CO³ POSITION PAPER:

LEGAL FRAMEWORK TRANSFORMATION

By Jikke Biermasz and Mirjam Louws, Kneppelhout & Korthals N.V.

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Deliverable D 2.9 ('Legal framework transformation')

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**COLLABORATION CONCEPTS FOR CO-MODALITY**

**WP2**

**STRENGTHEN THE OPERATIONAL AND LEGAL FRAMEWORK**

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Explanatory notes to model legal agreements (D 2.7 ('Written finalized agreements')) and comments on model agreements by legal specialists from other relevant EU jurisdictions (*Italy, Belgium, France, Germany, Spain, United Kingdom*)

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EXECUTIVE SUMMARY

Legal framework transformation

GENERAL
One of the main missions of the CO3-project has been to draw up a legal framework which forms a solid basis for horizontal collaboration between shippers in the supply chain and which can be used as an objective tool for supply chain partners that actually want to start to collaborate. A preliminary observation of the CO3 consortium has been that lack of clarity and uncertainty with respect to the legal possibilities and impossibilities causes ‘cold feet’ and can discourage prospective partners from engaging in horizontal collaboration.

STRUCTURE OF THE LEGAL FRAMEWORK
Putting horizontal collaboration between shippers on a sound contractual basis can be complicated. Different market participants are involved. The mutual rights and obligations of the shippers, intermediaries and logistics service providers need to be addressed in multiparty contracts. Horizontal collaboration is innovative and touches upon many areas of law, such as general contract law, competition law, IT-law and (international) transport law. This requires a multidisciplinary approach. 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.

In order to pave the way for practice, the CO3 consortium has drawn up a legal framework for horizontal collaboration in the supply chain. The structure of the legal framework includes three contractual levels. The first contractual level is the collaboration agreement between the shippers. In order to manage the collaboration between the shippers, but also to reduce the competition law risks of (in)direct information exchange between competitors, it was decided that a neutral, impartial third party, the trustee, needed to enter the game. The second contractual level is the contract for the provision of services between the participating shippers and this trustee. Last of all, the shippers have to make specific basic arrangements with the logistics service provider(s) relating to the transport of the bundled freight flow. The framework carriage contract between the individual shippers and the logistics service providers forms the third contractual level and the tailpiece of CO3’s legal framework. The following figure gives an overall picture:

![Figure 1: Overall Picture](image)

In Deliverable D 2.8 (‘Report on the legal framework for horizontal collaboration in the supply chain’), we have given a description of the main legal aspects of horizontal collaboration between shippers in the supply chain and have elaborated on our thoughts and findings. In this report we address the legal snare’s and pitfalls and explain how parties can try to overcome difficulties.
MODEL AGREEMENTS and KEY ELEMENTS
The three contractual levels have been worked out in model agreements, which have been included in Deliverable D 2.7 ('Written finalized agreements'). The key elements of each contract have been identified. Per contract the key elements have been identified. The mutual shippers willing to participate in a horizontal collaboration - for example - at least need to think of 'entry and exit' and 'gain sharing' rules as well as have to decide whether they want to enter into the collaboration 'without any obligations' or - to the contrary - want to commit to minimum volumes over a certain period of time. In case the services of a trustee are called in, the tasks and working method of this service provider need to be identified and the contracting parties have to determine how confidentiality and the security of data will be guaranteed. In the skeleton carriage contract the shippers and logistics service provider have to record that freight will be moved against the background of the broader collaboration between the shippers. Depending on the type(s) of goods to be carried, special requirements with respect to (un)loading, stowage and transport have to be laid down in this framework contract in order to avoid cross-contamination and other risks that might occur and to allocate reciprocal responsibilities of the shippers and logistics service provider.

PREMISES AND CUSTOMIZATION
Although in practice customization on a case-by-case basis will always be necessary, the intention is that the model legal agreements we have developed can actually be used in practice as a concrete starting point for company negotiations and decision-making and as an objective tool to facilitate real life collaboration(s) (projects). The legal framework and the model agreements are based on some underlying principles and choices the CO3-consortium has adopted such as the introduction of the trustee. These premises are identified in paragraph 2.12 'Premises for the legal framework' of Deliverable D 2.8.

TRANSFORMATION PROCESS
The model agreements have first been developed under Dutch law. The choice for Dutch law was motivated by the practical consideration that the consortium partner responsible for the 'legal' tasks, Kneppehout & Korthals lawyers, is a Dutch law firm and that the template agreements of course had to be developed under the legal system of a national (civil) law. The aim however has been to develop and provide a legal framework which – as far as possible – would also be sustainable under the law of relevant other EU jurisdictions. The object of this deliverable, Deliverable D 2.9 'Legal framework transformation' is to present the results of a review of the CO3 legal framework and the model agreements, which has been carried out by legal specialists from other relevant EU jurisdictions. Subcontracting law firms from Italy, Belgium, France, Germany, Spain and the United Kingdom have been asked to give their expert opinion about the work and to report similarities, differences and particularities of their own national legal systems. The object of this 'comparative law study' has basically been to confirm, if and to what extent, the model agreements we have developed are 'EU-proof'. We wanted to know whether it would also be possible to use the model agreements as a tool when parties to a concrete collaboration (project) would opt to contract under the laws of another EU jurisdiction than Dutch law.

COMMON THREAD
In order to make comparison possible, we have worked with a questionnaire and have focussed on the main features and not on the details. The agreements we have developed are templates. This means that they are not yet ready-to-use in practice, but always have to be tailored to the specific situation of a concrete collaboration (project). When prospective participants to a concrete collaboration (project) decide to use the CO3 model agreements as a basis for their contracts, the details of the collaboration and also particularities of the national legal system of choice need to be taken into account. Template contracts can be valuable tools, but in the end contract drafting is more than a form-filling exercise and requires legal expertise and a careful evaluation of facts, circumstances and arrangements. Also for this reason it made sense to concentrate on the broad outlines rather than to get lost in details.
The legal framework and model agreements have met with a positive response. The broad impression of the review by the legal specialists from Italy, Belgium, France, Germany, Spain and the United Kingdom is that, although specific deviations can always be found at a detailed level, in these jurisdictions, in general it works more of less the same as in the Netherlands. There seems to be a clear common thread.

On the basis of the questionnaire the subcontractors have reviewed the legal framework and the basic ideas. On the basis of their knowledge of and experience in legal practice, these subcontractors confirmed the preliminary advice the CO3 consortium has been highlighting from the very beginning of the project, such as that market participants who think of setting up a horizontal collaboration project are being well-advised to lay down their arrangements in written contracts, to involve legal experts from the beginning and to pro-actively coordinate commercial/logistics and legal operational processes.

In order to make it possible for the subcontractors to evaluate the three model agreements section by section, we have drafted explanatory notes per section and have asked them to give their comments on each section. The three model agreements, explanatory notes per section and comments of the subcontractors per section can be found in Appendix 1 to this report.

COMPETITION LAW ASPECTS
Listening to the opinions on the CO3 ‘shop floor’, we have realized in the course of the project that in practice there is a pressing need for greater understanding of the competition law implications of horizontal collaboration in the supply chain. In this report we have included an ‘Additional report regarding competition law aspects’. With this additional report, which has been reviewed by the subcontractors as a part of the transformation process, we hope to have given a clearer picture in respect of the principal aspects of competition law. The report is not an in-depth study, but has adopted a practical approach and reflects the main features. In the end competition law has a very factual character. A lot depends on the actual facts and circumstances as well as the characteristics and structure of the relevant market, such as the type of the product and the position and the number of market players. It is not only what contracting parties agree upon, but also how they act in practice. Competition law aspects need to be evaluated on a case-by-case basis. We recommend market participants to seek the advice of a competition law expert. This can already be relevant in the initial phase of providing supply chain data to a matchmaking service.

INTERNATIONAL PRIVATE LAW AND INTERNATIONAL TRANSPORT LAW ASPECTS
We were also of the opinion that the international private law and international transport law implications need more attention, also within the framework of the comparative law exercise. The absence of an international treaty with respect to multimodal carriage contracts seems to be a legal obstacle for horizontal collaboration in the supply chain. After all, efficiencies in logistics can in particular be achieved by consolidating the loads of several shippers and, in some cases, creating flows large enough to permit a modal shift from road to rail or water-borne services. In this report a second additional report, titled ‘Additional report regarding international private law and international transport law aspects’, is included. In that report we have dealt in greater depth with international private law and international transport law aspects. The subcontractors from Italy, Belgium, France, Germany, Spain and the United Kingdom have also commented on this report from the perspective of their own legal systems.

The findings of the transformation process are integrated into the theoretical part of this report (i.e. chapters 2, 3 and 4). For ease reading, the model agreements and the section by section explanatory notes and comments of the foreign subcontractors have been included in Appendix 1.

IMPACT ON PRACTICE
In view of CO3’s Applied Research Cycle, we have not only called in the expert opinions of foreign legal specialists to review the legal framework and model agreements, but have also interfaced with
commercial practice. What we basically wanted to learn from practice is, if and to what extent the legal concepts we have developed 'on the drawing table', would also work in practice. Would market participants express a positive opinion and confirm the main features of the legal framework and what observations and criticisms would be made?

