations of the aforesaid groupings.

⁸¹ Transport BER, article 2, paragraph 1. The EC may submit proposals to extend or reduce the list of agreements covered by the Transport BER (Article 2, paragraph 2, Transport BER).

⁸² In this case Deutsche Bahn relied upon the previous version of the Transport BER, Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway, Official Journal L 175 of 23 July 1968. The provision then invoked has not changed though.

⁸³ Transport BER, article 3, paragraph 1.

This exception is only applicable if the total carrying capacity of any grouping does not exceed the amounts explicitly stipulated in the Transport BER.⁸⁴ In addition, the EC can require the undertakings to make sure that the implementation and effects of these types of agreements are compatible with the conditions of individual exception of article 101, paragraph 3 TFEU.⁸⁵

Takeaway for NexTrust

Unfortunately, due to the lack of clarifying case law, the practical relevance of the exceptions of the Transport BER remains unclear. This brings along considerable risks for undertakings when relying on the Transport BER. Therefore, it is advised to take a cautious approach when assessing whether the Transport BER applies to a cooperation. It may be easier to first assess whether a cooperation can rely on another BER and/or assess whether it is realistic to meet the conditions of article 101, paragraph 3 TFEU.

4.4. The individual exception of article 101, paragraph 3 TFEU

Cooperation agreements that do not fulfil the conditions of a BER, can still be exempted from the cartel prohibition on an individual basis. Article 101, paragraph 3 TFEU provides for an individual exception, for which it must be established that the procompetitive effects of an agreement outweigh the anticompetitive effects. In order for this exception to apply, undertakings have to self-assess whether all (cumulative) conditions of article 101, paragraph 3 TFEU are met:

- 1) the cooperation contributes to improving the production or distribution of goods or contributes to promoting technical or economic progress;

and
- 2) consumers must be allowed a fair share of the resulting benefit;

and
- 3) the cooperation does not impose restrictions which are not indispensable;

and
- 4) the cooperation does not eliminate all competition in respect of a substantial part of the products in question.

⁸⁴ Transport BER, article 3, paragraph 1. I.e. 10,000 metric tons in the case of road transport (where the individual capacity of each undertaking involved shall not exceed 1,000 metric tons); and 500,000 metric tons in the case of transport by inland waterway (where the individual capacity of each undertaking involved shall not exceed 50,000 metric tons).

⁸⁵ Transport BER, article 3, paragraph 2.

The Guidelines on the application of Article 101, paragraph 3 TFEU⁸⁶ and also the Horizontal Cooperation Guidelines offer guidance on how to apply the four cumulative conditions in a specific case and how to perform such a case-by-case assessment. It must be noted however that in the case of hardcore restrictions, which often qualify as object restrictions, it is generally considered unlikely that such restriction can be excepted under article 101, paragraph 3 TFEU.⁸⁷

4.4.1. Sustainability under article 101, paragraph 3 TFEU

The NexTrust project aims to organise logistics in a more efficient and sustainable way. In case a cooperation purely aims at increasing sustainability, e.g. by reducing GHG emissions, but also restricts competition and cannot profit from any BER, the question rises whether it is possible to justify such cooperation under article 101, paragraph 3 TFEU?

The question whether the enhancement of sustainability can be qualified as an efficiency gain under the individual exception (first condition), is nowadays actively debated. In competition law, usually *economic* efficiency arguments and considerations play a central role which therefore in practice leaves little to no room for other (more political) considerations of public interest, for example in case a party needs to substantiate that the cooperation leads to efficiencies within the meaning of the individual exception of article 101, paragraph 3 TFEU.⁸⁸

There are only a few precedents in which sustainability considerations (successfully) played a role under this individual exception, one of which concerns the *CEDED* decision of the EC in which the EC approved⁸⁹ an agreement between producers and importers of washing machines⁹⁰ that they would no longer market the least energy-efficient machines in the EU. Even though this agreement would restrict competition by eliminating the production of less efficient washing machines, this agreement satisfied the conditions of article 101, paragraph 3 TFEU according to the EC, because *“more efficient and technologically advanced products are likely to replace those phased out; savings on electricity bills for individual purchasers more than compensate potentially higher purchase costs; the agreement is also beneficial in reducing emissions from electricity generation and does not eliminate competition, which is vigorous in this market, as regards prices, washing performance, brand image etc.”*⁹¹

⁸⁶ Communication from the EC – Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC), Official Journal C 101 of 27 April 2004, p. 97-118.

⁸⁷ Jones & Sufrin 2014, p. 204. GC 15 July 1994, T-17/93 (Matra Hachette) and Communication from the EC - Guidelines on the application of Article 81(3) of the Treaty, Official Journal C 101 of 27 April 2004, par. 46.

⁸⁸ White Paper on modernisation of the rules implementing Articles 81 and 82 of the EC Treaty (formerly Articles 85 and 86 of the EC Treaty), Official Journal 1999 C 132, par. 56-57 and Jones & Sufrin 2014, p. 50 and 245/255.

⁸⁹ At that time, a system of ex ante approval was applied by the EC, whereas currently a system of self-assessment and ex post control by the authorities applies. Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 001 of 4 January 2003, p. 1-25, introduced the system of (mandatory) self-assessment for undertakings.

⁹⁰ EC Decision of 24 January 1999, IV.F.1/36.718 (CEDED).

⁹¹ Press release IP/00/148 of the EC of 11 February 2000 “Commission approves an agreement to improve energy efficiency of washing machines”.

It must be noted though that the cost-savings for consumers were an important element in the (economic) efficiencies of this case, and that after its CEDED-decision the EC expressly made clear that agreements that would restrict competition, but would only contribute to public, non-economic interests, without improving the production or distribution of goods or contributing to the promotion of technical or economic progress, do not fulfil the conditions of article 101, paragraph 3 TFEU.⁹² Economic efficiency considerations will according to the EC always be decisive when assessing whether an agreement fulfils the cumulative conditions of article 101, paragraph 3 TFEU.⁹³

Takeaway for NexTrust

As the NexTrust project aims to achieve efficiency gains, such as reducing GHG- and transportation costs, it is very much recommended to assess whether the efficiencies of a cooperation can outweigh the (potential) restriction of competition and thus profit from an individual exception to the cartel prohibition.

The possible benefits involved in horizontal cooperation in logistics could relate to cost reduction, growth (in terms of increased turnover or profit, or extended geographical coverage), innovation, reduce of response times, first mover advantages and/or market entrance. Horizontal cooperation may also have social goals and effects, sustainability goals such as reduction of GHG-emissions and/or shifting towards more environment-friendly transport modes. All of the NexTrust-pilot cases envisage to achieve these aspects.

As a self-assessment on the fulfilment of all four conditions of the individual exception to the cartel prohibition requires a case-by-case approach, it is advised to seek advice by legal and economic experts. Furthermore, it is advisable to carefully document a self-assessment before actually implementing the intended cooperation.

⁹² See for example EC's letter of 26 February 2016, responding to the Dutch Minister of Economic Affairs' proposed policy on how competition law should take into account sustainability considerations, accessible via <https://zoek.officielebekendmakingen.nl/blg-775505> [last time consulted on: 11 January 2018].

⁹³ Jones & Sufrin 2014, p. 50 and 254/255, Communication from the EC - Guidelines on the application of Article 81(3) of the Treaty, Official Journal No C 101 of 27 April 2004) par. 42 and GC 15 July 1994, T-17/93 (Matra Hachette), par. 139.

5. Bottlenecks in cooperation in logistics: exchange of information

Undertakings may want to exchange certain information in order to be able to cooperate and achieve (economic) efficiencies. In doing so, the undertakings involved – especially when they are (potential) competitors – may also be subject to the cartel prohibition and should be aware which information they are and are not allowed to share, and under which circumstances and with whom.

NexTrust pilot cases are set up based on a three step methodology. Especially the first two steps of this methodology, i.e. where potential business opportunities are identified and a specific business case is prepared, involve the sharing, gathering and analysing of information. It cannot be excluded that the information which is required to realise a pilot case, may relate to volumes, transport costs, terms of supply, etc. As will be explained below, such information may qualify as commercially sensitive, and the exchange of such information between (potential) competitors is likely to be prohibited under the cartel prohibition.

This chapter provides guidance on the competition law aspects of information exchange. The competition rules are applicable to exchanges of information both directly between the cooperating parties, as well as via a (trusted) third party.

The NexTrust pilot cases are built on the so-called Trustee Model, involving a third trusted party that is specifically engaged to ensure a compliant process of information gathering.

Below, paragraph 6 sets out the applicable competition law assessment framework. Paragraph 5.2 explains which content and aspects of information exchange may raise competition law concerns (i.e. which information qualifies as ‘commercially sensitive’). The different manners in which information may be exchanged are discussed in paragraph 5.3. Paragraph 5.4 illustrates when information exchange may be permissible under the competition rules. Finally, paragraph 5.5 provides practical guidance for companies involved in (potentially problematic) information exchange.

5.1. *Exchange of commercially sensitive information: applicable assessment framework*

The cartel prohibition applies to conduct by undertakings designed to remove uncertainty as to each other’s future on the market⁹⁴ or to reduce strategic uncertainty in the market thereby facilitating collusion. The sharing of information, specifically the sharing of strategic, commercially sensitive data between competitors, may under circumstances reduce the independence of competitors’ conduct on the market and diminishes their incentives to compete.⁹⁵ This is subject to the cartel prohibition if it establishes, or is part of, an agreement, a concerted practice or a decision by an association of undertakings.⁹⁶ The mere exchange of information most often qualifies as a concerted practice.

⁹⁴ ECJ 14 July 1972, C-48/69 (ICI v. EC), par. 118 and ECJ 23 November 2006, C-238/05 (Asnef-Equifax v. Ausbanc), par. 51.

⁹⁵ Horizontal Cooperation Guidelines, par. 61.

⁹⁶ Idem, par. 55 and 60.

The applicable framework for assessing whether information exchange falls within the scope of the cartel prohibition has been set out by the ECJ and GC in its case law and by the EC in its decisions and policy documents. The main rules and principles governing the exchange of information are set out by the EC in its Horizontal Cooperation Guidelines and the *De Minimis* Notice.⁹⁷ These documents explain how the cartel prohibition must be applied to information exchange. The ECJ has ruled in many cases on the (im)permissibility of information exchange, among which in the two landmark cases of *T-Mobile*⁹⁸ and *Dole (Bananas)*.⁹⁹

Takeaway for NexTrust

In principle, the sharing of certain information between (potential) competitors is problematic from a competition law perspective.

The applicable assessment framework is primarily set out in the case law of the ECJ and EC policy documents. The Horizontal Cooperation Guidelines provide parties guidance on the exchange of (potentially commercially sensitive) information.

When information is exchanged, special attention must be paid to the rather flexible definitions and subsequent application of competition law to such exchanges. Each exchange should be assessed in its own legal and economic context.

It is important to realise that two undertakings that exchange information in the context of a vertical relationship (e.g. supplier-buyer) may also be actual or (potential) competitors from a competition law point of view.

5.2. *Problematic information exchanges under competition law*

Only the exchange between (potential) competitors of information which qualifies as *commercially sensitive* is considered to have negative effects and are therefore in principle not allowed under competition law. This paragraph sets out when identifying which information is commercially sensitive.

