

NexTrust Deliverable 6.1 – Consolidated legal report on the NexTrust pilot cases

Deliverable 6.1

PROJECT INFORMATION			
Type of Project	HORIZON 2020		
Call	H2020-MG-2014_TwoStages		
Grant Agreement No.	635874		
Project Duration	42 Months		
Project Coordinator	TX Logistik		
DOCUMENT INFORMATION			
Title	NexTrust Deliverable 6.1 – Consolidated legal report on the NexTrust pilot cases		
Version	1.0		
Release Date	30.04.2018		
Workpackage	WP6		
Dissemination Level	PU		
DOCUMENT AUTHORS AND AUTHORISATION			
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Authorised by	TX Logistik		
DOCUMENT HISTORY			
Version	Date	Modified Contents	Implemented by
1.0			KKL

Executive Summary

The herein presented Deliverable 6.1 focuses on the legal issues that came up during the pilot cases conducted within the NexTrust project, the solutions found, the course of the legal process management and the lessons learned.

The NexTrust project provided a legal framework for the participants. A center piece of this legal framework was the independent trustee who acted as a “black-box”, receiving commercially sensitive information, processing respectively analyzing it and then facilitating the collaboration in a legally compliant manner. The NexTrust participants were thoroughly instructed on the significance of legal compliance, especially with respect to confidentiality and competition law.

In March 2018, KKL circulated a questionnaire to the parties acting as a trustee in the NexTrust project and, in addition, other parties playing a leading role in one or more pilot cases. From the answers to the questionnaire we learned that when realizing the NexTrust approach into real life practice, the legal framework could be handled well by the parties involved. The legal framework turned out to be a very good support for the pilots rather than being an obstacle. Thus, several participants said that the NexTrust approach provided for a convincing, good to use legal basis for collaboration. Good to note: No single pilot had to be cancelled or could not be (further) pursued due to legal issues.

Legal issues that came during the NexTrust project were, among others, negotiations of the confidentiality obligations, insurance issues, conflicting contractual obligations, and, of course, competition law issues. The NexTrust participants reported that thanks to the clear and good legal framework many legal questions which came up during the NexTrust project could be solved with their own in-house or external legal counsels. In some cases, also KKL was involved to tackle a legal issue or support from the legal side.

From a legal perspective, the NexTrust project is a success. It showed that the legal framework with the trustee at its core is a legally feasible structure which proved to be fit for the market and, in addition, to be of commercial value.

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A. Introduction D6.1

1. Introduction

This deliverable is the report for D6.1, the consolidated report on the NexTrust pilot cases, due month 36 (April 2018). In this report, the experience of companies active in the supply chain/logistics sector with the NexTrust approach from a legal perspective will be described. The focus lies on legal issues these companies faced with the NexTrust legal framework in real-life operations.

2. NexTrust project overview

The NexTrust project has been granted funding from the EU Horizon 2020 Research and Innovation Programme under Grant Agreement 635874. In broad outline, the NexTrust Project specifically aims to increase efficiency and sustainability in the logistics chain by developing trusted collaborative networks that enable horizontal and vertical collaboration across shippers and industry sectors with all their respective supply chains, including last mile (e-commerce), in the European logistics market. These networks will fully integrate shippers, logistics service providers (“LSP’s” or “LSP”) and intermodal operators as equal partners. To reach a high level of sustainability, these networks will not only bundle freight volumes, but shift them off the road to intermodal rail and waterways. These networks will significantly reduce greenhouse gas emissions and traffic congestion, while simultaneously improving asset utilization and logistics cost efficiencies, thus creating a more sustainable, competitive arena for European logistics that will be an inspirational example for the market. The NexTrust Project original plan was to cover more than 23 pilot cases in four different categories. The action engages major shippers as partners owning freight volumes of well over 1,000,000 annual truck movements across Europe, plus SME shippers and LSP’s with a track record in ICT innovation. Characteristic of the NexTrust project is the focus on market driven research and innovation. NexTrust intends to create ‘stickiness’ for collaboration in the marketplace, validated through large-scale pilot cases carried out in real market conditions. The underlying foundation of the NexTrust consortium is the belief that horizontal and vertical collaboration should not be viewed only in the context of a theoretical or technological exercise, but when applied and validated pragmatically, can lead to a new level of business maturity and innovation strategy.