The practical validation we have carried out has been two-fold. We have held an interview round using a separate on the basis of a (another) questionnaire with industry partners and have spoken with three companies which are on the 'shippers'-side, a company which acts as a trustee and two logistics service providers. In the practical part of this report, we have given basic descriptions of the interviews and have briefly summarized which issues were brought up for discussion.

Although only elements of the model agreements were used in the CO3 test cases, these test cases have provided valuable learning opportunities, also in terms of the legal aspects. Therefore, apart from the interview round, in our effort to interface with commercial practice, we have also learned some lessons from those test cases from a legal point of view and report on that as well. These lessons learned from the test cases are also presented in the second, practical part of this report (chapter 5).

**MANAGEMENT OF LEGAL PROCESSES**

The interview round, the experiences we had in the test cases and numerous conversations we had with industry partners during High Level Industry Board meetings, congresses, dissemination events and training courses have revealed to us that when it comes to horizontal collaboration in the supply chain, the legal aspects, which are so important, often still remain underemphasized. In the past few years, commercial and logistic departments seem to have made the 'mental shift'. Within the same companies legal departments often appear to be lagging in their appreciation of the needs of horizontal collaboration. We think this is caused by poor coordination of commercial/logistic and legal processes. Commercial people still often expressed opinions like: We have oral arrangements, why do we need contracts? We work together and it works fine, we do not have or need any contracts. We do not involve legal people, because horizontal collaboration is difficult enough and when legal gets involved the deal will definitely be off.

The CO3 consortium has contributed its share to break through these deep-rooted misconceptions and prejudices, which have been confirmed by both the subcontractors and by industry partners in the interview rounds. Again, from a legal perspective horizontal collaboration in the supply chain is certainly quite complicated and not without risks. When the legal aspects are not taken into account properly, that is a lost opportunity. Industry partners who want to take their collaboration to a stage of maturity they need to have a solid legal basis in place and make sure that the mutual rights and obligations have been made explicit and laid down in clear, written contracts.

**MILESTONE PLAN**

In the meantime we have analyzed the legal process and have set up a milestone plan, in order to help market participants understand the subject matter. This milestone plan (see chapter 1.2), which was used during various CO3 training courses and other presentations, sets out in four, clear phases step-by-step what needs to be dealt with in order to finally come to contractual recording. We hope this milestone plan offers legal and non-legal specialists involved in a horizontal collaboration (project) the necessary overview to deal with the legal aspects.
1. INTRODUCTION
1.1 Background
1.2 Scope of the deliverable, aim and objectives
1. INTRODUCTION

1.1 Background

The EU-funded CO3-project (Collaboration Concepts for Co-modality) aims to develop, professionalise and disseminate information on the business strategy of logistics collaboration in Europe. The goal of the project is to deliver a concrete contribution to increasing vehicle load factors, reducing empty movements and stimulate co-modality, through collaboration between industry partners, thereby reducing cost and transport externalities such as congestion and greenhouse gas (GHG) emissions without compromising the service level. The project will coordinate studies and expert group exchanges and build on existing methodologies to develop legal and operational frameworks for collaboration via freight flow bundling in Europe. Furthermore, the project consortium of knowledge institutes and specialised industry players will develop new business models for logistics collaboration. The developed tools, technologies and business models will be applied and validated in the market via pilot studies. Finally, the CO3-consortium will promote and facilitate matchmaking and knowledge-sharing through conferences and practical workshops to transfer knowledge and increase the market acceptance of collaboration.

The core of the CO3-project is what is referred to as the applied research cycle. This cycle has been set up as a continuous learning and feedback loop between the models and tools needed for supporting collaborations, the most suitable business models for groups of companies wanting to collaborate and finally the actual test cases for collaboration. These elements are developed under individual work packages as shown below.

![FIGURE 3: THE CO3 APPLIED RESEARCH CYCLE](image)

1.2 Scope of the deliverable, aim and objectives

The first ‘legal’ deliverable within work package 2 has been the ‘Report on the legal framework for horizontal collaboration in the supply chain’ (Deliverable D 2.8). In this report we have given a general overview of and described the various legal aspects which need to be taken into account when supply chain participants want to start to collaborate. We have addressed the legal snares and pitfalls and advised how parties can try to overcome difficulties. In this more theoretical report we have outlined the legal background of horizontal collaboration in the supply chain.

However, there is more. The CO3-consortium aims at bringing theory and practice together. In this respect the CO3-consortium has developed a legal structure for horizontal collaboration in the supply chain, existing of (a framework of) three model agreements between the different market participants involved. These model agreements have been presented as Deliverable D 2.7 ("Written finalized legal agreements"). Although in practice customisation on a case-by-case basis will always stay necessary, the purpose is that this framework of model legal agreements can actually be used in practice as an objective tool to facilitate real life collaboration(s) (projects).
The legal framework and the model agreements are based on some underlying principles and choices the CO3-consortium has made, such as – for example – the introduction of the trustee. These premises are identified in the Report on the legal framework for horizontal collaboration in the supply chain (Deliverable D 2.8). We refer to paragraph 2.12 ‘Premises for the legal framework’ of that report.

The legal framework and model agreements have first been developed under Dutch law. The choice for Dutch law has not been principle but has been motivated by the practical consideration that the consortium partner responsible for the ‘legal’ tasks within work package 2 (Kneppelhout & Korthals lawyers) is a Dutch law firm and that the template agreements (as a starting point) of course had to be developed under the legal system of a national (civil) law.

The aim however has been to develop and provide a legal framework which is – as far as possible – legally sustainable under the law of other jurisdictions. The object of this present deliverable, Deliverable D 2.9 ‘Legal framework transformation’ is to test the framework and model agreements by asking foreign legal specialists to give their expert opinion.

Legal experts [the subcontractors] from Italy, Belgium, France, Germany, Spain and the United Kingdom have been asked to help us to carry out this task and evaluate the legal framework and model agreements against their own national legal systems and to indicate and report on the similarities and possible differences and also, if any, to give suggestions. The object of this review is that we hopefully will be able to confirm if and to what extent it is also possible to use the models we have developed when parties to a concrete collaboration (project) would opt to contract under the laws of another EU jurisdiction and if so which qualifications might need to be made in that case.

So, what the CO3-consortium wanted to achieve with this ‘foreign trip’ is to learn in broad outlines whether or not and to what extent the ideas the project group has on the legal aspects of horizontal collaboration between shippers in the supply chain as well as the structure that has been set up and the model contracts which have been developed are ‘EU-proof’.

The subcontractors have been told that the consortium is looking for similarities, differences and national particularities, but that they will only have to touch upon those and explicitly that they do not need to go down to the smallest details. After all, the contracts developed are ‘models’. Those are not yet ready-to-use, but always have to be tailored to the situation in each and every concrete collaboration (project). When prospective participants to a concrete collaboration (project) decide to use the CO3 model agreements as a basis for their contracts, the details and also national particularities of the national legal system of choice can and need to be taken into account anyway.

The object of this deliverable has more or less been a comparative law research. In order to be able to ‘compare’ it seemed to be useful to discuss in more general terms only and not to get lost in the details. The target of this comparative law exercise is to be able to compare the broad outlines of (including the Netherlands) seven national legal systems and not to compare the details.

In order to make it possible to compare the feedback of the subcontractors, we have worked with a questionnaire (see 2.2). In the questions we have asked the subcontractors to answer, we have systematically addressed the main legal aspects of horizontal collaboration in the supply chain which are reviewed in Deliverable D 2.8 (Report on the legal framework). A striking point - and that seems therefore to be the correct conclusion - is that, although of course specific deviations can be found on the level of detail, in the jurisdictions, which participated in the transformation process, in general it works more of less the same. There is a clear common thread. Of course, market participants who want to use the model agreements we have developed, will have to realize that these models are only a starting point for a process of own deliberations and decision-making. They will not only have to tailor the models to their concrete situation, but also have to check whether what they agree on is in accordance with the (inter)national law that applies to the contracts. What we can say however, after
the ‘transformation process’, is that the legal framework and model agreements we have developed, on broad outlines seems to be ‘EU-proof’. This means that – under the self-evident conditions that the contracting parties pay proper attention to their own specific facts and circumstances and have their actual contracts evaluated against the applicable national law – the model agreements can also be used as a basis for discussions and contract drafting when the parties would opt to contract under another national legal system. To avoid misunderstandings, with this we explicitly remark again that the transformation process was only executed in Italy, Belgium, France, Germany, Spain and the United Kingdom.

And there is more. In further elaboration of paragraph 2.9 ‘Competition law aspects’ and the paragraphs 2.8 ‘Areas of law’ and 2.10 ‘International private law’ of the Report on the legal framework’ (Deliverable D 2.8) we have in the meantime drafted two additional reports. Listening to the opinions on the CO3 ‘shop floor’, we have realised that in practice there is a pressing need for more hold with respect to the possibilities and impossibilities of competition law. With the ‘Additional report regarding competition law aspects’ (see 3.1) we hope to respond to the need for a more clear picture in view of competition law.