The exchange of commercially sensitive information may present the opportunity for competitors to coordinate their market behaviour, thereby distorting competition which is generally assumed to have a negative effect on consumer welfare.¹⁰⁰ Each undertaking must independently determine its policy. With regard to this requirement of independent market behaviour, the ECJ explained that this requirement “*does not deprive economic operators to adapt themselves intelligently to the existing or anticipated conduct of competitors, but it strictly precludes any direct or indirect contact by which*

⁹⁷ Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice (PbEU 2014 C 4136).

⁹⁸ ECJ 4 June 2009, C-8/08 (T-Mobile).

⁹⁹ ECJ 19 March 2015, C-286/13 P (Dole v. EC (Bananas)).

¹⁰⁰ Horizontal Cooperation Guidelines, par. 65.

an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market.”¹⁰¹

Information concerning the (recent) past, current or future behaviour of undertakings may provide a so-called focal point that facilitates the coordination between competitors of price or output levels on a market.¹⁰² Information exchange may also enable companies to quickly determine whether competitors deviate from a coordinated strategy - and adopt correction strategies accordingly - which contributes to the internal stability of the coordinated strategy.¹⁰³

The information exchange may also indicate whether a company entering the market might be a threat to the collusive or coordinated strategy. In this way, it contributes to the external stability of the coordinated strategy as well. As a result, this may also lead to reduced possibilities for competitors to enter the market.¹⁰⁴ This may be the case for example when the information exchange provides the recipient with a significant competitive advantage over rivals in the relevant market or in a downstream market.¹⁰⁵

The above shows that the nature of the information is crucial for assessing the exchange thereof under competition law. But not only the nature of the information is relevant, also the manner in which information is exchanged is relevant when assessing the potential restrictive effects of information exchange.

5.3. *Information exchange as an object or effect restriction*

In paragraph 3.4 it was explained that it is important to distinguish between restrictions *by object* and restrictions *by effect*.

In general, agreements or conduct between competitors to fix prices, share markets, limit output or reduce capacity are regarded as restrictions by object.¹⁰⁶ In addition, the exchange of commercially sensitive information can also have the object of restricting competition.¹⁰⁷

The assessment whether an information exchange system complies with the cartel prohibition cannot be done in an abstract manner – one needs to take into account the economic conditions on the relevant markets and the specific characteristics of the information exchange itself, such as in particular its purpose, the conditions of access to and participation in it, as well as the type of

¹⁰¹ ECJ 19 March 2015, C-286/13 P (Dole v. EC (Bananas), par. 111-135 and ECJ 4 June 2009, C-8/08 (T-Mobile), par. 33.

¹⁰² Faull & Nikpay 2014, nrs. 7.414-416.

¹⁰³ Horizontal Cooperation Guidelines, par. 7.417-419 and GC 6 June 2002, T-342/99 (Airtours).

¹⁰⁴ Horizontal Cooperation Guidelines, par. 7.420-421.

¹⁰⁵ Idem, par. 69-71.

¹⁰⁶ GC 15 September 1998, T-374/94 etc. (European Night Services), par. 136, ECJ 20 November 2008, C-209/07 (BIDS) and Guidelines on the application of Article 101 par. 3, par. 1.

¹⁰⁷ ECJ 4 June 2009, C-8/08 (T-Mobile) and ECJ 19 March 2015, C-286/13 P (Dole v. EC (Bananas)).

information exchanged (for instance public or confidential, aggregated or detailed, historical or current data), the periodicity of such information and its importance for the agreement or concerted practice (e.g. price fixing).¹⁰⁸ A case-by-case examination is required. The legal and economic context must thus also be taken into account for the assessment whether information exchange qualifies as a restriction by object.¹⁰⁹ Information exchanges on companies' individualised intentions concerning future market conduct regarding prices or quantities (e.g. future sales, customers, etc.) will generally be considered an object restriction.¹¹⁰

Takeaway for NexTrust

When information is (intended to be) exchanged, one should assess whether this information is commercially sensitive: will exchange of this information lead to less uncertainty about each other's future on the market or reduce strategic uncertainty in the market? If so, the information is considered commercially sensitive and should in principle not be exchanged. When assessing whether the exchange of information is a restriction of competition, the economic and legal context should always be taken into account.

If the exchange of information cannot be categorised as an object restriction, it may still be prohibited in case it has actual or potential anticompetitive effects (see also paragraph 3.4.2).¹¹¹ Such actual and/or potential effects on competition must be assessed in view of the context in which competition would occur in the absence of the information exchange in question.¹¹²

5.4. When is information considered commercially sensitive?

The following characteristics of an information exchange are relevant in the analyses of the potential restrictive nature of an (intended) information exchange:¹¹³

- The type of information which is exchanged;
- Whether the exchange concerns individualised or aggregated data;
- The age of the data;
- The frequency of the exchange;
- Whether the exchange concerns public or non-public information;
- Whether the exchange concerns a public or non-public exchange;
- The level of concentration on the market.

These aspects are subsequently discussed in the following paragraphs.

¹⁰⁸ ECJ 23 November 2006, C-238/05 (Asnef-Equifax v. Ausbanc), par. 49 and 54.

¹⁰⁹ Horizontal Cooperation Guidelines, par. 72.

¹¹⁰ Idem, par. 73.

¹¹¹ Idem, par. 75.

¹¹² ECJ 30 June 1966, C-56/65 (Société Technique Minière), GC 27 October 1994, T-35/92 (John Deere v. EC) and ECJ 28 May 1998, C-7/95 P (John Deere), par. 76/77.

¹¹³ Horizontal Cooperation Guidelines, par. 86-94.

5.4.1. *The type of information exchanged*

The exchange of strategic data, which is generally perceived as commercially sensitive, may reduce uncertainty in the market, is likely to be problematic and infringe article 101, paragraph 1 TFEU.

Strategic data may relate to¹¹⁴:

- Prices (actual prices, intended prices, discounts, increases or decreases, etc.);
- Quantities;
- Customers;
- Market shares;
- Changes in output or capacity;
- (Production) costs;
- Turnover and margins;
- Demand;
- Investment plans;
- New technology and R&D projects.

It should be noted that this list is not exhaustive, but indicative for the types of information that are generally considered commercially sensitive.

Takeaway for NexTrust

Strategic or commercially sensitive information which may, if exchanged, reduce uncertainty about market conduct of (potential) competitors, usually relates to their prices, volumes, costs, customers or market shares. It must be noted that a lot of information (indirectly) relates to future conduct regarding prices or quantities. It is of the utmost importance that it is ruled out that any such information is exchanged, especially between competing undertakings.

5.4.2. *Individualised or aggregated data*

If information does not allow one to see how an individual undertaking is or will be performing, then the exchange of it may not directly entail that it enables (potential) competitors to come to a so-called focal point or monitor an illegal understanding about market conduct.¹¹⁵ In the same sense, it is less likely that undertakings are able to coordinate their behaviour or to detect deviations from a coordinated strategy, when the information exchanged is aggregated in such a way that it is not possible to trace it back to individual undertakings. Hence, the exchange of sufficiently aggregated data in principle does not directly raise competition concerns.¹¹⁶

¹¹⁴ Horizontal Cooperation Guidelines, par. 86. The sharing of this information could decrease the parties' incentive to compete and increase opportunities for coordinated activity. See EC Decision of 17 February 1992, IV/31.370 and 31.446 (UK Agricultural Tractor Registration Exchange), GC 27 October 1994, T-34/92 (Fiatagri and New Holland), ECJ 28 May 1998, C-8/95 P (New Holland Ford) and GC 27 October 1994, T-35/92 (John Deere v. EC).

¹¹⁵ EC Decision of 18 October 1996, IV/34.936/E1 (CEPI-Cartonboard).

¹¹⁶ Horizontal Cooperation Guidelines, par. 89. It should be noted though, that the Horizontal

5.4.3. The age of the data

Is the information historic rather than current, then it is less likely that the exchange can facilitate the coordination of the conduct of the undertakings involved. Historic data are in principle considered to be less sensitive, if such data do not indicate a company's current or future conduct. Whether certain information qualifies as historic, so that there are no longer risks for competition involved in exchanging the information, shall be assessed by taking into account the characteristics of the relevant market and the competitive interaction in the sector, for example the frequency of price (re-)negotiations. To illustrate the importance of this assessment: in the past, the EC issued decisions in which data of one year old were considered historic and decisions in which data of less than one year old were considered recent and therefore sensitive.¹¹⁷ The one-year boundary may be used as a general rule of thumb, but only with caution and always analysing the relevant (market) circumstances at hand.

As regards exchanges of current or future information, these are more likely to facilitate a common understanding on the market.¹¹⁸ Exchanges on *intended* (i.e. future) behaviour are likely to allow competitors to arrive at common price levels and are, compared to exchanges of *current* data, less likely to involve pro-competitive effects.¹¹⁹

Cooperation Guidelines state that even the dissemination of aggregated data can facilitate coordination, in particular when it enables parties to identify that someone has deviated from the collusive outcome. Such may be the case in tight and stable oligopolistic (i.e. highly concentrated) markets.

¹¹⁷ EC Decision, IV/31.370 (UK Agricultural Tractor Registration Exchange), paragraph 50 and EC Decision, IV/36.069 (Wirtschaftsvereinigung Stahl), OJ L 1, 3.1.1998, p. 10, paragraph 17.

¹¹⁸ Horizontal Cooperation Guidelines, par. 89.

¹¹⁹ Idem, par. 72-74 and EC Decision of 15 May 1974, IV/400 (IFTRA glass containers), par 43.

Takeaway for NexTrust

The exchange of aggregated and historic data raises less concerns than the exchange of individualised and actual or future data. The exact qualification must be assessed based on the specific market circumstances.

For the NexTrust project, the boundaries of information exchange and the identification of commercially sensitive data may become relevant during meetings for pilot cases. When a business opportunity is discussed in a meeting, parties must make sure that, for example, actual or future volumes are not presented. It is recommended to use fictional, historic or sufficiently aggregated data. It may also be an option to only present aggregated volumes.

It must be noted however that one should always verify whether aggregated data can nevertheless be traced back to individual undertakings.

If it is not considered feasible for the purpose of the cooperation to refrain from the exchange of sensitive information, they are recommended to consult a competition law expert for advice (prior to the sharing).

5.4.4. Frequency of the information exchange

As a general rule of thumb, the more frequent exchange of information takes place, the more likely it is that this conduct facilitates collusive behaviour.¹²⁰ At which frequency exactly information exchanges are considered to facilitate collusion, depends on the nature, age and aggregation of the exchanged data, as well as the relevant market circumstances (such as the duration of contracts, the stability of demand and supply, market saturation, etc.).

In the landmark case *T-Mobile*, the ECJ considered that under certain circumstances even one single exchange of information can be sufficient to assume the existence of a concerted practice that restricted competition by object.¹²¹

5.4.5. Public or non-public information

Exchanges of *genuinely* public information are unlikely to infringe article 101 TFEU. Genuinely public information is information that is genuinely equally accessible (in terms of access costs) to all competitors and customers.

The cartel prohibition may be infringed if the information shared between the parties could have been obtained anyhow, however from other sources that are less convenient. The fact that there is a *possibility* to gather the information exchanged, does not per se mean that the information is genuinely public.¹²²

¹²⁰ Horizontal Cooperation Guidelines, par. 91.