The pilot cases cover the entire scope of the call and cover a broad cross section of entire supply chain (from raw material to end consumers) for multiple industries. The creation and validation of trusted collaborative networks will be market oriented and implemented at an accelerated rate for high impact. We expect our pilot cases to reduce deliveries by 20%-40% and with modal shift to reduce GHG emissions by 40%-70%. Load factors will increase by 50%-60% given our emphasis on back-load/modal shift initiatives. NexTrust will achieve a high impact with improved asset utilization and logistics cost efficiency, creating a sustainable, competitive arena for European logistics that will be an inspirational example for the market.

3. Purpose and Scope of Deliverable 6.1 – Consolidated legal report on the NexTrust pilot cases

This report shall summarize and describe the legal issues which came up for discussion during the pilot cases within the NexTrust project, the solutions found, the course of the legal process management and the lessons learned. The pilot cases were the practical realization respectively demonstration of the feasibility of the NexTrust approach. More than 40 pilot cases in different work packages were initiated during the project. Each work package tackled problems regarding efficiency in different supply chain operations which had been categorized previously to the project. These categories (“work packages”) were “less than truckload (LTL)” and “full truckload (FTL)” operations as well as intermodal and e-commerce operations.

The basis of the legal framework of the NexTrust project had already been developed prior to and in the beginning of the project. This framework dealt with the setting of a confidential and legally compliant environment using a trustee. During the project, the legal framework was further developed, analyzed and described within Work Package 6 of the NexTrust project.

For the purpose of this report we asked a number of the NexTrust project partners about their experience with the legal framework.

B. Legal report on the NexTrust pilot cases

1. Starting point

As legal advisers, KKL did not manage pilot cases nor were we involved operationally in the pilot cases. Our law office, however, was involved in drafting the project idea and the legal structure of the NexTrust project. Also, throughout the project we were occasionally approached with legal questions by project partners who were involved in the pilot cases. As a starting point for this deliverable, we asked a number of our NexTrust project partners who acted as trustees or played a leading role in pilot cases about their experiences in the pilot cases from a legal point of view: problems, obstacles, difficulties they have faced but also how they approached them and finally solved them. Our questions to the project partners were as follows:

- 1. Please state your name and the name of your company.*
- 2. In which WP are you or have you been active during the NexTrust project? Please also briefly describe the set-up of the pilot cases your company has been involved in.*
- 3. Did you make use of model agreements during the NexTrust project (i.e. NDA)?*

These initial questions were supposed to give us a background to put the answers in the right context. As the pilots differed substantially with respect to their set-up, parties participating and the description of the trustee function (see in that regard also our report D6.4), among others, this background was of importance for us to understand the problems and solutions from a legal perspective for the purpose of this report. For reasons of confidentiality we however decided not to make the names of the companies and persons in charge public and not to connect them to the issues discussed in this report.

The subsequent questions after the initial ones were then as follows:

- 4. Which legal issues came up during the identification, preparation and/or operation phase of the pilot case (i.e. pre-contractual issues, discussions regarding NDA, role and position of the trustee, confidentiality, information exchange, competition law issues, liability issues, insurance, etc.)?*
- 5. Did you (and how did you) overcome legal issues in order to continue the pilot project resp. did you have to cancel a pilot project because of legal issues?*
- 6. What is your opinion about the legal framework for horizontal collaboration in the supply chain (i.e. legal structure with three model agreements; collaboration agreement between the shippers, agreement between the shippers and the trustee and skeleton carriage contract between the individual shippers and the individual LSP's)? Which contractual stipulations are in your opinion of fundamental importance (i.e. confidentiality, entry/exit rules, liability)?*

7. *What are the legal lessons learned from the pilots you have been involved in from a legal point , if any?*
8. *Do you have additional remarks, recommendations and or other items that need to be addressed from a legal point of view in connection with the pilot cases and the NexTrust project?*

2. Legal issues

At the core of the legal issues throughout the NexTrust project were questions around legal compliance, confidentiality and, closely related to these points, the role of the trustee. As usual in common commercial ventures, also questions around liability were frequently addressed.

a) Non-disclosure agreement

All beneficiaries in the NexTrust project worked with the NexTrust template for the non-disclosure agreement (“**NexTrust NDA**”). This agreement was drafted to be used from the beginning of a pilot by all parties participating, regardless of whether or not the participants were NexTrust beneficiaries or third parties. The NexTrust NDA is a template mutually binding the parties to treat any information received confidential.