We were also of the opinion that the international private law and international transport law implications needed more attention, also within the framework of the comparative law exercise. The absence of an international treaty with respect to multimodal carriage contracts seems to be a legal obstacle for horizontal collaboration in the supply chain. After all, efficiencies in logistics can in particular be achieved by increasing volumes and then making the modal shift (for example from only road to road and rail or road and inland waterways). In the ‘Additional report regarding international private law and international transport law aspects’ (see 4.1) we deal in greater depth with international private law and international transport law aspects.

The subcontractors have been asked to read the abovementioned additional reports as well and to give their general comments from the perspective of their own legal system (see 3.2 respectively 4.2).

In view of an integrated approach the findings of this process of conversion and legal translation are presented in the theoretical part (chapters 2, 3 and 4) of this report, Deliverable D 2.9 ‘Legal framework transformation’, in which also the ‘Report on the legal framework for horizontal collaboration in the supply chain and model legal agreements’ (Deliverables D 2.8 and D 2.7) are included. After all, that is what the subcontractors have commented on. For easy of comprehension, the three model agreements (D 2.7), now provided with explanatory notes per section written by us, and the comments per section of the legal specialists from Italy, Belgium, France, Germany, Spain and the United Kingdom have been included in Appendix 1 to this Report. After all, this is a large document.

This Deliverable D 2.9 ‘Legal framework transformation’ has also a practical part. In view of CO3’s Applied Research Cycle the project group has decided not only to ask legal specialists from the selected other relevant EU jurisdictions to evaluate the legal framework, reports and model agreements, but also to actively seek an interface with commercial practice.

What we basically wanted to learn from practice is, if and to what extent the legal concepts we have developed ‘on the drawing table’, would also work in practice. Would market participants express a positive opinion and confirm the main features of the legal framework and what interesting observations and maybe criticisms would come up? We decided to do a limited interview round on the basis of a questionnaire. In this regard we spoke with three companies which are on the ‘shippers’-side, a company which acts as a trustee and two logistics service providers. For a report on these interviews we refer to paragraph 5.3.
Only elements of the model agreements we have developed within the CO3-project have been tested in practice in the pilot cases. The project period appeared to be too short to test the entire model agreements, which also had to be developed and subsequently evaluated against the legal systems of other relevant EU jurisdictions in that same project period, out in practice in the test cases. Furthermore, one of the main lessons we learned from the CO3-project, is that in practice there appear to be deep-rooted misconceptions between commercial/logistics and legal people. From a legal perspective, horizontal collaboration between shippers in the supply chain is certainly not uncomplicated. Various legal aspects need to be taken into account. Proposed participants to such collaboration are being well-advised to think about, discuss and address the relevant legal aspects and subsequently lay down their arrangements in writing. We strongly recommend to pro-actively manage and coordinate commercial/logistics and legal processes from the beginning, whenever industry parties think about the possibility of starting up a horizontal collaboration project.

In the meantime we have analyzed the legal process and have set up a milestone plan, in order to help market participants to understand and have a good insight in the subject matter. The milestone plan, which was used during various CO3 training courses and other presentations (dissemination), sets out in four, clear phases what steps and actions could be taken in order to come to a contractual recording of a horizontal collaboration (project).

![Diagram of Milestone Plan Legal]

**Figure 2: Milestone Plan Legal**

Although only elements of the model agreements were used in the CO3-test cases, these test cases have provided valuable learning opportunities, also in terms of the legal aspects. Therefore, apart from the interview round, in our effort to validate the legal framework in commercial practice, we have decided to try to deduct the main lessons that can be learned from the test cases from a legal point of view and report on that as well. These lessons learned from the test cases are presented in the second part of the practical part of this report (see 5.4).
THEORY
2. LEGAL FRAMEWORK

2.1 Report on the legal framework for horizontal collaboration in the supply chain (Deliverable D 2.8 ('Report on the legal framework'))

2.2 Questionnaire on the Report on the legal framework for horizontal collaboration in the supply chain

2.3 Answers to the questions given by legal specialists from other relevant EU jurisdictions (Italy, Belgium, France, Germany, Spain, United Kingdom)
CO³ POSITION PAPER:

REPORT ON THE LEGAL FRAMEWORK FOR HORIZONTAL COLLABORATION IN THE SUPPLY CHAIN AND MODEL LEGAL AGREEMENTS

By Jikke Biermasz, Kneppelhout & Korthals N.V.

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COLLABORATION CONCEPTS FOR CO-MODALITY

WP2
STRENGTHEN THE OPERATIONAL AND LEGAL FRAMEWORK

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EXECUTIVE SUMMARY:

Legal framework for horizontal collaboration in the supply chain

GENERAL
One of the main missions of the C03 project is to draw up a legal framework which will form a solid basis for horizontal collaboration in the supply chain and which can be used as an objective tool for supply chain partners that actually want to start to collaborate. Lack of clarity and uncertainty with respect to the legal possibilities and impossibilities causes cold feet and can prevent prospective participants to give horizontal collaboration a chance to try to convince them.
In general it is advisable to coordinate 'commercial' and 'legal' processes and involve legal experts in the early stage of a plan (to investigate the possibility) to bundle freight flows. That way it can be avoided that the reservations legal people might have, put a spanner in the works. Enthusiasm and trust are essential for success. Prospective partners who do not discuss the legal hurdles at the right time, risk the enthusiasm and trust.

COMPLICATING FACTORS
For many reasons it is a complicated work to 'catch' horizontal collaboration between shippers in the supply chain in contracts. Different groups of market participants are involved. The concept is innovative and takes place in the area of tension between competition and trust. The collaboration has horizontal and vertical aspects and can only be covered by more multiparty agreements. Furthermore, various areas of international and national law are involved which requires a multidisciplinary approach. Competition law often seems to be the main concern of market participants; however general civil law, (international) transport law and international private law aspects need to be reviewed as well. As a rule the collaboration will have an international character. Parties from different countries will be involved and trade lanes cross borders.

OBJECTS LEGAL FRAMEWORK
These difficulties make a solid legal framework very necessary. The C03 consortium hopes to contribute to the consciousness-raising process as well as pave the way towards collaboration by providing an objective tool. Although customization on a case-by-case basis will still be possible and even needed, we hope to reach a certain level of standardization. Apart from laying down the arrangements between the parties involved in writing, the legal framework should facilitate and guarantee a smooth working of the collaboration between the shippers by identifying and clearing away legal obstacles and providing quick and clear solutions to remaining potential problems. Other self-evident objects are legal certainty and legal uniformity. A patchwork of individual arrangements would considerable impede the collaboration, if not make it impossible. Therefore parties need to commit to the same legal regime.

STRUCTURE
We have developed a legal framework which exists of three model agreements. One of the assumptions of the C03 consortium is that a neutral, independent and trusted third party is needed to facilitate the collaboration between the shippers. The model service agreement between the shippers and this trustee however, forms an additional contractual layer between the collaboration agreement between the shippers on the one hand and the carriage contracts between the shippers and the logistics service providers ('LSP's') on the other hand. Important aspects that need to be covered by the collaboration are gain sharing, rules with respect to volume variation, entry and exit clauses and competition law aspects. C03 adopts the Shapley Value as well-defined, fair and understandable formula to divide the gains (costs reductions) generated through the collaboration among the shippers.

APPROACH
The first theoretical part of this report on the legal framework for horizontal collaboration in the supply chain gives an overview of the legal aspects that need to be taken into account when parties in the supply chain want to start to collaborate. What are the legal snares and pitfalls and how can parties overcome these difficulties?

C03 aims to bring theory and practice together. The consortium has developed a legal structure for horizontal collaboration in the supply chain, existing of (a framework of) three model agreements
between the different participants involved. This report secondly presents the three model agreements, which have first been developed under Dutch law. Depending on the test cases which will be carried out by the consortium in the course of the project, legal experts in other jurisdictions will be asked to check the legal framework and the model agreements against their own legal systems and to report on the similarities and possible differences. This way, we will be able to confirm if – and to what extent - it is also possible to use the model agreements when parties would opt to contract under the laws of another jurisdiction. We will present the investigation results of and report on this 'conversion' process in a later stage of the project.
INTRODUCTION

1.1 Background

The EU-funded project CO3 (Collaboration Concepts for Co-modality) aims to develop, professionalise and disseminate information on the business strategy of logistics collaboration in Europe. The goal of the project is to deliver a concrete contribution to increasing vehicle load factors, reducing empty movements and stimulate co-modality, through collaboration between industry partners, thereby reducing cost and transport externalities such as congestion and greenhouse gas emissions without compromising the service level. The project will coordinate studies and expert group exchanges and build on existing methodologies to develop legal and operational frameworks for collaboration via freight flow bundling in Europe. Furthermore, the project consortium of knowledge institutes and specialised industry players will develop new business models for logistics collaboration. The developed tools, technologies and business models will be applied and validated in the market via pilot studies. Finally, the CO3 consortium will promote and facilitate matchmaking and knowledge-sharing through conferences and practical workshops to transfer knowledge and increase the market acceptance of collaboration.