¹²¹ ECJ 4 June 2009, C-8/08 (*T-Mobile*), par. 54-62.

¹²² For example, if the exchange creates an artificial transparency of information limited to the

5.4.6. *Public or non-public exchange of information*

Publicly exchanged information may decrease the likelihood of collusion or a collusive outcome on a market to the extent that non-coordinating undertakings, potential competitors, as well as customers may be able to constrain potential restrictive effect on competition.¹²³ Genuinely unilateral announcements made through an intermediary, like a newspaper, are therefore generally not seen as an concerted practice. A pattern of these announcements however could nevertheless prove to be a strategy for reaching an illegal common understanding.¹²⁴

5.4.7. *The level of concentration on the market*

It is likely that information exchanges are more problematic in so-called oligopolistic markets (i.e. highly concentrated markets). Such market circumstances are considered conducive to interdependent coordinated behaviour, as markets where only a few players are active, are generally transparent, have a high level of concentration, are non-complex, stable and symmetric. In those types of markets, companies can (more easily) reach a common understanding on the terms of coordination and successfully monitor and punish deviations from any collusive behaviour.¹²⁵

5.5. *Modes of information exchange and applicability competition rules*

Information exchange can be done in different forms and manners, both directly and indirectly. All sorts of exchange, directly between competitors or indirectly via a third party, face to face or via an IT platform, even exchanges on a single occasion, can fall within the scope of the cartel prohibition.

Direct information exchange is generally easy to recognise, as it takes place directly between the undertakings concerned. This may be either via a communication tool (phone, email, fax, etc.) or *face to face*.

The manners in which information may be *indirectly* exchanged can be hard to categorise. In short, this concerns situations where information is shared between undertakings via a third party or third party mechanism. Such third party may e.g. be a trade association, or via a third party, e.g. a consultant or even a trustee, or through the companies' (common) suppliers or customers.

Further examples of indirect information exchange are the publication of information on a website or to investors, or the situation that the information was received and published or transferred by an intermediary (like a newspaper, consultant, trade association). In these situations the facts proving

participants, which would not be available in the absence of these arrangements, the exchange is assumed to affect the competitive conduct. EC Decision of 8 September 1977, IV/312-366 (COBELPA/VNP), EC Decision of 23 December 1977, IV/29.176 (Vegetable parchment), EC Decision of 2 December 1981, IV/25.757 (Hasselblad) and ECJ 23 November 2006, C-238/05 (Asnef-Equifax v. Ausbanc), par. 58.

¹²³ Bennet & Collins 2010 and Horizontal Cooperation Guidelines, par. 94.

¹²⁴ This is referred to as 'signalling'. Horizontal Cooperation Guidelines, par. 63.

¹²⁵ Horizontal Cooperation Guidelines, par. 77, EC Decision of 17 February 1992, IV/31.370 and 31.446 (UK Agricultural Tractor Registration Exchange), GC 11 March 1999, T-141/94 (Thyssen Stahl v. EC).

whether or not the undertaking and its competitors have agreed or concerted, should be assessed carefully.¹²⁶

In the next paragraphs, the following forms of *indirect* information exchange will be discussed: information exchange via an association of undertakings (paragraph 5.5.1), exchange of information by means of a hub and spoke construction paragraph 5.5.2), and via third parties that act as cartel facilitators (paragraph 5.5.3). These modes of indirect information exchange are considered most relevant for the NexTrust project. Indirect forms of information exchange however cannot always be clearly distinguished from one another. For example, the difference between a hub and spoke setting and a third party facilitator – if at all – is not always clear-cut. However, it is not necessary to qualify a setting as one or the other, as the underlying principles are the same. Both situations are discussed however for illustration purposes.

As a preliminary remark, it must be noted that information exchanges via a digital platform (of a third service provider) may be considered as indirect information exchange and, for the purpose of the application of competition law, should be assessed under the principles governing hub and spoke and/or cartel facilitation situations.

5.5.1. *Exchange via or dissemination by an association of undertakings*

It is possible that the members of an association of undertakings have agreed to provide the association with certain information, for instance for future shipment volumes for the purpose of benchmarking. If such information is provided by the members and subsequently disseminated by the association, such may result in an impermissible concerted practice, depending on the output (whether the output can reduce the uncertainty about a competitor's market behaviour, etc.).

5.5.2. *Hub and spoke exchanges: buyer-supplier relationship*

In a supplier-buyer relationship, information exchange is generally a frequent and often necessary practice. The exchange of commercially sensitive information between competing buyers via a third party, for example via a common supplier or buyer of goods and/or services, may be caught by the cartel prohibition. The exchange of commercially sensitive information via a third party that has common relationships with several competitors is generally referred to as a 'hub and spoke' exchange or cartel. The third party acts as a 'hub' between the competing undertakings, the 'spokes'. A hub and spoke system is depicted in Figure 1 below:

¹²⁶ ECJ 20 January 1994, C-89/85 etc. (Ahlström Osakeyhtiö v. EC (Woodpulp II)), par. 76/77.

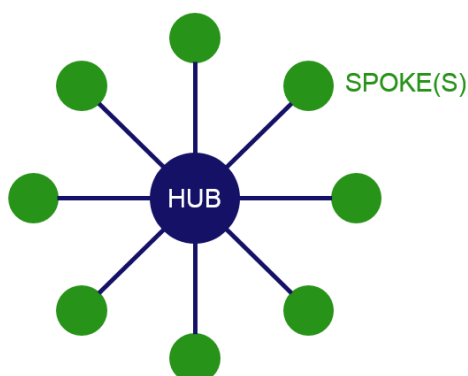


Figure 1

As an example: supplier HUB receives commercially sensitive information from its retailer SPOKE A for the purpose of the proper execution of its supplies to SPOKE A. Such information may relate to margins or quantities or contract terms of SPOKE A. If HUB shares such information to the other retailers SPOKE B, SPOKE C and SPOKE D, they may become familiar with commercially sensitive information of SPOKE A which may lead to collusion between the retailers.

Both the Horizontal Cooperation Guidelines¹²⁷ and the Vertical Restraints Guidelines¹²⁸ refer to hub and spoke mechanisms as a form of information exchange. National competition authorities have held undertakings liable for infringing the cartel prohibition by exchanging commercially sensitive information via a hub. In the UK for example, retailers (spokes) of British-produced cheddar and territorial cheeses indirectly exchanged their future retail pricing intentions via common suppliers (hubs).¹²⁹ In Germany, food retailers, under the moderation of a manufacturer, urged manufacturers to persuade other retailers to observe a standard shop price level. This resulted in resale price maintenance between retailers (spokes) and manufacturers (hubs) implemented via a hub and spoke system.¹³⁰ In Belgium, suppliers (hubs) of healthcare products and toiletries acted as intermediary and enforcers in the coordination of retail prices of healthcare products and toiletries between supermarkets (spokes).¹³¹ In all cases, both the spokes and the hubs were accused of infringing the cartel prohibition.

¹²⁷ Horizontal Cooperation Guidelines, par. 55.

¹²⁸ Vertical Restraints Guidelines, par. 211.

¹²⁹ Competition Appeal Tribunal, case 1188/1/11 (*Tesco Stores Ltd (2) Tesco Holdings Ltd (3) Tesco Plc v Office of Fair Trading*), via <http://www.catribunal.org.uk/237-7317/1188-1-1-11-1-Tesco-Stores-Ltd-2-Tesco-Holdings-Ltd-3-Tesco-Plc.html> [last time consulted on: 11 January 2018].

¹³⁰ See the Bundeskartellamt's press release of 18 June 2015 via http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/18_06_2015_Ve rtikalfall.html;jsessionid=D689E8ED0729243171CF442AC12828DA.1_cid378 [last time consulted on 11 January 2018].

¹³¹ Decision of the Belgian competition authority of 22 June 2015, case ABC-2015-I/O-190-AUD, via <https://www.bma-abc.be/nl/beslissingen/15-io-19-aud-grande-distribution> [last time consulted on 11 January 2018].

However, on a European level the EC¹³², GC and ECJ have never given a decision or ruling in a hub and spoke situation. The EC and the ECJ are in no way bound by national cases.

Takeaway for NexTrust

Infringement of the cartel prohibition may also take place via a third party that acts as a hub between the competing spokes. In the NexTrust project, an LSP may have contractual relations with several shippers (spokes) and a trustee provides its services to several shippers. This structure shall not be used to exchange commercially sensitive information between the competing shippers. The EC and ECJ have not ruled upon a so-called hub and spoke cartel yet, but national cases in the UK, Germany and Belgium may serve as an example.

5.5.3. *Third party facilitators*

A third party may have the position to facilitate illegal information exchange between competitors. It follows from three cases before the ECJ that both an undertaking which facilitates cartel arrangements between competitors, as well as those competing undertakings can be held liable for an infringement of the cartel prohibition. These cases are *VM Remonts*¹³³, *AC-Treuhand*¹³⁴ and *ICAP*.¹³⁵ Considering the importance for the NexTrust project of the role of the trustee as a third party service provider, these cases are discussed below.

As a preliminary remark, it must be noted that these principles regarding cartel facilitation deriving from EU case law are or may be relevant for assessing hub and spoke situations under EU competition law.

In the *VM Remonts* case, competitors were held liable for the acts of a third party service provider which infringed the cartel prohibition. It follows from this case that in order to be held liable, it is not necessary that (all) the competing undertakings have instructed the third party to act a certain way. The ECJ ruled that liability for the acts of an independent service provider may exist if:

- the service provider was in fact acting under the direction or control of the undertaking (for example via ownership, shares, rights to appoint directors, etc.); or
- the undertaking was aware of the anticompetitive objectives pursued by its competitors and the service provider intended to contribute to it by its own conduct (for example by explicit or tacit consent); or

¹³² Hub and spoke collusion was alleged by the EC in its E-BOOKS decisions of 12 December 2012 and 25 July 2013, COMP/39.847 (E-BOOKS). The EC however accepted commitments by the undertakings concerned, without concluding that an actual hub and spoke infringement had occurred. These commitments took away the EC's concerns regarding a possible infringement of the cartel prohibition

¹³³ ECJ 21 July 2016, C-542/14 (VM Remonts).

¹³⁴ ECJ 22 October 2015, C-194/14 P (AC Treuhand).

¹³⁵ GC 10 November 2017, T-180/15 (ICAP).

- the undertaking could reasonably have foreseen the anticompetitive acts of its competitors and the service provider was prepared to accept the risk which they entailed.¹³⁶

Such a third party may e.g. be a trustee or a consultant, but also a common supplier, such as an LSP. For undertakings involved in NexTrust pilot cases, it is therefore essential to always be aware of the behaviour of other parties involved and note that each party bears an own responsibility - not only for its own acts but also for the acts of other parties that it accepts.

It further follows from the *AC-Treuhand* and *ICAP* cases that a third party can be considered a cartel facilitator and held liable for the infringement of the cartel prohibition, if it:¹³⁷

- intended to contribute by its own conduct to the common objectives pursued by all participants (the first condition of the facilitator test); and
- was aware of the actual conduct planned or put into effect by the other parties pursuing the same objectives, or that it could reasonably have foreseen such behaviour and was prepared to take the associated risk (the second condition of the facilitator test).

The case law on cartel facilitators is important for the position of the trustee in the NexTrust project. Chapter 6 deals with the role of the trustee and provides both an explanation of its position in each step of the pilot cases as well as guidance for the trustee on how to remain compliant with the competition rules.