The NexTrust NDA has been used for most contractual relationships within the NexTrust project. Nevertheless, although the NexTrust NDA was drafted as a well-balanced agreement for the mutual benefit of the parties entering into it, some of the NexTrust partners experienced that pilot participants would not want to use this template. This concerned especially larger companies who provided for its own templates originating from their legal department or their external legal counsels. The persons representing these companies argued that using their own templates was mandatory for them for internal compliance reasons. Any deviation from this internal guideline would require an internal review by their legal counsels. This would either take time or might even be rejected from the beginning if the company would not deem the transaction worth the effort in terms of value, knowledge gain or other benefit.

The following issues arose in connection with these third party NDA’s:

- The NDA’s worked only unilaterally. This way, any and all obligations under the NDA should rest with the NexTrust trustee only but not upon the participant.
- As is common in NDA’s, the definition of what confidential information was supposed to be was crucial and often deviated from the NexTrust NDA.
- In some cases these NDA’s provided for a severe penalty payment in case of a breach of the NDA regardless of any damage actually incurred.
- The participant’s NDA contained an applicable law and jurisdiction clause providing for a law different from the NexTrust NDA (that is Dutch law).

Within NexTrust, the trustees did not reject participants' NDA's principally. Facing such situations mentioned before, upon receipt of the pilot participant's NDA the NexTrust the trustees usually had it checked by KKL or their internal legal counsel. Even if the participants said that using their own NDA was mandatory in our experience there was always room for aligning the interests of all parties involved. The participants were in some cases facilitated by agreeing to use their NDA template subject, however, to amending or supplementing their NDA with the key elements of the NexTrust NDA. This way, the participants usually did not have to liaise with their legal counsels for internal approval or such internal check was brought back to a minimum while at the same time the trustees were sufficiently protected by the NexTrust project's standards under a well-balanced NDA.

b) Information exchange

Enabling collaboration without the exchange of commercially sensitive information between participants of the collaboration (but instead through an independent trustee as a "black-box") is one of the pillars of the NexTrust project. Therefore, handling the information exchange has been a crucial issue throughout all phases of a pilot project, i.e. the initial identification phase, subsequently the preparation phase and finally the operation phase. Next to bilateral non-disclosure obligations also the information flow followed strict guidelines within the project. Commercial information with respect to, among others, transport volumes and prices have to be communicated by the shippers to the NexTrust trustees only. The NexTrust trustees, then, observed to communicate data to other shippers only in aggregated and anonymized form that the receiver of the information was not able to draw conclusions from the information with respect to the other shippers' business. This way an infringement of competition and privacy laws shall be prevented.

The feedback to our short questionnaire for the purpose of this report showed that the trustees involved in pilot cases acknowledged the issue of information exchange as being of great importance. From their answers we conclude that in organizing the pilot cases, they pointed out the relevance of a legally compliant exchange of information to all pilot participants and the participants accepted this mode of working. No problems or infringements were reported. In most cases the NexTrust NDA was used as a solid basis for the collaboration. Where participants insisted on using their own NDA's, solutions were found through negotiations.

For as far as we can see from our involvement in pilot cases, the NexTrust approach to set up a legally compliant collaboration structure has not been a deal breaker in any of the pilot cases. Pilot participants accepted this approach and the strict guidelines on information exchange regardless of whether they were beneficiaries under the NexTrust project or external participants.

c) Insurance

In a few of pilot cases, participants raised the question of acceptable insurance coverage for the operation phase of the pilot. The matter was brought up in some cases by a shipper, at least in one other case by a carrier participant. In the work package on intermodal transport, in one pilot where this became relevant the logistics services provider arranged for sufficient insurance, in other pilots it was possible to cover the goods under a shipper's block insurance.