The core of the CO3 project is what is referred to as the applied research cycle. This cycle has been set up as a continuous learning and feedback loop between the models and tools needed for supporting collaborations, the most suitable business models for groups of companies wanting to collaborate and finally the actual test cases for collaboration. These elements are developed under individual work packages as shown below.

![Diagram of CO3 Applied Research Cycle]

FIGURE 1: THE CO3 APPLIED RESEARCH CYCLE

1.2 Scope of the deliverable, aim and objectives

This report on the legal framework for horizontal collaboration in the supply chain in the first place aims at giving an overview of and describing the various legal aspects which need to be taken into account when supply chain participants want to start to collaborate. What are the legal snares and pitfalls? How can parties overcome legal difficulties? The first, more theoretical part of this report outlines the legal background of horizontal collaboration in the supply chain.

The CO3 consortium aims at bringing theory and practice together. In this respect the consortium has developed a legal structure for horizontal collaboration in the supply chain, existing of (a framework of) three model agreements between the different market participants involved. Although in practice customization on a case-by-case basis will always stay necessary, the purpose is that this framework of model agreements can actually be used in practice as an objective tool to facilitate real life
collaboration(s) (projects). The legal framework is based on some underlying principles and choices the C03 consortium has made. These starting points will also be identified and explained in the first part. This report secondly presents the three model agreements. This way, the report brings the deliverables D2.8 ('Report about model legal framework') and D2.7 ('written finalized legal agreements') together. In order to demonstrate the structure of the legal framework we have included various diagrams.

The legal framework and model agreements have first been developed under Dutch law. The aim is however to develop and provide a legal framework which is - as far as possible - legally sustainable under the law of other legal systems. Depending on the test cases which will be carried out by the C03 consortium in the course of the project, legal experts in other jurisdictions will be asked to check the legal framework and the model agreements against their own legal systems and to indicate and report on the similarities and possible differences. This way, we will be able to confirm whether it is also possible to use the model agreements we have developed when parties would opt to contract under the laws of another jurisdiction and if so which qualifications might need to be made in that case. In view of an integrated approach, the findings of this process of conversion and translation (deliverable D2.9 'Legal framework transformation') will later on also be included in this report.

For more (background) information about the position of the C03 consortium on horizontal collaboration in the supply chain, we refer to C03 position paper 'Framework for collaboration' which has been released in February 2012 (Deliverable D2.1). In that initial paper, which gives an overview of the most relevant aspects of horizontal collaboration projects, it is stated and substantiated in more detail that - for example - a trustee is needed and that a fair gain sharing mechanism is a key success factor. This "Report on the legal framework for horizontal collaboration in the supply chain and model agreements" addresses the legal issues. It goes without saying that aspects as the role of the trustee and gain sharing rules are (also) closely related to the legal framework.
2. Legal aspects of horizontal collaboration in the supply chain

2.1 The pre-contractual phase

One of the main missions of the CO3 consortium is to draw up a legal framework which will form a solid basis for horizontal collaboration in the supply chain and which can be used as an objective tool for parties that want to start to collaborate. Before we proceed to the legal relationships between parties that have actually already entered into an agreement, we should pay some attention to the pre-contractual phase which precedes the contracts.

It should not be forgotten that this pre-contractual phase is important as well. In this stage the potential participants to a horizontal collaboration (project) lay the foundation for a (long-term) legal relationship which has to be based on mutual trust. Especially in the more complex forms of collaboration, often (substantial) investments will have to be made to analyze whether there are possibilities to bundle freight flows and if so, subsequently to synchronize these flows. It is obvious that parties, which make clear arrangements with respect to this pre-contractual stage of research and negotiation, reduce the chance of raising false expectations. The parties can give structure to the pre-contractual phase by laying down the arrangements in writing, for example in a letter of intent ('LOI'). Consideration could for example be given to aspects as:

- the division of research and other (initial) costs;
- competition law aspects in the preliminary stage;
- confidentiality;
- the breakdown of the research activities and/or negotiations;
- when parties will be deemed to have concluded a contract;
- applicable law and jurisdiction;

It is also important to realize, that although this seems inherently contradictory, negotiations about a cooperation contract itself can sometimes develop in such way that those become the main obstacle for the actual realization of the proposed collaboration. In particular within large companies there will normally be a distinction between the 'commercial' and 'legal' department and these business units do not necessarily speak the same language. The commercial arm of the company will normally make the initial contact with other companies and start up research activities. When this research shows that there are good possibilities to combine distribution and logistics on certain trade lanes and that considerable efficiency gains, costs savings and other benefits can be achieved with that, the commercial people will become enthusiastic and might even be convinced. But then parties realize that they will (still) have to lay down the proposed collaboration in writing. Mutual in-house lawyers or external legal advisors will then be called in. Those people have a different perspective and might start to express concerns and objections against the collaboration. The communication about such reservations that subsequently takes place between the proposed collaboration partners can easily have a negative effect on their relationship. To sum up a few potential reservations legal people might bring up for discussion:

- conservatism on model (commercial) contracts and standard contractual clauses used by the company;
- the applicability of general terms and conditions;
- competition law;
- confidentiality;
- intellectual property rights;
In general it is advisable to coordinate ‘commercial’ and ‘legal’ processes and involve or at least inform legal experts in an early stage. After all, there is a multiplicity of legal aspects which needs to be arranged in the eventual collaboration contracts. When parties do not discuss potential legal hurdles in time, those might nip the initial enthusiasm and trust, which are so essential for success, in the bud.

2.2 Complicating factors

Parties have to realize that – for many reasons – it is a complicated work to implement horizontal collaboration (projects) in contracts in a good way.
First of all, different groups of market participants are involved in a horizontal collaboration in the supply chain. There are shippers, intermediaries, transport- and other logistics service providers. Sometimes these parties are competitors. Horizontal collaboration in the supply chain is innovative. Elements as competition and trust are hard to catch.
Another complication is that the collaboration between shippers in the supply chain, which has horizontal (collaboration between shippers) as well as vertical (in the supply chain) elements, cannot be covered by one contract, but only by more, multiparty agreements.
Apart from that various areas of civil and public law are involved, such as general contract, (international) transport and competition law. This requires a multidisciplinary approach.
Last, but not least, horizontal collaboration in the supply chain has a pre- eminent international character. Frequently, parties from different countries will be involved and trade lanes cross borders. As a consequence of this international (private) law has to be taken into account as well.
Because there are many complicating factors, it is very necessary to have a solid legal framework. With this report and the model legal agreements it has developed, the CO3 consortium hopes to contribute to the consciousness-raising process as well as to pave the way towards horizontal collaboration by providing an objective tool.

2.3 Objects of a legal framework

We have asked ourselves what needs to be achieved by a legal framework for horizontal collaboration in the supply chain.
First of all, the legal framework we have developed should become an objective tool. The intention is that parties that want to start collaborate in the future can decide to use this tool as an objective, solid and balanced legal basis for their collaboration. Developing a legal framework for horizontal collaboration in the supply chain carries with it a great deal of brainwork. The idea is that it will be much easier for parties to start to collaborate if other parties have already thought about the legal aspects and have worked their ideas out. The fact that the CO3 consortium exists of impartial third parties, probably contributes to the acceptability. The agreements are not the model contracts of one of the parties; parties together decide to use the model developed by third parties. Although there will still be room and – what is more - even need for customization on a case-by-case basis, the desired result is to reach a certain level of standardization.
Apart from laying down arrangements in writing, the legal framework should facilitate and guarantee a smooth working of the collaboration between the shippers by identifying and clearing away (legal) obstacles and providing quick and clear solutions to remaining problems. The framework has to make the collaboration work as a well-oiled machine. It is for example obvious that a multi-party collaboration will not be granted a long life if an individual dispute between two parties could throw a spanner. The framework has to provide legal certainty, but also legal uniformity. More parties are involved and in view of a smooth course of the collaboration, it is important that all parties more or less commit to the same legal regime. A patchwork of individual arrangements would considerably impede collaboration, if not make it impossible. There is a lot to gain in horizontal collaboration, but another side of the coin is that the prospective participants would need to avoid too much customization.

2.4 Structure of the legal framework

As indicated above, the CO3 consortium has set up a structure for a legal framework for horizontal collaboration in the supply chain. It exists of three model skeleton agreements, namely:

1. the collaboration agreement between the shippers;
2. an agreement between these shippers and the trustee;
3. A framework carriage contract between the (individual) shippers and the (individual) logistics service providers (LSP's), which will form the basis for the concrete carriage contracts to be concluded between those parties after the collaboration has started.

On the basis of an inventory of the various parties involved and an analysis of the contractual relationships between those parties, we have come to the conclusion that we needed to develop these three different model agreements. The CO3 consortium has the firm conviction that a neutral, independent and trusted (third) party is needed to facilitate the collaboration between the shippers. We refer to the initial position paper for the substantiation of this basic assumption. The consequence of the introduction of a trustee is an additional contractual layer (between the shippers and the trustee), next to the legal relationships between the shippers between or among themselves and the shippers and the LSP's.