Takeaway for NexTrust

In addition to the attribution to the concerned competing undertakings of an infringement of the cartel prohibition, an infringement may also be attributed to any third party which has facilitated this infringement. That third party becomes a true 'cartel participant' in terms of liability.

In NexTrust, in particular the trustee and LSPs must be very aware of this risk.

¹³⁶ ECJ 21 July 2016, C-542/14 (VM Remonts), par. 33.

¹³⁷ ECJ 22 October 2015, C-194/14 P (AC Treuhand), par. 30 and GC 10 November 2017, T-180/15 (ICAP), par. 100 and 106.

Practical examples: illegal hub and spoke and cartel facilitator situations (trustee and LSP)

The arrows in the figures below represent information flows between the parties. For the purpose of this example, it is assumed that the information sent from the trustee back to the shippers is not (sufficiently) aggregated and/or anonymised, so the information is assumed to be commercially sensitive. The colours represent the origin of the information.

Figure 2 below depicts a fictional illustration of how an illegal hub and spoke or cartel facilitator setting might look in the context of cooperation in logistics and therefore should be prevented:

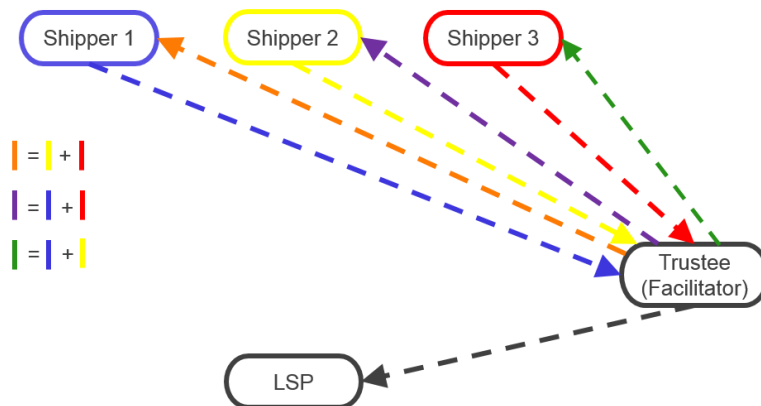


Figure 2

The trustee in Figure 2 provides the commercially sensitive information of the shippers to the other competing shippers (without redacting the information). The information flows from the trustee to the LSP are not relevant in this specific example (yet), as the LSP is not a competitor of the shippers and there are no information flows between the shippers and the LSP (yet).

In Figure 3 below, it is not the trustee but the LSP who provides commercially sensitive information to the shippers (the grey arrows represent non-sensitive information), which it received from the trustee. In this (fictional) example not only the LSP, but also the trustee might qualify as facilitator or hub and are liable for infringing the cartel prohibition. So, in total there might be five cartel participants:

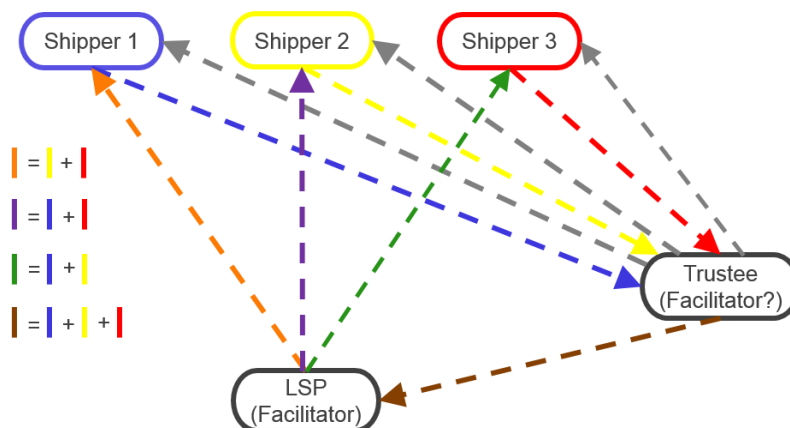


Figure 3

5.6. *Information exchanges not covered by or excepted from the cartel prohibition*

Information exchanges are only covered by the cartel prohibition if the information exchange is expected to have negative effects on competition. An exchange of information is thus not always prohibited under the cartel prohibition. Information exchange may fall outside the scope of the cartel prohibition, for example if the information exchanged is not capable of restricting competition (paragraph 5.6.1 **Error! Reference source not found.**) or if it has positive effects on competition paragraph 5.6.2).

Information exchange may furthermore be exempted from the cartel prohibition under the individual exception of article 101, paragraph 3 TFEU (paragraph 2).

5.6.1. *Information exchange not capable of restricting competition*

As explained in paragraph 5.4 above, information exchanges fall within the scope of the cartel prohibition if the information qualifies as commercially sensitive. It must thus first be assessed whether the particular piece(s) of information can actually lead to a restriction of competition. This has also been recognised by the ECJ.¹³⁸ Whether a particular exchange is actually capable to restrict competition, shall be assessed by taking into account the legal and economic context within which the information exchange took place.

Takeaway for NexTrust

The nature and content of the information exchanged must be carefully assessed in order to identify whether the exchange of a piece of information is capable of restricting competition. If sharing the information does not reduce market uncertainty and/or does not relate to parameters of competition, it is unlikely that the exchange thereof restricts competition.

5.6.2. *Information exchange and article 101, paragraph 3 TFEU*

An information exchange can be exempted from the cartel prohibition in case the conditions of article 101, paragraph 3 TFEU are fulfilled.¹³⁹ See also paragraph 4.4.

An exchange of information may lead to efficiency gains, ultimately for the benefit of customers. The exchange of information may increase market transparency, enabling suppliers for example to improve commercial strategies and/or allocate efficiency, to increase internal efficiency (e.g. by benchmarking their processes and performance against other industry performance), to promote innovation and/or to improve product positioning. Positive effects may be more apparent in very

¹³⁸ In this respect, reference can be made to the case *Asnef-Equifax*, in which the ECJ held that a particular exchange of information (i.e. on debtor credit-worthiness between financial institutions) did not constitute an infringement of the cartel prohibition. The particular exchange of information did not restrict competition, but (inter alia) brought down overall costs of lending money by reducing the risk of defaults. See ECJ 23 November 2006, C-238/05 (*Asnef-Equifax v. Ausbanc*).

¹³⁹ Horizontal Cooperation Guidelines, par. 95/110. Reference is made to paragraph 4.4 above explaining the assessment framework for article 101, paragraph 3 TFEU.

competitive markets.¹⁴⁰ Increased market transparency may also reduce search costs and may increase transparency for customers (e.g. consumers may be able to choose better between competing products and make well-informed decisions if the information sharing is targeted at them).

Despite these efficiency possibilities, the individual exemption possibility has not played a very big role in cases of the EC and case law of the ECJ.

5.7. *What to do in case commercially sensitive information is or was exchanged?*

Chapter 6 deals with the role of the trustee and also provides practical guidance and best practices for parties involved in cooperation in logistics. In anticipation of Chapter 6, this paragraph provides some guidance on the applicable assessment framework following from ECJ case law, which framework should be taken in account by parties that become part of a (potentially) impermissible exchange of information.

5.7.1. *Exchange during meetings or calls*

In the event commercially sensitive information is exchanged between (potential) competitors during (physical) anticompetitive meetings or calls, a direct legal presumption exists that the undertakings illegally used this information for determining their market behaviour (if they remained active on the market).¹⁴¹ As a result, undertakings can be held liable for an infringement of competition law. This presumption can only be rebutted by proving that the undertaking involved unambiguously and firmly, publicly distanced itself from that practice.¹⁴²

Furthermore, a passive mode of participation in any type of anticompetitive behaviour can also lead to liability, e.g. when a party tacitly ‘approves’ an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities.¹⁴³

5.7.2. *Exchange via a digital platform*

In the specific event that commercially sensitive information is exchanged via a message on a (digital) platform, such as via e-mails or in a cloud or on a hub, the undertakings are presumed to be aware of the content of that message as from the date of its dispatch, which triggers the legal presumption mentioned above that they used the information for determining their market behaviour. The undertakings will still have the opportunity to rebut this presumption by, for example, proving that they:

¹⁴⁰ Horizontal Cooperation Guidelines par. 57-58, 64-71.

¹⁴¹ ECJ 21 January 2016, C-74/14 (Eturas), par. 33 and ECJ 4 June 2009, C-8/08 (T-Mobile), par. 51-53.

¹⁴² The ECJ however has held that rebutting the presumption can also be done by reporting the infringement to the authorities. It is not entirely clear whether this refers to applying for leniency or otherwise. Also, the conditions for publicly distancing are not always applied uniformly See ECJ 28 June 2005, C-189/02 P (Dansk Rørindustri), par. 143, ECJ 21 January 2016, C-74/14 (Eturas), par. 28 and 46 and Bailey 2008, p. 177.

¹⁴³ ECJ 21 January 2016, C-74/14 (Eturas), par. 28.

- did not receive that message, or;
- that they did not look at the section on the digital platform or only after some time had passed since that dispatch.¹⁴⁴

If the presumption with regard to an exchange via a message cannot be rebutted, which implies that the pilot participant subsequently can be considered to be aware of the content of the message, then it is also presumed that the concerned party took part in the unlawful exchange of commercially sensitive information. The pilot participant concerned may however rebut this presumption by, in addition to the possibilities mentioned in paragraph 5.7.1, providing other evidence, for example by proving that the pilot participant did not align its market behaviour to that of its competitors.¹⁴⁵

Takeaway for NexTrust

Parties that exchange information in relation to cooperation in logistics or intend to do so, should always verify the nature of the information that is (about to be) exchanged and make assess whether such information – in the specific (market) circumstances at hand – may restrict competition. If a restriction of competition seems at hand, which is generally assumed in the event commercially sensitive information was shared between competitors – the parties are advised to distance themselves in the proper manner from the information received. At this stage, it is generally recommended to engage a competition law expert.

¹⁴⁴ ECJ 21 January 2016, C-74/14 (Euras), par. 41.

¹⁴⁵ Idem, par. 46-47.

6. The Trustee model as a solution to information flows

The necessity to exchange commercially sensitive information to make a cooperation a success, is traditionally perceived as a bottleneck in cooperation in logistics. The risks of infringing the cartel prohibition may be a potential showstopper for shippers to cooperate and organise their logistics more efficiently. Clearly, the risk of non-compliance with the competition rules is also a worry for undertakings other than the directly involved shippers, such as suppliers, buyers or independent service providers.

This chapter sets out how the NexTrust project aims to avoid prohibited exchanges of commercially sensitive information, i.e. by implementing the so-called Trustee Model. This model was developed in the course of the NexTrust project and encompasses the so-called *NexTrust three step methodology*. With regard to the three step methodology and the role of the trustee in general, reference made to NexTrust Deliverable 6.2 (*‘Report on the legal aspects of the initial phase of matchmaking and the pre-contractual phase’*) and to NexTrust Deliverable 6.4 (*‘Report on the legal definition of the trustee concept and legal forms’*). This chapter solely deals with the three step methodology insofar as relevant for the role of the trustee from a competition law point of view.

The three step methodology and the role of the trustee are explained in paragraph 6.1 below.