There was one particularity in the work package on e-commerce with respect to insurance. The idea in the e-commerce-pilots was to use transport vans (so-called white vans) owned by local businesses which were on the road only parts of the day (i.e. the van fleet of bakeries) for delivering

parcels to consumers in the context of e-commerce orders. An issue in the first pilot scenario was that the white vans were supposed to be provided by the owner without a driver. The trustee himself would organize a driver for the white vans for the relevant time window and draw up a delivery route via a digital platform. This procedure however raised the question of an adequate insurance for the white vans also for this purpose. Because this approach had not been practiced before there were no solutions for the insurance coverage readily available at the insurance companies. Most insurance companies approached in that regard suggested to qualify this kind of practice as a car rental which (next to stricter technical control procedures for the vans by the technical supervisory association for example in Germany) resulted in very high costs for insurance premiums. In the end, one insurance company could be found which offered insurance coverage under a tailor-made policy. However, in addition to the insurance problem another, related, obstacle came up: Due to the fact that vans were provided to third-party drivers under (applicable) German law the van owners had to register as car rental companies which also involved additional costs. Together with the high insurance premiums the pilot entered the operations phase but, ultimately, the business case of this particular pilot turned out to be not feasible due to costs. These two problems were solved in subsequent pilots by amending the business case.

d) Conflicting contractual obligations

During the identification phase the shippers often addressed the issue that they were bound for a number of transport lanes with certain carriers under longer term contractual agreements. In this specific business it is not unusual for shippers to contractually award certain lanes after a tender procedure to the carrier with the most attractive offer for a longer period.

For the NexTrust project, this meant that the shippers were often able to participate only with respect to some of their transport lanes in the NexTrust project. From a practical view this was not a problem when analyzing the data and doing the matchmaking with the data of other shippers. However, naturally a significant part of some of the shippers' data was unavailable for the NexTrust project for conflicting contractual obligations.

From a legal perspective, existing contractual obligations must be observed (*pacta sunt servanda*). Only in the case the contractual agreement or applicable law (the latter usually not in the case of agreements contractually limited by time) provides for a termination for certain reasons one party may seek to end the contractual relationship. The approach to legally compliant collaboration in the supply chain as introduced by the NexTrust project is new in the market. The shippers (and carriers) are not yet familiar with this approach. While the NexTrust project is able to establish a proof of concept, it will take some time for this approach to become accepted in the market. Thus, in view of conflicting contractual obligations this issue might be of less importance time by time with the market participants gradually accepting this approach.

e) Possible antitrust risks due to corporate group structures

It happened that shippers provided for their own logistics services from within their group of companies, i.e. through a sister company. Inviting such carriers to the tender procedure might have led to the disclosure of sensitive data of possible competitors of a competitor of a group company.

Within the NexTrust project, this issue came up in Work Package 2 (FTL). The trustee here decided not to invite such carriers who are affiliated to shippers participating in the pilot for reasons of precaution in the light of competition law and securing a compliant exchange of information. The trustee's concern was as follows: The shippers provide the trustee with sensitive data for the lane matching process. For promising lane combinations the trustee would – in agreement with the relevant shippers – commence a tender procedure providing some data to the carriers who have previously agreed to confidentiality under a non-disclosure agreement. Once a lane is rewarded to a specific carrier, this carrier would enter into bilateral agreements with each shipper participating in the lane and, naturally, agree among others upon a price for the carriage of goods. Such price agreement will be part of the price calculation of the shipper when selling its products.