Again, we have developed the model agreements, which have been inserted in this report, under Dutch law. These agreements will be examined for compatibility with the legal systems of other relevant European jurisdictions by foreign legal experts. We will also report on the outcomes of this process of legal conversion.

The model agreements will also be tested against practice. The concrete applications which will be carried out by the CO3 consortium, will form an important basis for this. The idea is that real learning cycle will arise. The legal framework will be used to facilitate the test applications. At the same time the pilot projects will test the legal framework and in their turn provide input and feedback for the legal framework. The model agreements presented in this report are therefore not static, but still work in progress.

The following four diagrams will provide insight in the various contractual relationships:

1. The collaboration agreement between the shippers

![Diagram 1: Collaboration Agreement]

2. The agreement between the shippers and the trustee

![Diagram 2: Agreement with Trustee]
3. the skeleton carriage contract between the (individual) shippers and (individual) logistics service providers

![Diagram of contractual relationships between shippers and LSPs](image)

4. overall picture

![Diagram of overall contractual relationships](image)

2.5 The collaboration agreement between the shippers

The details of the collaboration agreement between the shippers will be provided below. At this point we only will give the highlights.
First of all, a point of special interest is the legal form of the collaboration between the shippers. In our view the collaboration has a contractual nature only. The prospective participants to a collaboration (project) simply want to pool their cargo. That does not mean they (have the intention to) enter into a joint venture or some kind of contractual partnership agreement. What is more, that will explicitly not be their intention.
In diagram 1 we see that within our legal framework the collaboration agreement between the shippers is a multiparty agreement and does not setup a new company, separate joint venture or contractual partnership. This is also reflected in diagram 2. The agreement between the shippers and the trustee is again a multiparty agreement. All shippers enter into this agreement with the trustee on an individual basis. All individual shippers are the contractual other party of the trustee, not the collectivity of the shippers (which again does not exist).
The diagrams 5 and 6 try to make clear the distinction between a separate entity and a collaboration which only has a contractual basis:

Other key elements of the collaboration contract between the shippers are methods of cost and gain sharing, entry on exit clauses and rules with respect to volume variation. A fair gain sharing mechanism is essential for the success of the collaboration. This gain sharing mechanism has to be included in the contract. As far as the CO3 project is concerned we will assume the Shapley Value as gain sharing mechanism, since this provides a well-defined, fair and understandable formula. 

Exit and entry clauses also play an important role. From a competition law perspective it can be important to keep the collaboration open and transparent. On the other hand, (apart from the situation of a test case of course) parties need to have the commitment to build long term relationships. Otherwise it will never work.

Last of all it is important to include rules with respect to volume variation, at least in situations where the collaboration is based on scale benefits. After all in that case parties have negotiated price reductions with LSP’s in advance on the basis of freight volumes. This might lead to problems when the parties fail to live up to their promised volumes. A similar situation can by the way occur when the choice for a certain transport modality (for example the possibility to change from road to train) depends on the combined promised freight volumes.

2.6 The agreement between the shippers and the trustee

As we have explained we have chosen for a setup in which we include a neutral, impartial and external third party in the legal structure: the trustee. From a legal perspective this is also sensible in terms of competition law. The shippers will not disclose competition law sensitive information (such as price and volume information) to each other, but only to the trustee. At the instruction of the shippers, the trustee will try to make and advise on possibilities to collaborate. The trustee can have different roles, tasks and responsibilities. In this respect the position paper talks about the distinction between the ‘offline’ and ‘online’ collaboration support activities of the trustee. 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).

In theory it would be possible to carry out the activities of the trustee on the shipper’s level or to place those with a LSP. In order not to complicate the operational and legal framework, we take as a premise that the activities of the trustee are placed with a separate entity. Furthermore we will assume that the trustee carries out the offline as well as the online processes. Another premise we have adopted is that there will not be a separate fourth party ‘between’ the trustee and the LSP’s which takes care of the daily processes (‘online’ collaboration support activities), such as a traditional freight forwarder. ‘Our trustee’
also carries out the online tasks, although we will not pay (too much) attention to those activities, since those are of course not the subject of this project.

In respect of the ‘online’ activities one thing is however worth mentioning. 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 agreement).

2.7 The framework carriage contract between the shippers and the logistics service providers

From a transport law point of view the actual carriage contracts need to be concluded in a direct contractual relationship between the individual shippers and the individual LSP’s. It is – for example - not the intention that the goods of the one shipper are mentioned on a CMR-waybill together with the goods of another shipper. If that would be the case, this could lead to all kind of procedural complications in case of transport damages. Think for example of the title to claim. For example: in the case that shipper A (a manufacturer of food products) and shipper B (a company which trades in sports equipment) collaborate and the goods of shipper B are stolen during transport, it is not the intention that shipper A also will have a title to claim towards the LSP, because shipper A has to be considered as consignor under the subject CMR-waybill and as a party to the carriage contract between shipper B and the LSP. This is not what the parties want. Therefore, although the cargo is bundled during transport there need to be just as much carriage contracts as there are shippers involved in the collaboration.

However, on the other hand the LSP’s which will be involved, to a certain extent need to acknowledge the special character and vulnerability of the collaboration between the shippers. Think for example of the exercise of rights of retention with respect to the goods of one shipper on a container in which the goods of another shipper are stuffed as well. Situations like that can happen in practice and would in case of collaboration not only lead to tensions between the LSP and the shippers, but could also easily restrain the relationships between the shippers between or among themselves.

In this respect it is our advice to also have a skeleton carriage contract between the individual shippers and individual LSP’s in place. These parties can enter into this contract in advance. The skeleton carriage contract will form the basis for the concrete carriage contracts to be concluded when the parties actually start to collaborate. We have made a model for this skeleton carriage agreement which acknowledges the special character of the horizontal collaboration situation. In order to avoid unnecessary complications, within the framework of our model agreements we have only taken into account that the LSP’s carry out transport activities and not that they are also engaged in storage or other logistic activities. Of course in practice the reality could be different.

2.8 Areas of law

As indicated, within the legal context of horizontal collaboration in the supply chain various areas of law are involved. Developing a legal framework thus demands a multi-disciplinary approach. Market participants are most of the times mainly concerned about competition law aspects, but general contract law, international private law and transport law aspects need to be reviewed as well.

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.

2.9 Competition law aspects

Then in a nutshell competition law: this area of law gives rules for horizontal and vertical collaboration. Collaboration between shippers in the supply chain is horizontal in its nature, but, as indicated, it has vertical aspects as well. After all, it concerns a collaboration in the area of logistics.

Our advice in general is to seek the opinion of a competition law expert and have a detailed analysis made in each individual case of collaboration. Competition law is very complicated, has a factual nature and – of course - it is always better to be safe than sorry. Not only the structure of the collaboration and the
contents of the contracts are important in this respect, but also the way the parties implement their arrangements in practice.

Point of departure is that competition law may prohibit horizontal collaboration. The cartel ban is included in article 101 paragraph 1 of the Treaty on the Functioning of the European Union. It reads that:

"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any trading conditions;
(b) limit or control productions, markets, technical development or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby displacing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Paragraph 2 prescribes that any of such agreements or decisions shall be automatically void. Since horizontal collaboration in the supply chain generates efficiency gains, paragraph 3 of article 101 of the EU-Treaty is interesting. This provision contains an exemption on the cartel ban:

"The provisions of paragraph 1 may be declared inapplicable in the case of:
- any agreement of category of agreements between undertakings,
- decision or category of decisions by associations or undertakings,
- any concerted practice or category of concerted practices,
which contributes to improving the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerted restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of elimination competition in respect of a substantial part of the products in question."

Co-operations that improve distribution and generate efficiency gains can be exempted if these constitutive requirements are fulfilled. In this respect it can be very useful to allow customers a fair share of the resulting benefit.

In the past it was possible to submit collaboration agreements to the authorities for approval. Unfortunately, this is no longer the case. Prospective participants will therefore have to make a self-assessment.

In this respect it needs to be mentioned that the European Commission has published guidelines on the applicability of article 101 of the EU-Treaty to horizontal co-operation agreements in 2011 (2011C 11/01). These guidelines contain very useful and detailed information with respect to the do's and don'ts.

In the model collaboration agreement between the shippers and the agreement between the shippers and the trustee we have taken into account competition law. The legal framework has been set up in a way that the exchange of competition law sensitive information (such as price and volume information) between the shippers can be avoided. This information will only be shared with an independent third party, the trustee, which will be bound to confidentiality. Apart from that the collaboration agreement has an open and transparent character. In theory it should always be possible for third parties to enter the game provided that those third parties add value to the collaboration. Ideally, from an antitrust standpoint, the collaboration should be between companies that are not in the same product market. Efficiency gains should be made demonstrable and consumers should be granted a fair share of the resulting benefits.
2.10 International private law

The legal framework exists of three model framework agreements. In many cases parties from different countries will be involved and the nationalities of these parties can differ per contract. Since the agreements are connected, it is important to analyse the implications of international private law and ideally coordinate the national law which applies (additionally) to the different contracts. The same goes for the international jurisdiction. Preferably, the national court which has competence with respect to possible disputes should be able to apply its own national law. In general coordination of the applicable national and law and jurisdiction will benefit to the predictability and quality of court decisions.