Paragraphs 6.2-6.4 elaborate more in detail on the role of the trustee in each specific step of the three step methodology. Paragraph 6.5 further illustrates its role by means of (anonymised) descriptions of some pilot cases of the NexTrust project.

As explained in Chapter 5, the trustee has to ensure compliance with the cartel prohibition as well. For this purpose, some best practices for the trustee are provided in paragraph 6.6.

6.1. The role of the trustee and the three step methodology

The NexTrust project aims to create a safe and compliant environment for all parties involved in cooperation in logistics. NexTrust therefore developed the Trustee Model, which envisages to reduce and prevent the risk of impermissible exchange information between cooperating parties. The Trustee Model – or at least the involvement of an independent third party – is not a new phenomenon. It is however new to cooperation in the logistics sector. It entails the involvement of a neutral third party, the trustee, which serves as a Chinese wall between parties who need to exchange commercially sensitive information for the purpose of their cooperation.

The main role of the trustee is to enhance cooperation by preventing the impermissible exchange of commercially sensitive information between (potentially competing) cooperating parties. The trustee is involved from the initial phase of exploring business opportunities between shippers and/or LSPs and remains involved for the entire duration of the cooperation. The trustee thus serves as the process monitor, a Chinese wall which prevents impermissible information flows. The trustee is also a processor of the information and data which it has received for the purpose of the cooperation. In this regard, the trustee also has an important task in identifying which pieces of information qualify

as commercially sensitive and must thus be redacted before sharing (for example by aggregation and/or anonymization, see paragraph 5.4).

In addition, all parties that participate in a pilot case are bound by a non-disclosure agreement, based on which all information (including non-strategic or non-sensitive information) must be treated confidential.

The NexTrust three step methodology includes three phases¹⁴⁶:

1. Identification phase, in which the trustee explores business opportunities to achieve efficiencies, e.g. by identifying so-called ‘matches’ based on information provided by the shippers. Matches may e.g. arise where there are lanes used by several shippers with many LTLs or where the bundling of shipments can lead to a different (more efficient) mode of transport. The trustee gives (aggregated and/or anonymised) feedback to the individual shippers whether or not ‘matches’ are found. The trustee subsequently investigates whether the shippers are willing to proceed with the cooperation.¹⁴⁷
2. Preparation phase, in which the trustee, after having identified matches and after the shippers have agreed to proceed with the cooperation, investigates whether the cooperation is feasible. LSPs will be approached by the trustee and in some cases invited to make a bid to offer services. In this phase, the business opportunity is developed into a business case.¹⁴⁸
3. Implementation phase, in which the business case is put into practice by entering into agreements with LSPs and bundling of shipments.¹⁴⁹

These three phases and the precise role of the trustee in these phases will be explained in more detail below. Specific attention will be paid to the information flows in each phase of the cooperation. It must be noted, as may also be derived from Chapter 5, that compliance of the information exchanges with the competition rules is not guaranteed by the mere involvement of the trustee. It depends on the proper *execution* of the three step methodology by both the parties and the trustee and overall legal compliance.

6.2. *The role of the trustee in the identification phase*

In the identification phase, the trustee either identifies individual parties (in principle the shippers) who are interested to cooperate in logistics, or the trustee is approached by one or more of shippers who intend to cooperate. The trustee then collects information from the shippers individually, meaning that there will be one-way information flows running from the individual shippers to the trustee. The information provided to the trustee contains high-level transport data, such as information on shipment types, equipment and service requirements, locations and volumes per lane. The sharing of the data is necessary for exploring the full potential of business opportunities

¹⁴⁶ Reference is made to NexTrust Deliverable 6.4, paragraph 1.3 (‘Project phasing’), where the three phases of the three step methodology are explained in more detail.

¹⁴⁷ NexTrust Deliverable 6.4, paragraph 1.3.1. (‘Identification’).

¹⁴⁸ NexTrust Deliverable 6.4, paragraph 1.3.2. (‘Preparation’).

¹⁴⁹ NexTrust Deliverable 6.4, paragraph 1.3.3. (‘Implementation’).

for cooperation in logistics. High-level transport data however might contain commercially sensitive and confidential information. Hence, it is important that such high-level transport data are not exchanged as such between the parties, but that the parties individually submit their information to the trustee. The trustee subsequently serves as an essential link in the process to ensure that no sensitive information of individual shippers flows to other (competing) shippers. To this end, as explained, all parties are also bound by a non-disclosure agreement.

The individual information-flows in the identification phase are depicted in Figure 4 below.



Figure 4

Later on in the implementation phase, the trustee processes and analyses the information received from the shippers. It identifies matches and informs the shippers of opportunities for cooperation in such a way that no sensitive information is disclosed (e.g. by giving aggregated and/or anonymised feedback). This also includes a role for the trustee to provide the (redacted) information in such a way to the shippers that information cannot be traced back to the individual shippers.

After a potential match has been identified, the trustee can draw up the outlines of a business case in close consultation with each shipper individually. The trustee will communicate to the shippers individually the mere existence of a potential match for cooperation. The shippers can then decide individually if they wish to further participate in exploring cooperation opportunities simply by indicating this to the trustee. This is depicted in Figure 5 below.

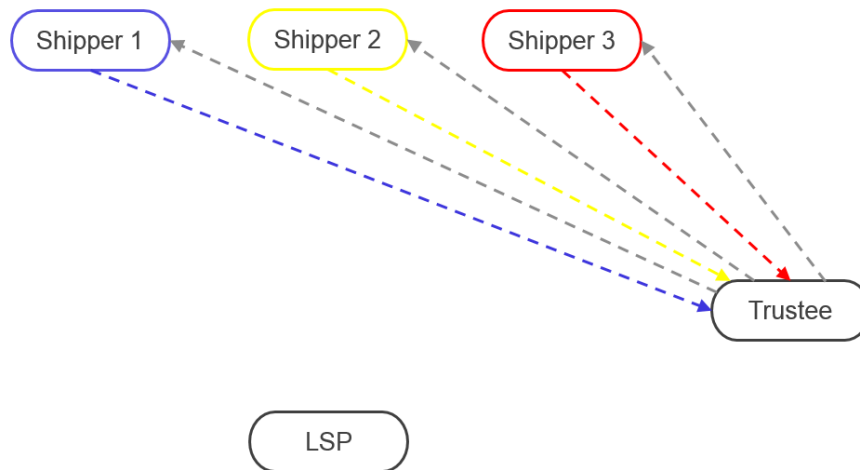


Figure 5

The grey arrows in Figure 5 represent the redacted information (e.g. by aggregating and/or anonymising information) that the trustee shares with the shippers. Such information-flows could also contain information purely relating to the shipper concerned. In such case, in principle no redaction is required as it only concerns (sensitive) information concerning the party itself. For example, the information-flow from the trustee to Shipper 1 might contain aggregated and/or anonymised information (based on information from Shippers 2 and/or 3), as well as information purely relating to Shipper 1, for example information regarding the products of Shipper 1 (such as special conditions of transport, customer information, et cetera).

6.3. *The role of the trustee in the preparation phase*

After the trustee has identified two or more shippers who are open for cooperation, has mapped their structural freight flows (confidentially and only visible for the trustee) and identified matches, the trustee will issue to the shippers its proposal for a concrete cooperation in a business plan. This business plan sets out the proposal from three perspectives: efficiency (logistics cost savings), sustainability (reduction in greenhouse gas emissions) and effectiveness (service level improvement). In doing so, the trustee helps the shippers in building profitable business cases and quantifying the benefits and risks of the cooperation scenarios in the preparation phase.

After acceptance of the business plan by the shippers, the shippers start to work out their cooperation under the direction of the trustee. The trustee not only manages the process but also functions as a black box to avoid the exchange of commercially sensitive information between the shippers, either directly or indirectly.

In order to prepare a feasible cooperation the trustee will verify with one or more LSPs whether the envisaged lane combinations can be run by the LSP(s). To the extent necessary for the potential engagement of the LSP, the trustee will provide the LSP with the analysed and combined information. This phase is depicted in Figure 6 below.

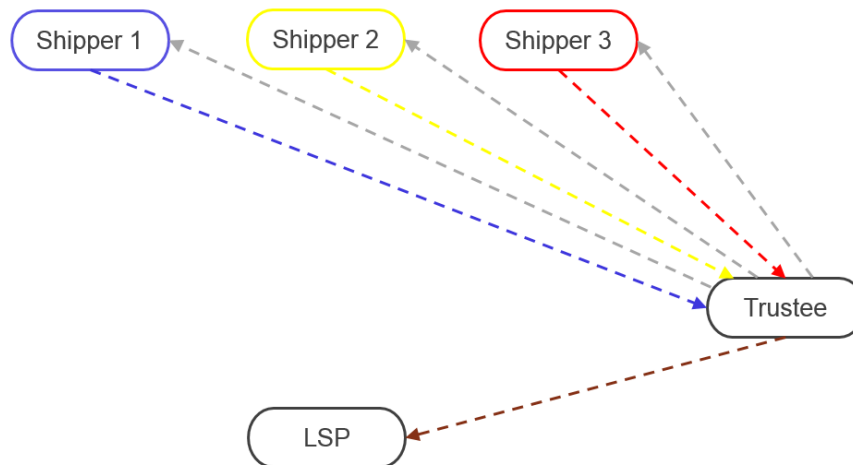


Figure 6

Of course, the LSP should be subject to a non-disclosure agreement. It is generally not required (yet) that the LSP in this phase shares any information with shippers.

6.4. *The role of the trustee in the implementation phase*

In the third and last phase, the trustee provides the LSP with information necessary for the execution of the cooperation. In the case of bundling of shipments, the information may relate to shipments of the individual shippers, in order to run as many FTLs as possible. Of course, the LSP is still subject to a non-disclosure agreement and the trustee must ensure that no information is shared with the individual shippers.

The trustee continues to receive information from the shippers in the entire course of the cooperation. In addition and specific to this part of the cooperation, the shippers may require the LSP to inform them about the transportation process, e.g. the mode of transportation, timing of delivery of the shipment, etc. In this phase of the cooperation the LSP also has a role to safeguard that the information flows are compliant with competition law. This can be realised, for example via a 'track-and-trace' system which may provide restricted access per individual shipper, without the LSP providing the shippers with commercially sensitive information about their competitors. This is depicted in Figure 7 below.