This led to the question whether a special scrutiny procedure must be applied with respect to information flows for carriers which are affiliated with shippers who might be competitors of other shippers participating in the transport. From the competition law perspective, one should consider the following: In principle, information on pricing of their goods is considered sensitive information between competitors which may not be exchanged. Whether or not costs of carriage is sensitive information in that regard depends on the relevance of the costs of carriage in relation to the final pricing of the goods – if it is a negligible part of the final pricing then such information might not be considered commercially sensitive. However, such a commercial consideration would require detailed background information and market knowledge. This is difficult to have or obtain for a trustee. Moreover, even if he had access to such information the trustee would be exposed to great risks for the compliance of the procedure. Especially because the assessment whether or not certain information is subject to discretion and law is constantly developing against the background of, for example, new jurisprudence and guidelines from the cartel authorities the trustee would take over a role of a sort of a compliance guarantor for the participating parties. This would be exceeding his competence and designated tasks as designed in the NexTrust project by far. In contrary, pursuant to the NexTrust approach it was always made clear that the parties participating in the pilots would have full responsibility for compliance with all applicable laws. The trustee offers his services to the participants so that an environment is created for the participants in which they can collaborate with each other in a legally compliant manner.

The bilateral non-disclosure agreements and strict confidentiality would be of little help to the trustee if he took over such responsibility. A party will rarely (if at all) be able to exculpate for taking part in a competition law infringement on the grounds that such behavior by another party would be a breach of contract. Merely contractually agreeing upon strict confidentiality would not relieve the trustee from the responsibilities required under European and national competition law. The cartel authorities will also not accept that somebody participates in a high risk cooperation while turning a blind eye on possible infringements. On the bottom line, such agreements might lead to damage claims against the party in breach but rather not to contracting out of compliance infringements towards the cartel authorities.

Within the NexTrust project, the consortium followed a cautious approach and decided not to share any information on costs in connection with the transport of goods, regardless of the significance of these costs in relation to the pricing of the relevant products and regardless of the question whether or not the participating shippers were competitors. This relieved the trustee from the responsibility to consider such commercial factors. In the end, this approach is a significant mitigation of liability risks of the trustee.

3. Approaches to solve the issues

At KKL, we acted in the background of the pilot cases. We were, among others, actively involved in some issues around non-disclosure agreements, especially where a third-party participant insisted to use their own non-disclosure agreements. Also, we participated in many meetings, calls and discussions around the organization and implementation of pilot case operations, especially where (potential) competitors were involved.

We noticed that the participants were well prepared for this new approach. In workshops compliance issues were repeatedly and frequently addressed and taken seriously by everybody. Above, we described a number of legal issues where we at KKL assisted in a solution for a legal obstacle. Next to this, from our experience and also from the answers received on our questions we saw that the participants used their in-house legal teams (where available) and their usual external counsels to successfully solve legal issues coming up during the process. Not one of the many pilot cases within the NexTrust project was not further pursued or terminated for legal reasons.

The answers showed that legal issues were regularly addressed with great emphasis at the beginning of the pilot cases. All parties were thoroughly instructed about compliance and confidentiality. The participants, most of the times guided by the trustee in the respective pilot, often made clear arrangements already in the early contractual stages. One NexTrust beneficiary said in the answers to our questions: *“Legal side of the project was very well expressed from the beginning. Thanks to it we did not face any issues in this field”*. The trustees themselves, from what we at KKL observed, handled the relevant legal issues diligently and properly.

This, actually, is a very desirable outcome. Because the NexTrust project is for a great part a new approach to solve the problem of inefficiency in the transport sector introducing a new player, namely the trustee, proof of concept and market-stickiness are the ultimate goals of the NexTrust project. One of the greatest obstacles to collaboration in the supply chain so far had been legal compliance. The NexTrust project offers, among others, a legal framework which allows legally compliant collaboration even between competitors. The fact that the participants were open and quickly adjusted to the legal framework in view of the commercial efficiency gains showed that this approach is promising for the future and has good chances to be accepted in the market. Legal issues, when they came up, could most of the times be solved by the participants in-house, thanks to the solid legal framework there were no legal “deal breakers” which disturbed the pilot cases.

4. (Legal) lessons learnt

Apart from the issues discussed above, the following lessons learned were mentioned by beneficiaries:

A key lesson learned from the NexTrust project is that instead of trying to make small steps in terms of efficiency with a number of bilateral confidentiality agreements between various parties, it is much more efficient to have one person in the supply chain functioning as a sort of a “firewall”, as one project partner put it, between the parties – the entity called trustee in the NexTrust project. The trustee allows the participants not only a legally compliant framework for collaboration, from a commercial perspective it also is a breakthrough for matching shippers’ freight data and thus finding

potential for collaboration. The efficiency gain can therefore be multiplied in comparison to the standards before the NexTrust project.