As regards, the applicable national law Regulation (EC) No 593/2000 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I"), gives the relevant rules. Article 3 states first and foremost that parties have freedom of choice with respect to the national civil law they want to apply to the contract. This choice shall be made expressly or clearly demonstrated by the contract. We advise to enter a choice of law clause in the contracts. Otherwise, parties might end up in complicated discussions about the applicable law. With respect to the collaboration agreement article 4 of Rome I ‘Applicable law in absence of choice’ does not contain a clear criterion to determine the applicable law. Without a choice of law clause, the agreement will be governed "by the law of the country with which it is most closely connected" (article 4, paragraph 4). After all, between the shippers there is no ‘characteristic performer’. By absence of a choice of law clause, the contract with the trustee will be governed by the law of the court where this service provider has his habitual residence (article 4, paragraph 1, sub b Rome I). In our view it is undesirable that this is another law than the law which applies to the collaboration agreement between the shippers. After all, both agreements are closely connected to one another.

Carriage contracts with LSP’s will in most cases be governed by mandatory applicable international conventions such as for example the CMR (road), CMNI (inland waterways) or the COTIF-CIM (railway). However, in addition to that it is possible to appoint a national legal system that applies additionally to the applicable international convention and governs legal issues which have not been provided for in that convention. Apart from that it is also advisable – and possible - to make a choice of law clause in the framework carriage contract in view of multimodal transports.

In accordance with article 23 of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I") the contracting parties are also allowed to allocate (international) jurisdiction to a national court of their choice. Since such jurisdiction choice should be made in writing parties have to include it in their contract. With respect to the framework carriage contract, parties also need to take into account the strict rules with respect jurisdiction clauses included in the international carriage conventions.

2.11 Trust

Although hard to define and not a legal concept, trust is essential to success in horizontal collaboration. Contracts are never a goal in itself and in that respect it should be remembered that 'legal' should always play a supportive role to the trust. However, on the other hand a solid legal basis is indispensable when parties want to keep the trust alive. Our advice to prospective collaboration partners would be to start discussing legal issues at the right time: not too early and not too late.

2.12 Premises for the legal framework

Below we have listed some central points of departure in the structure of the legal framework we have developed.

- we have used as a basis for the model collaboration agreement a co-operation between four shippers;

- this agreement has a contractual nature only;

- the legal framework takes as a basis that the shippers enter into a multiparty services contract with an independent trustee;

- the trustee is a separate entity and carries out 'offline' duties as defined elsewhere;
• the concrete carriages contracts are being concluded in a direct contractual relation between the individual shippers (as consignor) and the individual LSP’s. The framework carriage contract we have developed forms the basis for these contracts. The trustee may also act as a freight forwarder ((one of the) ‘online’ functions), but will not enter into the transport contracts in its own name as an indirect representative of the respective shippers. Therefore the trustee does not become a party to the carriage contracts;

• in respect of the method of gain sharing between the shippers we have assumed the Shapley Value;

• the LSP’s only carry out transport services; we have abstracted from the situation that the LSP’s also perform other logistics services;

• although we have not worked out in greater detail the different transport modalities, it should be possible to apply the legal framework to all transport modalities and to multimodal transports as well;

In practice, all kind of variations on this basic model are conceivable, which may lead to the necessary modifications of the model agreements. It is possible to adapt the models and customize them to specific other situations.
2.2 Questionnaire to the report on the legal framework for horizontal collaboration in the supply chain

*Please read the 'Report on the legal framework for horizontal collaboration in the supply chain' (deliverable D 2.8) carefully and comment on it by filling in the questionnaire below.*

**Paragraph 2.1 The pre-contractual phase**

1. In the report it is stated that clear arrangements with respect to the pre-contractual phase of research and negotiation reduces the chance of raising false expectations. Would you agree from your practical experience that it is advisable for prospective participants to a horizontal collaboration (project) to give structure to the pre-contractual phase by laying down arrangements in writing, for example in a Letter of Intent ('LOI') or a Non-disclosure agreement ('NDA')?

2. The report mentions (as examples) a number of aspects (6) that could be arranged in such a LOI, such as the division of research and other initial costs, competition law aspects in the pre-contractual stage, confidentiality et cetera. Can you confirm that these are the main aspects or did we forget an important LOI-subject and if so what aspect?

3. Does your national civil code/contract law provide for specific rules with respect to the pre-contractual phase or LOI’s or are there any other specific points of interest/attention in this field?

4. Horizontal collaboration between shippers in the supply chain is innovative. Would you from your experience in practice agree with us that 'commercial' and 'legal' forces within companies should be coordinated and that it is advisable to involve the legal department in an early stage?

**Paragraph 2.2 Complicating factors / paragraph 2.3 Objects of a legal framework**

5. It is stated in the report that because of complicating factors a solid legal framework is needed. We would advise the different parties involved in a horizontal collaboration project to lay down their arrangements in written contracts. Sometimes market participants however raise questions as: "But what do we need a contract for?". In this respect we always answer that (at least) under Dutch law oral arrangements are binding contracts as well, but can be a breeding bed for legal disputes because oral arrangements are less clear and more difficult to prove and that misconceptions lie in wait.

Would you also prefer written contracts above oral arrangements? And are oral arrangements considered a binding contract under your legal system as well?

6. Considering the complicating factors described under paragraph 2.2 we have advised that the contracts that cover the legal relationships between the different parties involved should provide 'quick and clear solutions' and that all parties should (more or less) commit to the same legal regime. Would you endorse this position?
Paragraph 2.4 Structure of the legal framework

7. Would you have any general remarks with respect to the structure we have developed existing of the three model contracts mentioned in paragraph 2.4?

Paragraph 2.5 The collaboration agreement between the shippers

The subcontractors in the different jurisdictions will comment on the provisions of the model collaboration agreement between the shippers. Specific issues will be discussed/addressed there. We have the following more general question:

8. Under Dutch law the collaboration agreement between the shippers relating to the law of obligations, is not a ‘special contract’ (contrary to - for example labour-, transport- or storage contracts). It would be qualified as a normal reciprocal contract creating obligations that is regulated by general contract law in Book 6 of the Dutch Civil Code. Would the collaboration contract between supply chain partners under your national legal system qualify as a normal/general contract or as a special contract, qualified by civil law?

Paragraph 2.6 The agreement between the shippers and the trustee

The subcontractors in the different jurisdictions will comment on the provisions of the model agreement between the shippers and the trustee. Specific issues will be discussed/addressed there. We have the following more general questions.

9. The CO3-project has adopted the idea that in case supply chain partners want to start to collaborate and bundle their freight flows a neutral, impartial trustee should be involved and enter the game to ‘manage’ the collaboration between the shippers. The trustee acts in the interests of the mutual shippers and is bound to confidentiality. The shippers provide information on a confidential basis so they will not need to share competition law sensitive information to the other shippers. What is your opinion about the ‘trustee-concept’? Is it needed? Would it work?

10. The trustee can have ‘offline’ and ‘online’ tasks. Under Dutch law the contract between the shippers and the trustee would qualify as:
- an agreement for professional services in general;
- as far as the contract obliges the Trustee to perform legal acts in its own name or in the name of the shippers, but always for the benefit of the shippers (as its principals) as a mandate contract as well. Under Dutch law a mandate contract is a special form of an agreement for professional services; and
- a freight forwarding contract as far as the Trustee would perform more traditional tasks in logistics and would (in its own name or in the name of the shippers) enter into carriage contracts with LSP’s or negotiate such carriage contracts between its principals, the shippers, and the LSP’s.

Under Dutch law all these types of contracts are special contracts, specifically mentioned and arranged for by the Dutch Civil Code (Books 7 and 8). For instance the freight forwarding contract is described in article 8:60 of the Dutch Civil Code: “A contract to forward goods is a contract whereby one party (the forwarding agent) binds himself towards the other party (the principal) to enter, for the benefit of the latter, into one or more contracts of carriage with a carrier to transport things which are to be made available by the principal; or, it is a contract whereby the forwarding agent undertakes to include a stipulation for the benefit of the principal in one or more such contracts of carriage.” Furthermore Dutch law provides for rules how to deal with ‘mixed’ agreements.
What would be your analysis of the contract between the shippers and the trustee in terms of qualification? In case you would come to the conclusion that the contract could be qualified under (a) special contract(s) regulated by your national civil law, can you give the various statutory definitions of these special contracts? Please also give the definition of a freight forwarding contract under your legal system.

**Paragraph 2.7 The framework carriage contract between the shippers and the LSP’s**

The subcontractors in the different jurisdictions will comment on the provisions of the framework carriage contract between the shippers and the LSP’s. At this point we have no specific questions.