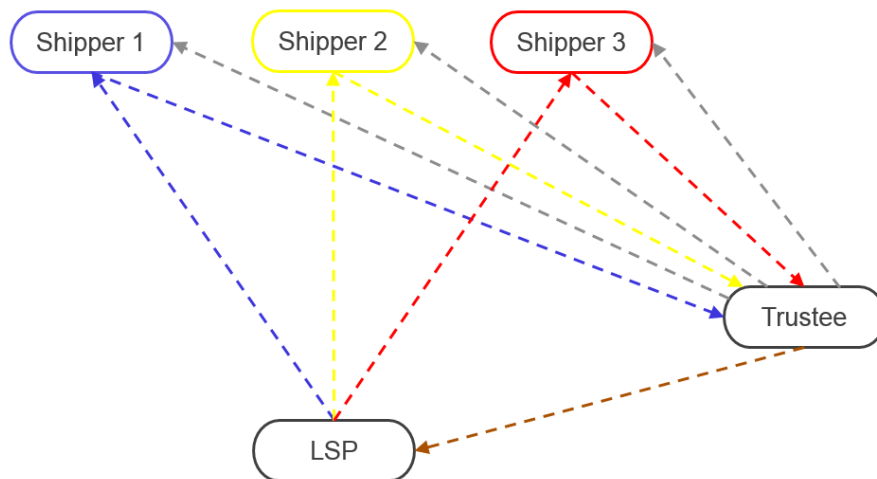


Figure 7

6.5. Examples of the role of the trustee in NexTrust pilot cases

The NexTrust consortium partners and pilot participants engaged in several real-life pilot cases for different forms of cooperation in logistics. Up to a certain level, the role of the trustee was similar in each pilot case, i.e. to safeguard the execution of the three step methodology in a manner compliant with the competition rules on information sharing. Below, some examples of types of pilot cases are explained to further illustrate the role of the trustee and where information sharing obstacles may be encountered.¹⁵⁰

6.5.1. LTL to FTL

The most straightforward example of a pilot case is where several shipments, which separately would result in LTLs, are bundled into one or more FTLs. This type of pilot case is particularly sensitive where the participating shippers are (potential) competitors. The role of the trustee here is to collect the necessary high level transport data, analyse such data, find lane combinations ('matches') and, most importantly from a competition law point of view: identify which information pieces qualify as commercially sensitive in order to prevent the exchange of commercial sensitive information by not sharing information regarding shipper A with shipper B (and vice versa).

6.5.2. Intermodal transport

Some pilot cases focused on bundling of shipments in order to shift from one transportation mode to a more efficient transportation mode (e.g. from transport via trucks to the use of train transportation). These pilot cases are referred to as intermodal pilot cases. Their goal is to realise the improvement of the efficiency ratio.

¹⁵⁰ Reference is made to NexTrust Deliverable 6.4, paragraph 1.4 ('Added value trustee from a legal point of view') and paragraph 1.5 ('Legal forms of collaboration').

As indicated, here the role of the trustee is to collect high level transport data, analyse such data and inform the pilot participants in the event matches are found. In doing so, the trustee plays an important role in bringing the shippers to a point that they would change to a more efficient mode of transport.

6.5.3. MSMR (multi retailer multi shipper) platform

One pilot case focused on the joint development by retailers, shippers, an LSP and a trustee of a warehousing and shipping solution to reduce LTLs. The solution entailed the use of a warehouse and a digital platform of the LSP (4PL), governed by the LSP. The information flows were governed and monitored by the trustee. This pilot case is referred to as MSMR (multi retailer multi shipper) platform pilot and ideally involves two stages of bundling of shipments to achieve FTLs, i.e. the shipments from the shippers to the warehouse and the shipments from the warehouse to the retailers.

The efficient bundling of shipments, required the shippers to transport volumes according to forecasts provided by the retailers. Bundled shipments were shipped to and stored in the warehouse. The retailers called for products stocked in the warehouse via the digital platform that was set up for this specific pilot case. Based on the retailers' demand, calls for products were combined into FTLs and sent from the warehouse to the retailers by the LSP. The MSMR platform pilot is depicted in Figure 8 below.

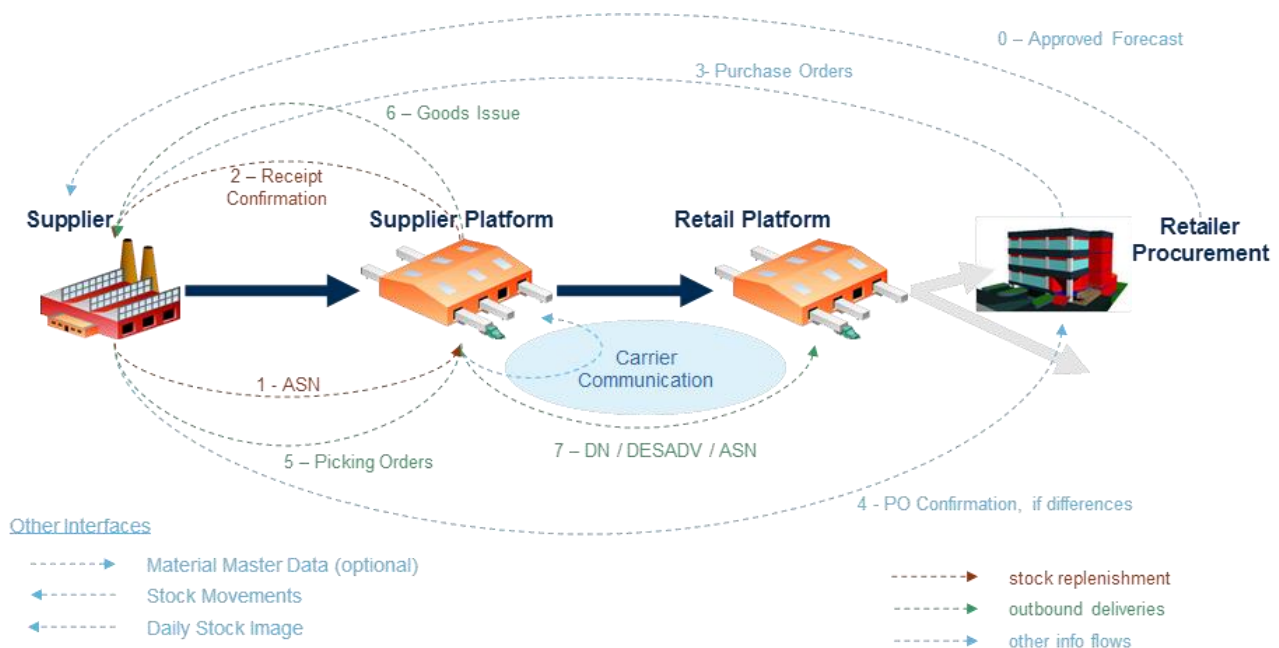


Figure 8 (Source: Tri-Vizor N.V.)

The role of the trustee in this pilot case is to find combinations and approach suitable participants. Next to this, the trustee also has the role to gather the relevant information from the retailers, such as product forecasts and to send this information to the shippers. Also, the trustee (in this particular case together with the LSP) had to make sure that the digital platform and software used was secure

and could not be used by the shippers and the retailers to (indirectly) exchange commercially sensitive information among them.

In order to achieve a workable and secure platform, the traditional lines of communication between retailer and shipper are maintained as much as possible, meaning that the retailer places its orders (based on the forecasts as much as possible) directly to its suppliers (the shippers) separately from other retailer(s). Subsequently, the supplier forwards this order to the LSP via the platform, which is in charge of the operation of the platform. The LSP then collects the shipments placed by the individual suppliers on the platform, combining them as much as possible in FTLs. The LSP would also invoice the amounts that have to be paid per supplier and/or retailer, according to the agreed terms and conditions.

The platform allows the trustee to have access to the same information as the LSP, in order to perform its tasks as trustee, safeguarding that no commercially sensitive information gets exchanged between competitors, for example between shippers via a retailer and vice versa. The platform guarantees that each individual supplier is connected bilaterally to each of its customers (retailers) and trustee, while it prevents that the retailers and/or suppliers will contact each other via the platform.

6.5.4. *E-commerce pilot platform*

In the NexTrust project, also the model of a trustee as a platform provider is tested. This model is tested in two ways. In the first way, the trustee hosts an online platform where shippers (retailers) and carriers (white van owners and drivers) can meet to match freight flows on the last mile transport of goods. As host of the platform, the trustee can safeguard that all confidential and commercially sensitive information, if any, will be administrated by him only and that all information flows are compliant with competition law. The second way this approach has been tested is by offering a holistic IT solution for intermodal transport of goods as a supply chain manager (4PL) with trustee function.¹⁵¹

6.6. *Best practices for trustees*

As may be clear from the foregoing, the trustee has an important task in each cooperation, both in terms of exploring the full potential of a cooperation and ensuring compliance with the competition rules throughout the entire cooperation. In the context of NexTrust, best practices have been developed to provide guidance for trustees when they are involved in a cooperation in logistics.

Best Practice Rule 1

Before starting a cooperation in which (potential) competitors participate, always stress the importance of the competition rules. Explain the boundaries on information sharing based on competition law and make sure that parties are aware that any possibly problematic discussion or information sharing will be stopped immediately by the trustee. In the context of (physical) meetings, an antitrust caution and legal disclaimer should be given, e.g. on the first slides of a (PowerPoint) presentation. This should be included in the minutes of the meeting for documentation purposes.

¹⁵¹ Reference is made to NexTrust Deliverable 6.4.

Best Practice Rule 2

Always allow oneself and the parties the opportunity to consult a competition law expert in case of doubt about whether a piece of information may be shared and/or in what manner. Competing participants to a meeting must be given the opportunity to involve their legal counsels. Explicit reference shall be made to this at all stages of the cooperation. Moreover, in case of a debate between the participants about which information can and cannot be exchanged directly, the trustee may use this best practice rule and refer these participants to their respective counsels for advice, in order to safeguard its own independence.

Best Practice Rule 3

In the event parties can be regarded as (potential) competitors and it is not clear whether information that is necessary for the identification of matches can be regarded as commercially sensitive information, the trustee is recommended to consult a competition law expert. One shall refrain from communicating such information to participants until having obtained the expert's advice. This best practice rule prevents the trustee from violating the cartel prohibition itself, as explained in Chapter 5.

Best Practice Rule 4

Competitors shall not be informed about each other's individualised intentions concerning future market conduct or other commercially sensitive information, e.g. regarding prices or quantities, market shares (in sales or volumes), intended sales, sales to particular (groups of) customers, capacity, offers or bids. For such communication anonymised, aggregated or historic information shall be used. The exact manner of redaction depends on the specific case and parties involved.

In the exceptional case where it is absolutely necessary for the purpose of the cooperation to share certain sensitive information, the trustee is advised to consult a competition law expert on the permissibility and the most proportionate manner of sharing such information. This requires an in-depth individual assessment of the specific circumstances at hand to see whether a justification for information sharing is present.

Best Practice Rule 5

Every party involved, including the trustee, has the responsibility to pro-actively and properly distance itself from inappropriate conduct. This means that in the unlikely event that commercially sensitive information is (about to be) exchanged, one should explicitly and immediately dissociate from such conduct in a clear and unambiguous manner. This may be done by expressly stating so to the other parties. It is recommended to also have such distancing noted in the minutes of a meeting and/or to confirm the distancing in a letter or email to the other parties involved afterwards.

In case commercially sensitive information is exchanged via a digital platform, the party receiving such information must delete it and must expressly distance itself from the exchange.

In the event a party or the trustee is unsure about whether the competition rules have been violated, it is advised to obtain immediate legal expert advice on its position.

Best Practice Rule 6

If the trustee suspects that parties might abuse the cooperation, it must ensure that this behaviour is stopped and a clear objection must be made. In the event of a meeting and when a discussion continues, the trustee must end the meeting and ask the parties to leave. This must be documented while taking careful consideration of the manner in which such will be done. It is advisable to consult a competition lawyer.

Takeaway for NexTrust

One of the roles of the trustee is to prevent the exchange of commercially sensitive information between (potential) competitors, thereby ensuring that an intended cooperation in logistics is compliant with the competition rules on information sharing. The trustee has a 'blackbox' function and monitors the difference phases of the cooperation.