The participants experienced that it is very helpful to get the basic legal framework, among this the non-disclosure agreements, agreed upon at an early point in the procedure and get a good mutual understanding of the mechanisms and do's and don'ts. In this regard, parties should in the beginning communicate and accept clear timetables with respect to steps to take and – among others – legal prerequisites to be checked off. In addition, it was experienced to be of importance that it should always be clearly communicated which data in which form shall be provided to the trustee.

5. Value of the NexTrust legal framework

The answers to our questions showed great appreciation of the NexTrust approach. Especially the importance of confidentiality and compliance were mentioned as being key issues for customers, we learned from the participants. This is a crucial selling point for the NexTrust approach leading to greater efficiency in the supply chain sector. It was also emphasized that the use of the templates, among them the NexTrust NDA, was a great help with setting up the pilots and that it made a professional impression in the market.

It was noted by one participant that it is desirable to have clear entry- and exit-rules for a multiparty collaboration. This issue therefore deserves further attention should the NexTrust approach, in whatever form and appearance, goes to market.

Concluding the chapter on the value of the NexTrust legal framework, we quote one of the trustees directly:

“The legal framework is the key component and success to build trust horizontally but also vertically. Confidentiality is key and gives the neutral trustee the power to listen to each stakeholder properly, like a ‘doctor’. With the proper knowledge the trustee then can better address any constraints and support to overcome them.”

C. Summary of findings from the legal perspective in the NexTrust project

Here below, the findings of our legal research on the relevant legal issues in connection with the NexTrust project will be summarized. The legal research on these topics has been elaborated on in detail in the respective reports, all of which are publicly available.

1. Legal aspects in the pre-contractual phase (Deliverable 6.2)

The NexTrust project pilot cases followed a three step methodology: In the identification phase, data is collected and analyzed for potential matches and thus potential for collaboration. After matches have been identified, the realization of the collaboration is prepared in the preparation phase with the trustee and the shippers identified for the specific collaboration make all necessary arrangements. The third and final phase is the operations phase where the collaboration is realized under real life conditions. KKL's findings with respect to the pre-contractual phase are as follows:

During the preparation phase parties also need to discuss the contractual basis for their collaboration. The mutual rights and obligations of the shippers, intermediaries and LSP('s) need to be addressed in multiparty agreements. Horizontal collaboration is innovative and touches upon many areas of law, such as general contract law, competition law, IT-law and (international) transport law. Last but not least, aspects of international private law need to be taken into account, as transport lanes in most cases will cross borders and often parties from different countries will be involved. Although the last-named area of law for an important part exists of international conventions and is used to deal with complex international contractual relationships, one needs to realize that transport law has its particularities, such as mandatory (international and national) law, separate regimes for different modalities and multimodal transports, a very formal character as regards the title to claim, a result obligation, short time bars, liability limitations and strict rules with respect to jurisdiction. The contractual freedom is limited; the international and national legal framework needs to be observed. Developing a legal framework thus demands a multi-disciplinary approach. Written contracts can facilitate and guarantee a smooth working of the collaboration between the shippers by identifying and clearing away potential (legal) obstacles and providing quick and clear solutions to remaining problems. Legal contracts can provide legal certainty and also legal uniformity. The structure of the legal framework, which has to be discussed during the preparation phase, includes three contractual levels.