**Paragraph 2.8 Areas of law**

We refer to the Additional report on international private law and international transport law issues. At this point we have no specific questions.

**Paragraph 2.9 Competition law aspects**

11. We refer to the Additional report on competition law aspects (paragraph 3 of this transformation report). At this point we (only) want to ask whether you have other proposals, suggestions, ideas in view of competition law other than the ‘safety measures’ the CO3-consortium has come up with?

(i.e. involvement of the Trustee bound to confidentiality; no direct/indirect information exchange; open, transparent character of the collaboration; open/regular tenders towards carriers; collaboration open for other shippers who want to join and can add value; written arrangements (also in the pre-contractual phase); if possible it might be better to avoid collaboration with direct competitors; market structure of the markets involved: stability, oligopolistic structure et cetera; (total) market share of the collaborating companies; the collaborations’ influence on the market; making efficiency gains and other benefits demonstrable (by objective methods); be aware of the burden of proof under article 101 (3) TFEU; find out who the consumers are; grant consumers a fair share; assessment by a competition law expert in any concrete case; competition law training for relevant employees within the companies [...]).

**Paragraph 2.10 International private law**

We refer to the Additional report on international private law and international transport law aspects. At this point we have no specific questions.

**Paragraph 2.11 Trust**

We have no specific questions.

**Paragraph 2.12 Premises for the legal framework**

We have no specific questions.

**Paragraph “General”**

12. If you have any other relevant remarks with respect to the Report on the legal framework for horizontal collaboration in the supply chain, please touch on those briefly below.
2.3 Answers to the questions given by legal specialists from other relevant EU jurisdictions (Italy, Belgium, France, Germany, Spain and the United Kingdom)

Please read the “Report on the legal framework for horizontal collaboration in the supply chain” (deliverable D 2.8) carefully and comment on it by filling in the questionnaire below.

Paragraph 2.1 The pre-contractual phase

1. In the report it is stated that clear arrangements with respect to the pre-contractual phase of research and negotiation reduces the chance of raising false expectations. Would you agree from your practical experience that it is advisable for prospective participants to a horizontal collaboration (project) to give structure to the pre-contractual phase by laying down arrangements in writing, for example in a Letter of Intent (‘LOI’) or a Non-Disclosure Agreement (‘NDA’)?

Italy

Whenever the parties commence negotiations aimed at executing a complex agreement, it is common practice also in Italy that they structure the negotiation phase through a Letter of Intent (LOI). The LOI is not governed by specific provisions of Italian law although it is known to both practice and case law. The LOI will have the purpose to set forth the main legal and commercial terms and conditions of the proposed transaction provided that the LOI has no binding effect upon the parties other than their obligation to negotiate in good faith.

Belgium

Yes, the pre-contractual intentions and expectations of the parties are most certainly worth encapsulating in a LOI, even though any other format that testifies to the parties’ understanding could be brought in as evidence should a dispute arise on the interpretation of the affected contract. It should be noted that a LOI serves to interpret a contract but does not replace the terms of a perfectly clear contract.

France

Yes, setting down the main terms and conditions in a LOI is advisable before undertaking negotiations, as it reduces the risk of substantial misunderstandings between the parties further down the process.

Germany

Yes, in Germany, a Letter of Intent or a similar written document stated for both/all parties and their employees what the intention and the aim is. Correspondingly, the chance of raising false expectations should be reduced.

Spain

Yes, we agree.

United Kingdom

Yes, we would agree that this is advisable. This is possible under English law and such written arrangements or Letters of Intent are used in commercial matters in the UK.
2. The report mentions (as examples) a number of aspects (6) that could be arranged in such LOI, such as the division of research and other initial costs, competition law aspects in the pre-contractual stage, confidentiality et cetera. Can you confirm that these are the main aspects or did we forget an important LOI-subject and if so what aspect?

Italy
Confirmed.

Belgium
These would appear to represent the typical aspects to be laid down in a LOI, also in Belgium. Possibly insert a condition precedent on the minimum number of participants / scale to be reached for the project to move ahead to the contractual stages.

France
Under French law, the contents of a LOI are freely decided between the Parties, and the 6 aspects mentioned reflect the essential points of the negotiation.

We would advise also inserting an indicative timetable of the different steps of the CO3-Project, in order to drive the process and limit the risks of the negotiations coming to a standstill.

Germany
We agree that these subjects are the main aspects in this pre-contractual stage. There is no need for completion or extension.

Spain
In addition to the 6 aspects listed, we would add:

- How parties can recover their investments in the event that one of the shippers unilaterally decides, for whatever reason, to withdraw from the CO3-project, causing the entire CO3-project to fail; and
- Most commercial people like to see time-frames (you refer to long term) to be able to make future projections based on commercial goals etc. We would therefore suggest a time limit for the completion of the preliminary works and signing of the agreement.

We would also suggest that the LOI have a preamble that emphasizes that the overriding intention is not just to save costs for the shippers, but in general for the environment, consumer et cetera. This should help market the project generally and address Competition law concerns.

United Kingdom
The applicable law and jurisdiction provisions should contain a dispute resolution provision in the event that the parties may come into dispute over their rights and obligations under the agreement.
3. Does your national civil code/contract law provide for specific rules with respect to the pre-contractual phase or LOI's or are there any other specific points of interest/attention in this field?

**Italy**

According to the general principles of Italian law, the parties are under the duty to behave fairly both in the negotiation phase and in the performance of the agreement. Pursuant to Article 1175 of the Italian Civil Code (*Fair behavior*), the debtor and the creditor shall behave according to the rules of fairness.

Negotiations and pre-contractual liability are governed by Article 1337 of the Italian Civil Code: in the course of the negotiations and the formation of the contract, the parties shall conduct themselves according to good faith.

Pre-contractual liability may occur during the preliminary phase (in which the parties express their willingness to enter into a contract) as well as in the formation of the contract. In the course of the negotiations the parties are required to follow the principles of accuracy and consciousness: in this respect, the parties should take into account at least the essential elements of the prospected agreement.

Pre-contractual liability is caused by any unjustified conduct which may have as a consequence the interruption of negotiations and which may lead the other party to incur expenses (which otherwise would not be borne) or to lose other business opportunities. Liability arises even though the party who withdraws from the negotiations had no intention to harm the other party.

The interruption of negotiations, even in an advanced stage, does not necessarily determine the liability of the party who withdraws from negotiations, provided that such party acted in good faith and did not express the willingness to sign the agreement (Supreme Court of Cassation, judgment no. 477 of 10.1.2013).

The general duty to act in good faith implies the duty to inform the other party whenever, during the negotiations, the preliminary conditions, on which the negotiations started, have changed so much that it is unlikely that the agreement will be executed. The Supreme Court found that the violation of the duty to inform the other party that the preliminary conditions have changed is a breach of the general duty to act in good faith (Supreme Cassation Court, judgment no. 5297 of 29.5.1998).

Pre-contractual liability is a form of non-contractual liability. The compensation of damages is limited to the so-called negative interest, i.e. the expenses incurred in negotiations that did not lead to the conclusion of a binding undertaking and the loss of possible business opportunities. The damaged party has the burden to prove the breach of the rule of good faith as well as the damages suffered.
Belgium

There is no specific legal framework that regulates pre-contractual relationships between commercial partners.

France

There are no specific legal provisions relating to the contents of a LOI.

However, please note that Parties are under the obligation to negotiate in good faith. A terminating party may therefore have to indemnify the terminated party if a French court finds that pre-contractual negotiations have been terminated abusively (i.e. if the behavior of the terminating party had led the other party to legitimately hope and trust that a contract would be executed). Such indemnification is limited to the costs actually incurred by the terminated party during the pre-contractual phase.

Germany

Accordingly to Section 311 of the German Civil Code it is only regulated that by Commencement of contract negotiations each party may be obliged to take account of the rights, legal interests and other interests of the other party. Specific rules with respect to the pre-contractual phase or LOI's are not provided.

Spain

As a matter of Spanish law, there is no specific regulation that would apply to a LOI between shippers. And consequently, the parties are free to agree terms and conditions as long as they are not contrary to law, morality or public policy (Civil Code Article 1255).

Since the LOI is legally binding, the LOI should always be drafted by lawyers. Further, where the LOI contains choice of jurisdiction and law clauses, it is essential that the shipper actually signs the LOI to make binding any submission to a foreign jurisdiction and choice of law.

United Kingdom

There is no specific Code or Statutory Rules for this area. The legal effect of pre-contractual written arrangements or LOI's is subject to the general English law of contract. In particular the extent that the arrangements create legally binding obligations between the parties will depend on the express terms and construction of the particular written agreement. If the parties wish to create legally binding obligations under such written arrangements or LOI's, it is important under English law that this is made clear by the express terms of the agreement. On the other hand, if the parties do not wish to create legally binding obligations for the agreement or a particular aspect of the agreement, then it is also important that is made clear by the express terms of the agreement.
4. Horizontal collaboration between shippers in the supply chain is innovative. Would you from your experience in practice agree with us that 'commercial' and 'legal' forces within companies should be coordinated and that it is advisable to involve the legal department in an early stage?