The trustee shall be involved from the very starting phase of exploring possibilities for cooperation and remains involved for the entire duration of the cooperation. In general, its role from a competition law point of view does not change as the cooperation progresses. However, in specific cases the trustee can be asked to approach potential parties to the cooperation, to organise tenders, to set up an IT platform: all to facilitate a compliant cooperation in logistics.

7. Potential bottlenecks in cooperation in logistics: joint purchasing and joint production

In NexTrust pilot cases it is assumed that logistic services can be arranged jointly, and can possibly even be purchased jointly as well. Even though during the NexTrust project, none of the pilot cases actually qualified as joint production or joint purchasing from a competition law perspective, cooperating parties must be well aware in which situations a cooperation qualifies as such and thereby triggers a specific applicable competition law framework.

In this final chapter, joint purchasing and joint production agreements will be shortly discussed. The aim of this chapter is to provide cooperation parties some first guidance on when a cooperation might qualify as a joint production or joint purchasing agreement. Both types of agreements might be caught by the cartel prohibition of article 101, paragraph 1 TFEU.

7.1. Joint purchasing agreements

Joint purchasing agreements can include purchasing through a jointly founded, controlled or owned company, and can even include looser forms of cooperation. The purchase of logistics services via a third party such as a trustee can also be seen as a joint purchasing agreement between shippers. Joint purchasing agreements must be assessed under the cartel prohibition of article 101, paragraph 1 TFEU in particular where groups of purchasers agree upon the prices that they are prepared to pay for the logistics services. The joint purchasing agreements may also fall under article 101, paragraph 1 TFEU if the shippers agree to purchase wholly or mainly through the agreed arrangements, such as a jointly founded, controlled or owned company, via a third service provider or via looser forms of cooperation.¹⁵²

Joint purchasing agreements may raise competition law concerns, but may also result in efficiencies. For instance, joint purchasing may result in more favourable prices for consumers. At the same time, joint purchasing may be anticompetitive. This is because joint purchasing may in some circumstances lead to restrictive effects on both the purchasing and selling markets, such as increased prices, reduced output, reduced product quality or variety, market allocation or anticompetitive foreclosure.¹⁵³

The effects of joint purchasing agreements usually manifest themselves in two markets: (i) the market on which the parties to the agreement purchase the product (i.e. logistics services), also referred to as 'the purchasing market' and (ii) the market on which the parties to the joint purchasing are active as sellers, also referred to as 'the selling market'. It is therefore vital to always analyse the position of the cooperating parties on *both* markets.¹⁵⁴

¹⁵² Bellamy & Child 2015, nr. 6.065.

¹⁵³ Horizontal Cooperation Guidelines, par. 200 and Bellamy & Child 2015, nr. 6.067.

¹⁵⁴ When defining the purchasing market, the focus should be on the extent to which there is substitutability which may constrain the market power of buyers (in cooperation in logistics, the buyers would in principle be the shippers). See Horizontal Cooperation Guidelines, par. 197-198, by contrast Notice relevant market, par. 13-14.

7.1.1. Competition law assessment of joint purchasing

The Horizontal Cooperation Guidelines provide guidance to cooperating parties to (self-) assess their joint purchasing activities.¹⁵⁵

Even though the EC adopts an economics-based approach in its Horizontal Cooperation Guidelines, it is clear that a joint purchasing agreement which in fact is a ‘disguised’ cartel will be qualified as an object restriction (see paragraph 0).¹⁵⁶ The EC has held that so-called ‘buying cartels’, extending to the fixing of purchase prices, can distort producers’ willingness to generate output as well as restrict competition amongst processors in downstream markets. Collectively agreeing on the price to pay to third party suppliers is however not necessarily always per se an object restriction (see also paragraph 3.4.2).¹⁵⁷

The ECJ has held that the maintenance of contractual power for a purchasing association as ‘a significant counterweight to the contractual power of large producers’ may promote competition. The ECJ moreover has ruled that a provision in the rules of a cooperative purchasing organisation which restricted its members from participating in other forms of organised cooperation in direct competition with that organisation, was not necessarily caught by the cartel prohibition and may have even have beneficial effects on competition.¹⁵⁸ An assessment of the relevant legal and economic context is essential.

In order to assess whether a joint purchasing agreements is pro- or anticompetitive, and therefore either allowed or not allowed under competition law, the following scenarios and considerations should at least be taken into account.

Where joint purchasing leads to a group of buyers acting collectively making up a significant proportion of the total demand on the relevant market, such may entail risks for competition. In this scenario, a competition law risk may be that this group is able to influence market prices or total output.¹⁵⁹ When a joint purchasing agreement accounts for a sufficiently large proportion of the total volume of the purchasing market, there may be an anticompetitive effect through the foreclosure of competing purchasers, the reduction of incentives for suppliers to invest, innovate or maintain or improve quality. There may also be an indirect effect on output, quality and variety on the selling markets. Joint purchasing agreements may facilitate the coordination of the undertakings’ behaviour on the selling market if it leads to the undertakings having a high proportion of the costs in common, in particular variable costs, and provided that the undertakings have market power and the characteristics of the selling market are conducive to coordination.

¹⁵⁵ Horizontal Cooperation Guidelines, par. 194 – 224. It must be noted that joint purchasing agreements may include both horizontal and vertical agreements. The horizontal aspects are assessed first and according to the Horizontal Cooperation Guidelines. Vertical aspects are assessed afterwards and according to the applicable framework agreements (see Chapter 4). Horizontal Cooperation Guidelines, par. 195.

¹⁵⁶ Idem, par. 205. If a joint purchasing agreement does not qualify as a restriction by object, then it is necessary to assess the effects on both the purchase and selling markets.

¹⁵⁷ Idem, par. 206.

¹⁵⁸ ECJ 15 December 1994, C-250/92 (Gøttrup-Klim).

¹⁵⁹ Horizontal Cooperation Guidelines, par. 202, 210.

Collective purchasing may lead to bargaining power and can put a group of buyers in such a stronger position against individual sellers that the purchasers are able to collectively insist upon a lower purchasing price.¹⁶⁰ In such case, negative effects on competition are more likely (and the benefits are less likely to be passed on to consumers) if the purchasers have market power on the downstream selling market.¹⁶¹

In addition, a collusive outcome on the selling market may be facilitated in the event commercially sensitive information (such as purchase prices and volumes) is exchanged in the course of joint purchasing.¹⁶²

7.1.2. Joint purchasing agreements allowed under the cartel prohibition

There is no specific BER exempting joint purchasing agreements from the applicability of the cartel prohibition. The Horizontal Cooperation Guidelines nevertheless mention that “*if the parties’ combined market shares do not exceed 15% on both the purchasing and the selling market or markets, it is likely that the conditions of Article 101(3) are fulfilled.*”¹⁶³

Furthermore, regardless whether the parties’ market shares do or do not exceed 15%, joint purchasing agreements may fall under the individual exception of article 101, paragraph 3 TFEU (see also paragraph 4.4). An in-depth individual assessment is required. Joint purchasing may give rise to benefits in the production or distribution of goods or technical or economic progress. They may produce cost savings in the form of lower purchase price, scale and scope benefits, lower transportation and storage costs. They may also encourage innovation.¹⁶⁴ Efficiencies may be passed on to consumers in terms of lower prices on the down-stream selling market. This is considered unlikely however when the purchasers together have market power on the selling market.¹⁶⁵

7.2. Joint production agreements and combination agreements

In some cases, parties may wish to enter into subcontracting contracts or form a combination with each other. Such cooperation could for example be instigated by the fact parties cannot (individually) offer the desired availability, quality or consistency of a certain product or service. In the context of the NexTrust project, such a desire is most likely to arise with LSPs. If the LSP cannot carry out the logistics service desired by the shippers, the LSP might need to engage the services of other LSPs to fulfil its contractual obligations. This type of cooperation is referred to as subcontracting and may qualify as a “joint production agreement” under the competition rules.¹⁶⁶ Furthermore, LSPs may

¹⁶⁰ Horizontal Cooperation Guidelines, par. 194, 212.

¹⁶¹ Idem, par. 201, 204.

¹⁶² Idem, par. 215-216.

¹⁶³ Idem, par. 208.

¹⁶⁴ Idem, par. 218.

¹⁶⁵ Idem, par. 219.

¹⁶⁶ Certain “joint production agreements” may profit from the Specialisation BER, if they meet the conditions laid down in the Specialisation BER.

wish to work together in order to meet the requirements of, or improve the chances to win, a particular tender. Such cooperation is referred to as combination agreements.

This paragraph briefly deals with the bottlenecks that companies may encounter when cooperating in the form of subcontracting (joint production) or a combination agreement.

A combination or subcontracting cooperation as such is not prohibited under competition law. Depending on the position of the parties involved in the cooperation, such cooperation may however require an assessment under the cartel prohibition. Especially when the cooperating parties are competing LSPs, there might be a risk that competition between the LSPs will be restricted as a result of the cooperation. It has been explained before that so-called ‘horizontal’ agreements – i.e. between (potential) competitors – should always be assessed with caution. Therefore it is important to be aware when a cooperation may qualify as a subcontracting or combination agreement and which potential competition law risks may be involved with such cooperation.

7.2.1. *Competition law assessment of combination and/or subcontracting agreements*

Agreements between competitors that qualify as subcontracting or combination may qualify as joint production agreements. The Horizontal Cooperation Guidelines provide guidance to parties (i) in defining their cooperation and (ii) analysing where competition law issues may exist.¹⁶⁷ Limiting the parties’ ability to price as they choose, limiting output and arrangements on sharing markets or customers are generally regarded as restrictions by object under the cartel prohibition. E.g. a reciprocal subcontracting agreement or combination may come close to a market sharing agreement where the parties do not cross-supply products and/or services to one another.¹⁶⁸

Agreements where competitors jointly produce a product or offer a service, almost inherently entail restrictions on the parties’ level of output and may also lead to joint determination of prices or other contract terms. Such however does not necessarily have to result in a restriction of competition by object.¹⁶⁹ An in-depth analysis of the specific cooperation is required, the agreement must be assessed in its entirety to discover its effects on competition. The EC considers that the risks of a subcontracting agreement or combination for competition, depends on a comparison of the actual situation with the situation that would have occurred in the absence of the agreement (the so-called *counterfactual*).¹⁷⁰ This entails an examination of the characteristics of the market, the nature and market coverage of the cooperation and the product concerned.¹⁷¹ Related markets and in particular markets downstream of the cooperation in question, must be taken into consideration as well.¹⁷²

Restrictive effects may arise from subcontracting agreements or combinations if the parties attain market power as a result of the agreement, which would otherwise not have existed. This especially the case if the parties are close competitors.¹⁷³

¹⁶⁷ Horizontal Cooperation Guidelines, par 150-193.

¹⁶⁸ Idem, par. 190.

¹⁶⁹ Idem, par. 160.

¹⁷⁰ Idem, par. 163.

¹⁷¹ Idem, par. 162.

¹⁷² Idem, par. 155.

¹⁷³ Idem, par. 165 and 173.

Furthermore, a subcontracting agreement or combination may lead to collusion when the agreement creates or reinforces a commonality of costs¹⁷⁴ or involves the exchange of commercially sensitive information (for example information relating to production costs, volumes purchased or produced).¹⁷⁵ A foreclosure risk may also exist, in particular where the product or service is a key input in a downstream market and cooperation would permit the parties to raise the costs or rivals in that market.