The tasks and services of a trustee need to be identified and the contracting parties have to determine how confidentiality and the security of data will be guaranteed. In a nutshell important aspects which need to be discussed/included in this contract are:

- list of tasks / activities, working method: the tasks can be divided into 'offline' and 'online' tasks. The offline activities more or less create a new function in the logistics chain. The online activities relate to the harmonization of the daily processes and have therefore a more traditional character (comparable to freight forwarding);
- define the typical gain sharing task of the trustee. Given the gain sharing mechanism tackles the financial flows between multiple shippers and each shipper's info needs to be hidden from the other shippers, typically the trustee will arrange the actual gain sharing set-up and info flow.
- confidentiality clause;
- data rules, data ownership, privacy issues;
- trustee compensation;

- freight forwarding / position trustee towards LSP's (see above). From a transport law point of view it is important to know whether the contract between the shippers and the trustee qualifies as an agency agreement in general, or – as a consequence of the online activities carried out by the trustee – (also) as forwarding contract. After all, that could have consequences for the legal regime that applies to this contract, especially under national legal systems which provide for specific statutory provisions for particular types of contracts. Dutch law for example provides for a specific regulation of the forwarding contract (as well as by the way the commission contract and the mandate contract);
- liability regime;
- choice of law clause;
- jurisdiction.

2. Competition law aspects of cooperation in the supply chain (Deliverable 6.3)

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.

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.

3. Legal definition of the trustee concept and the legal forms (Deliverable 6.4)

Given the crucial role of the trustee in a collaboration it is of utmost importance that the trustee meets certain criteria. The most relevant criteria are:

- **Neutrality:** The trustee shall not enter into the collaboration itself and shall have no stakes in any of the participants' organizations.
- **Independence:** The trustee shall be a service provider for facilitating cooperation in a legally compliant way and shall therefore be distinguished from the role of the common supply chain participants such as general freight forwarders and carriers.
- **Confidentiality:** The shippers will provide their competition law sensitive information confidentially to the trustee only. This way they will not need to share sensitive information to the other shippers.

A trustee needs to be aware of the qualification of its tasks and responsibilities during negotiating and concluding a contract with the shippers. For these reasons it is, in principle, not the intention that the trustee would ever become the contractual party of the LSP's. The trustee might negotiate a transport contract, but would only enter into such contract in the name of the shippers, who individually become the contractual other party of the LSP's. The trustee shall facilitate the supply chain process on behalf of one or more parties, but not enter as an intermediary into the supply chain, especially not because of the obligations and liability risks which arise should the trustee be qualified as a freight forwarder. Thus, concrete carriage contracts shall always be concluded in a direct contractual relationship between the individual shippers and the LSP's. The trustee will not (be authorized to) enter into any carriage contract on behalf of any of the shippers in its own name and therefore will never become a contracting party to such transport agreements concluded within the framework of the collaboration between the shippers itself.

The three core features of the trustee – neutrality, independence and confidentiality – should be made clear in an underlying service agreement with the shipper(s), whether directly or indirectly. Irrespective of whether the principal is a sole shipper, the agreement is entered into as a multiparty agreement with several shippers or with a shipper joint venture, the trustee shall be considered as a service provider.

It should be avoided to include any indication into the contract which might be characteristic for a freight forwarder in the scope of services of the trustee (see article 1.6.1 above). Especially, it should be made clear that the trustee does not conclude the contracts of carriage with the LSP's in his own name. Rather, it must be made clear that he supports to organize the collaboration for the sake of greater efficiency and acts as intermediary where sensitive data must be considered or analysed.

From the shippers point of view it will be important to assign all compliance-sensitive tasks to the trustee and make clear that they do not wish to receive any sensitive data from (potential)

competitors. It will be one of the main tasks of the trustee to safeguard that the dataflow between him and the shipper and among the shippers, as far as it is orchestrated by him, always remains compliant, especially with regard to competition law and privacy.

4. The effect of the absence of an international convention on multimodal transport (Deliverable 6.5)

Currently, a number of different national and international laws and conventions are in place providing for the legal framework in international transport. Many of these regulations only apply to a certain means of transport. Especially in cases of multimodal transport, the lack of alignment of these laws and conventions becomes apparent. The absence of an international convention on multimodal transport leads to uncertainty in the transport sector, especially with respect to applicable and thus the parties' obligations and rights and remedies in case of need. This is an obstacle to choose for multimodal transport which often can be more efficient than unimodal transport.

Given these issues and uncertainties, it makes sense to have a contingency plan in place, an alternative to step in if necessary, this alternative being a Carriage of Goods Convention (CGC).

The starting point of the CGC is the contract of carriage in general. Whereas the existing conventions all depart from a unimodal contract of carriage, the CGC does not discriminate between unimodal and multimodal contracts of carriage. The convention gives uniform rules for all contracts of carriage within its formal scope of application.

The establishment of mandatory rules is not an objective in itself. Any convention should obviously be mandatory to have any effect in the first place, but the CGC gives way to the agreement of the parties whenever this is possible. The convention therefore only aims to cover the necessities, and for the rest it intends to interfere as little as possible. This means, for instance, that the CGC will not regulate jurisdiction. In the commercial practice, the contracting parties will often agree on a competent court to settle their disputes, and they are perfectly free to do so. The parties can also agree on arbitration; the CGC does not intend to restrict party autonomy in this respect either.

The convention should be consumer friendly. The convention needs to be easily accessible for merchants, carriers, bankers, insurers and claims handlers, not just for trained and specialized legal practitioners. This means, for instance, that the convention ignores the concept of successive carriage. Instead, the CGC treats contracts of successive carriage, just like contracts of sub-carriage for that matter, as contracts of carriage. It also means that the CGC will not provide any rules on (the operation of) documents of title. The convention covers contracts of carriage, and as such contracts of carriage under a bill of lading or similar document of title, but the ambit of the CGC remains limited to the bill of lading contract and the document of title function is left untouched.

The convention is a living instrument. This is quite impossible of course, but it means that its provisions are not carved in stone. Instead of allowing for a revision of the convention (every so many years), the CGC requires the contracting states to reconvene in order to amend or revise the convention at regular intervals.

In Deliverable 6.5, KKL provided a draft of such CGC as a suggestion for a common international regulation in the future.

5. Drafting a General Legal Framework for E-Commerce (Deliverable 6.7)

Online retail sales, the so-called e-commerce, is a booming business sector. The European e-commerce turnover has reached a staggering € 530 billion in 2016, at a growth rate of nearly 14%, which has had a significant impact on the delivery component of e-commerce supply chain, also called the “last-mile” delivery.

This impressive growth has led to a continuous expansion of delivery fleets of the traditional parcel networks, which must fulfil the last mile deliveries to end customers. However, e-commerce exposes all kinds of new challenges. What happens when the personal data of the end customer if he or she places an order at the Trustee? Which stakeholders are involved in the e-commerce standard set up? And what are the mutual rights, obligations and liabilities of these stakeholders?

Therefore, it is important to identify the relationships between the stakeholders, pinpoint potential risks, discover blind spots and offer insights on how these relationships should legally be characterized.

D6.7 focusses on developing a General Legal Framework for collaboration in e-commerce and the legal basis for CITS/ICT. The General Legal Framework is based on the following fields of law:

- Employment law
- Insurance law
- Transportation and Logistics
- Privacy and Data Protection
- Intellectual Property Rights, and
- Competition Law

The e-commerce pilot as drafted in D4.1 has been taken as a point of departure. The e-commerce pilot, in accordance with the main goals of the NexTrust project, wishes to reduce deliveries, reduce GHG emissions and increase load factors, by building a collaborative trusted network around multiple, independently owned vehicles, tapping and pooling this “underutilized” pool of existing transport equipment.

Also, D6.7 offers insights on what kind of provisions and elements should be included in the agreements between the different stakeholders.

References

- [1] www.nexttrust-project.eu project website
- [2] NexTrust Deliverable 6.2 - Report on the legal aspects of the initial phase of matchmaking and the pre-contractual phase
- [3] NexTrust Deliverable 6.3 - Competition law aspects of cooperation in the supply chain
- [4] NexTrust Deliverable 6.4 - Report on the Legal definition of the trustee concept and on the legal forms
- [5] NexTrust Deliverable 6.5 – Report on the effect of the absence of an international convention on multimodal transport
- [6] NexTrust Deliverable 6.7 – Drafting a general legal framework for e-commerce

Acronyms and Abbreviations

ACROYNM	EXPLANATION
FTL	Full Truck Load
KKL	Kneppelhout & Korthals
LSP	Logistics services provider
NDA	Non-disclosure agreement
PU (Dissemination level)	Public

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