7.2.2. *Combination and/or subcontracting agreements allowed under the cartel prohibition*

Under specific circumstances, a cooperation may be exempted under the Specialisation BER.¹⁷⁶ In this respect, the EC has stated in the Horizontal Cooperation Guidelines that “*the parties’ combined market share does not exceed 20 % it is likely that the conditions of Article 101(3) are fulfilled.*” When a subcontracting agreement or combination cannot profit from the Specialisation BER, that agreement should be analysed carefully in its individual context to determine whether that agreement may be individually excepted under article 101, paragraph 3 TFEU. The individual exception could be invoked as a justification, even if the parties are competitors with high market shares.¹⁷⁷

Circumstances which are relevant to consider for the individual assessment are e.g. market shares (individual and combined), the degree of market concentration, whether the market is dynamic due to innovation, the existence of barriers to entry and expansion, the degree to which the parties are close competitors, whether buyers have limited possibilities of switching suppliers, the extent of spare capacity in the market¹⁷⁸ and whether the cooperation allows the parties to produce a new product which they would not otherwise have been able to do.¹⁷⁹

¹⁷⁴ GC 25 March 1999, T-102/96 (Gencor), par. 222, EC Decision of 21 December 1994, IV/34.252 (Philips-Osram), par. 18, Horizontal Cooperation Guidelines, par. 156 and 176-179.

¹⁷⁵ Idem, par. 158 and 165.

¹⁷⁶ See paragraph 4.1. For the Specialisation BER to apply, the parties’ joint market share may not exceed 20% of the relevant market and no hardcore restrictions may be part of the cooperation.

¹⁷⁷ EC Decision of 21 December 1994, IV/34.252 (Philips-Osram).

¹⁷⁸ Horizontal Cooperation Guidelines, par. 168-173.

¹⁷⁹ Idem, par. 163.

Takeaway for NexTrust

If shippers jointly purchase logistics services (via or organised by a trustee), than such cooperation could qualify as a joint purchasing agreement, which shall be assessed under the cartel prohibition. The collective position of the cooperating parties has to be assessed, both on the selling markets downstream, and on the purchasing markets upstream. The presence of market power (based on a 15% market share threshold) and the legal and economic context of the cooperation, are vital elements in this assessment.

In any case, the joint purchasing agreement may not function as a cartel (for instance to share markets, to allocate customers or to fix prices). Restrictive effects may exist if the cooperation results in or aims at the foreclosure of competing shippers, or if it leads to a reduced incentive to invest or innovate.

Also, parties must prevent the exchange commercially sensitive information in the course of the joint purchasing of logistics services as much as possible. The Trustee Model as described in Chapter 6 may safeguard this risk.

A cooperation may qualify as a joint production agreement, for instance in the form of a subcontracting agreement. Such a cooperation requires an assessment whether it fulfils the conditions laid down in the Specialisation BER. If the Specialisation BER cannot be applied, the agreement must be assessed in its entirety in accordance with the principles laid down in the Horizontal Cooperation Guidelines, taking into account the relevant legal and economic context, to determine whether it qualifies for the individual exception of article 101, paragraph 3 TFEU.

8. Conclusions and recommendations

8.1. *Competition law and cooperation in logistics*

Competition law regulates the behaviour of undertakings, thereby protecting the structure of the market in the EU and the process of competition as such. The maximisation of (economic) welfare plays an important role in the application of competition law.

This deliverable has put forward which elements of the competition rules should be taken into account when cooperating in logistics. This document has been drawn up specifically in light of the NexTrust project and the pilot cases developed under the NexTrust project and is written based on the assumption that EU competition law will always apply, rather than national rules.

In this deliverable, the cartel prohibition has been discussed. Other instruments of competition law – such as the prohibition of abuse of a dominant position, merger control and state aid – might be relevant too for cooperation in logistics, but in the NexTrust project and the specific pilot cases such issues were not encountered.

The definition of the relevant market is an important aspect of every assessment of a cooperation under the competition rules. Based on the relevant market definition, possible restrictive effects on competition may be identified and efficiency gains may be demonstrated, in order to assess whether or not it may be justified to prohibit the behaviour under competition law. Moreover, the definition of the relevant market enables parties to calculate the market shares of the undertakings involved in order to assess the appreciability of a cooperation and whether it may be possible to profit from (block) exemptions. Economic assessments and definitions of the relevant market should be done case-by-case. It is advised to involve economic experts for such exercises.

8.2. *The application of the cartel prohibition*

When undertakings engage in cooperation in logistics, it is considered highly unlikely that the cooperation does not qualify as either an agreement, concerted practice or a decision by an association of undertakings as meant in the cartel prohibition. How the cooperation takes place is not very relevant: any form of cooperation between undertakings can be covered by competition law. Whether a cooperation in logistics entails a restriction of competition violating the cartel prohibition must be assessed on a case-by-case basis, taking into account inter alia the content and the objectives of the arrangements made, as well as the economic and legal context of a cooperation. In such an assessment, a distinction must be made between restrictions by object and restrictions by effect. So-called object restrictions are considered the most harmful to competition and therefore are strictly prohibited and should be prevented. Price fixing and/or market sharing agreements, as well as limitations of output or capacity are generally considered object restrictions, as well as the exchange of certain commercially sensitive information.

8.3. *Exceptions to the cartel prohibition*

In the event that a cooperation falls under the scope of the cartel prohibition, there are generally two possibilities to exclude the cooperation from violating the cartel prohibition: (i) a cooperation may benefit from a block exemption regulation (BER) or (ii) a cooperation may fulfil the criteria of the individual exception of article 101, paragraph 3 TFEU. However, in many other cases it is not so clear whether the behaviour is anticompetitive (and should be prohibited) or procompetitive (and should be allowed). The economic effects need to be demonstrated will have to be assessed case-by-case.

8.3.1. *Block exemption regulations (BERs)*

The Transport BER provides a group exemption for several types of cooperation in logistics. Unfortunately, due to scarce case law which moreover dictates a strict interpretation of the exemptions mentioned in the Transport BER, the practical relevance of the exemption of the Transport BER remains unclear.

There are other BERs from which cooperation in logistics may profit, such as the general BER for vertical agreements, the Specialisation BER and the R&D BER. A cooperation is not eligible to profit from a BER, if the relevant market share thresholds are exceeded and/or if the cooperation entails a hardcore restriction or another specific restrictive clause as specifically mentioned in the relevant BER.

8.3.2. *Case-by-case assessment under article 101, paragraph 3 TFEU*

If a cooperation in logistics falls under the scope of the cartel prohibition but cannot profit from a BER, it may be eligible to be individually excepted from the cartel prohibition if it meets the conditions of article 101, paragraph 3 TFEU. Undertakings have to self-assess whether or not the cooperation meets the conditions of the exception. For the purposes of such self-assessment, the EC has issued guidelines for both horizontal and vertical cooperation. The assessment requires a case-by-case approach and it is advised to carefully document the self-assessment and to seek advice from legal and economic experts.

As concerns the NexTrust pilot cases, these often aim to achieve efficiency gains. The possible benefits involved in cooperation in logistics could relate to cost reduction, growth (in terms of increased turnover or profit, or extended geographical coverage), innovation, reduce of response times, first mover advantages and/or market entrance. Cooperation may also have social goals and effects, sustainability goals such as reduction of GHG-emissions and/or shifting towards more environment-friendly transport modes. Provided that a cooperation may restrict competition, it is very much recommended to assess whether the efficiencies of a cooperation can outweigh the (potential) negative effects on competition and thus profit from an individual exception to the cartel prohibition.

8.4. *Exchange of commercially sensitive information*

The sharing of information becomes problematic from a competition law perspective if the information shared qualifies as commercially sensitive and is exchanged between (potential) competitors. It is important to realise that two undertakings that exchange information in the context of a vertical relationship (e.g. supplier-buyer) may also be regarded as actual or (potential) competitors from a competition law point of view. Impermissible information exchange may also take place via a third party that acts as a hub between competing spokes or which has facilitated this infringement. Such third party has then become a 'cartel participant' in terms of liability. In cooperation in logistics and specifically in relation to the NexTrust project, in particular the trustee and LSPs must be aware of this risk.

Information that relates to prices, volumes, costs, customers or markets in principle qualifies as commercially sensitive, but the list of types of information is not exhaustive. Each exchange of information, regardless of the method or form of the exchange, should be assessed in its own legal and economic context.

The nature and content of the information exchanged must be carefully assessed in order to identify whether the exchange of a piece of information is capable of restricting competition. If sharing the information does not reduce market uncertainty and/or does not relate to parameters of competition, it is unlikely that the exchange thereof restricts competition. If the information in fact does reduce uncertainty on the (future) market behaviour of competitors and/or does relate to parameters of competition, the information is considered commercially sensitive and should in principle not be exchanged. The exchange of aggregated and historic data in principle raises less concerns than the exchange of individualised and actual or future data. The exact qualification and potential issues must be assessed based on the specific market circumstances.

For the NexTrust project, the boundaries of information exchange and the identification of commercially sensitive data are relevant in different stages of the pilot cases, e.g. during meetings but also when evaluating possibilities to cooperate. It is recommended to use fictional, historic or sufficiently aggregated data. It must be noted however that one should always verify whether aggregated data can nevertheless be traced back to individual undertakings, in which case aggregation is not a solution to avoid an otherwise impermissible information exchange.

If it is not considered feasible for the purpose of the cooperation to refrain from the exchange of sensitive information, parties are recommended to consult a competition law expert (prior to the information sharing). If a potentially problematic exchange of information nevertheless seems to already have occurred, which may generally be assumed in the event commercially sensitive information was shared between competitors, the parties are advised to properly distance themselves from the information received, also after having consulted a competition law expert.

8.5. *The role of the trustee in cooperation in logistics*

One of the roles of the trustee in the NexTrust pilot cases is to prevent the (direct and indirect) exchange of commercially sensitive information between (potential) competitors, thereby ensuring

that an intended cooperation in logistics is compliant with the competition rules on information sharing. The trustee has a 'blackbox' function and monitors the information flows in all the phases of the cooperation.

The trustee shall be involved from the very starting phase of exploring possibilities for cooperation and remains involved for the entire duration of the cooperation. In general, its role from a competition law point of view does not change as the cooperation progresses.

8.6. *Joint purchasing and joint production*

A specific competition law framework applies to cooperation that may qualify as joint purchasing, joint production, for instance in the form of a subcontracting agreement. In the NexTrust project, this did not occur, but cooperating parties should be aware of when their cooperation may qualify as such, so that they can properly assess whether they act in compliance with the cartel prohibition. In any case, the joint purchasing or joint production agreement may not function as a cartel (for instance to share markets, allocate customers or fix prices). Restrictive effects that parties should be aware of are e.g. if the cooperation results in or aims at the foreclosure of other shippers, or if it leads to a reduced incentive to invest or innovate.

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10. Acronyms and Abbreviations

ACROYNM	EXPLANATION
BER	Block Exemption Regulation
EC	European Commission
ECJ	European Court of Justice
EU	European Union
FTL	Full Truck Load
GC	General Court
GHG	Green House Gas
GIV	Giventis International
KKL	Kneppelhout & Korthals
LSP	Logistics Service Provider
LTL	Less Than Truckload
NCA	National Competition Authority
TFEU	Treaty on the functioning of the European Union