**Italy**

Agreed.

**Belgium**

In the case of horizontal collaboration we would most certainly recommend that the legal department is involved from the beginning given the potentially important competition compliance risks. Notably if the company has a compliance and compliance reporting system in place it is important that this is respected throughout. Parties might wish to ensure that the collaboration itself is supervised by a third party legal counsel that can take knowledge of all information and easily identify and prevent the occurrence of competition law risks, acting in the interest of the consortium and the trustee.

**France**

Yes, legal departments should be involved in the process as early as possible, in order to limit the risks of the Parties going too far forward with an idea / solution which is later revealed to be in breach of either legal/regulatory provisions or simply goes against company policy.

**Germany**

Absolutely, yes! A cooperation between „commercial“ and „legal“ forces could avoid later difficulties. In most cases - according to our experience - the legal force is contracted too late.

**Spain**

We totally agree with your comments.

However, it is our experience that the commercial departments of Spanish entities distrust lawyers believing them to be unaware of business realities and pressures. The legal department will need to be hyper-sensitive to the prejudices of the commercial departments in order to be able to move forward.

**United Kingdom**

Yes, we would most definitely agree that this is advisable.

**Paragraph 2.2 Complicating factors / paragraph 2.3 Objects of a legal framework**

5. It is stated in the report that because of complicating factors a solid legal framework is needed. We would advise the different parties involved in a horizontal collaboration project to lay down their arrangements in written contracts. Sometimes market participants however raise questions as: “But what do we need a contract for?”. In this respect we always answer that (at least) under Dutch law oral arrangements are binding contracts as well, but can be a breeding bed for legal disputes because oral arrangements are less clear and more difficult to prove and that misconceptions lie in wait.

Would you also prefer written contracts above oral arrangements? And are oral arrangements considered a binding contract under your legal system as well?
In principle it is advisable that, for the reasons already explained by K&K (the need to have clear commitments and written evidence of the undertakings), all of the agreements outlined in the Legal Framework be executed in writing. The Italian legal scenario is the following. Under Italian Law, a contract may be validly executed verbally, unless a specific form (i.e. written form or public deed) is expressly provided for by law under penalty of voidness (see Article 1325 of the Italian Civil Code).

Article 1350 of the Italian Civil Code sets out a list of contracts that must be executed in writing under penalty of voidness.

In addition the parties may agree in writing to adopt a specific form for the execution of a future contract, in which case it is presumed that such form is intended for the validity of the contract (Article 1352 of the Italian Civil Code).

In order to determine whether or not, under Italian law, a specific form is required for the model agreements, we have mainly relied on how K&K qualified each of those agreements.

a) Should the contract among the shippers be regarded as a collaboration agreement, no specific form would be required by the Italian law. We are aware that, in principle, the collaboration contract will not "constitute a partnership, joint venture, association or any other legal entity between the Shippers" (see page 27 of the Legal Framework). However, should the agreement be regarded as a consortium (i.e. an association of businesses) then Article 2603 of the Italian Civil Code provides that the agreement to set up a consortium has to be executed in written form.

The collaboration agreement may also have some elements in common with the so called network contract (contratto di rete) whose definition is set forth in Article 3, paragraph 4-ter of Legislative Decree no. 5 of 10.2.2009 (see no. 8 below); the contratto di rete may be executed either in written form or by public deed to be further registered in the company register.

b) The contract among the shippers and the trustee would qualify as either an agreement for the provision of professional services or a mandate agreement or a freight forwarding agreement (see page 38 of the Legal Framework):

- an agreement for the provision of professional services does not require to be executed in written form;

- under Italian law (Article 1703 of the Italian Civil Code) the mandate is an agreement whereby one party (the agent) binds himself to accomplish one or more legal transactions on behalf of the other party (the principal). There are no specific requirements as to the form of the agreement, unless the mandate is granted to accomplish deeds that must be executed in written form, in which case the mandate must be in the same form as the deed to be performed;

- the mandate may be granted con rappresentanza (with the power of representation, i.e. the agent has been given the power to act in the name of the principal) or senza rappresentanza (without the power of representation, in which case the agent will act in his own name and will acquire the rights and will assume the duties arising from transactions made with third parties). Under Italian law the freight forwarding agreement is a mandate senza rappresentanza and does not require any specific form.

c) The agreement among the shippers and the logistics service provider should be regarded as either a freight forwarding agreement (see above) or a carriage contract. Under Italian law the carriage contract does not require any specific form. However, pursuant to a fairly recent law that regulates, inter alia, the road carriage of goods (Article 83 bis of Law Decree 25.6.2008 n. 112), the form of the contract has an impact on the statute of limitation provisions: if the carriage contract is executed in writing, the right of the carrier to obtain the payment of the freight charges is time barred in one year; in case the carriage contract is executed in oral form, such right is time barred in five years.
Belgium

We would most definitely recommend the use of a written contract. The complex nature of the arrangement, involving manifold parties of different types, which have rights and obligations towards another that are horizontal, vertical and diagonal (trustee) in nature and that has to ensure the proper quantification of the efficiencies realized by the combined effort would most certainly lead to serious trouble, in terms of evidence, if an agreement was not fixed in the form of a written contract.

France

Although oral agreements are equally valid under French law, a written agreement will provide material evidence of the intention of the Parties and will limit the need for interpretation of such intention by a judge in the event of a dispute.

Written agreements will also enable the Parties to set down the terms under which they will resolve their disputes and may provide for alternate conflict resolution solutions.

Germany

Yes, we prefer written contracts as well because of their provableness but oral arrangements are also binding under German law.

Spain

The Spanish Civil Code Article 1278 and the Commercial Code Article 51, provide that oral contracts are equally valid.

That said, we agree that a written contract is always the best option.

United Kingdom

Yes, we would strongly advise that written agreements are always used by parties to reduce the possibility of uncertainty and disputes.

Oral agreements can be legally binding under English law.

However with oral agreements, in the event of a dispute between the parties, evidence would need to be produced in the form of witness statements or correspondence or other documents in order to prove what had been agreed by the parties.

6. Considering the complicating factors described under paragraph 2.2 we have advised that the contracts that cover the legal relationships between the different parties involved should provide ‘quick and clear solutions’ and that all parties should (more or less) commit to the same legal regime. Would you endorse this position?

Italy

We agree that, should the Legal Framework remain as it is, all the model agreements should be subject to the same legal regime and jurisdiction.

Belgium

Yes, in the case of cross-border involvement that will be very important. However, each time it will be important to be mindful of national legal pitfalls. This is to avoid that certain arrangements might be (re)qualified as something they had not been intended to be (e.g. freight forwarding, agency, distribution, etc.).
France
Yes, provided that such legal regime does not breach French « public policy » provisions (lois de police), as such provisions will apply as long as the contract has sufficient connections with France, regardless of the governing law.

In particular, lois de police include certain commercial law provisions, such as the indemnification of a terminated party when a "long-standing commercial relationship" has been abusively terminated (as indicated in the answer under Section 12 of the Trustee Agreement).

Germany
Yes, absolutely!

Spain
Yes, we agree.

United Kingdom
Yes, we would endorse this approach, particularly in cases where there is an international law aspect to the arrangement.

Paragraph 2.4 Structure of the legal framework

7. Would you have any general remarks with respect to the structure we have developed existing of the three model contracts mentioned in paragraph 2.4?

Italy
No remarks on the structure except what is explained under answer 10 (under Italy) below.

Belgium
The structure of the agreement is particularly well thought through. Notably the role of the trustee who arranges for the proper execution of the overall project is important to be carefully defined, to avoid that liabilities related to shipments might shift to the trustee. Attention to this has been given in para 2.7.

France
The structure of the agreements itself is not cause for remarks.

The agreements between the shippers and the trustee will have to be drafted carefully, in order to avoid the trustee being considered to be a "transport agent" (commissioneer de transport) under French law and subject to the corresponding liabilities (please see answer under Paragraph 2.7 for further information on the regime of transport agents.

Germany
In our opinion there is no need for remarks or a change in structure.

Spain
What you describe as a 3 contract system as a matter of Dutch law, could in fact be treated as a 2 contract system in Spain. We say this because Spanish law will treat the figure of the "trustee" as a carrier in respect of his "on-line" role (freight forwarder) - see answer 10 below (under 'Spain').
United Kingdom

We have no general remarks.

**Paragraph 2.5 The collaboration agreement between the shippers**

The subcontractors in the different jurisdictions will comment on the provisions of the model collaboration agreement between the shippers. Specific issues will be discussed/addressed there. We have the following more general question:

8. Under Dutch law the collaboration agreement between the shippers relating to the law of obligations, is not a 'special contract' (contrary to – for example labour-, transport- or storage contracts). It would be qualified as a normal reciprocal contract creating obligations that is regulated by general contract law in Book 6 of the Dutch Civil Code. Would the collaboration contract between supply chain partners under your national legal system qualify as a normal/general contract or as a special contract, qualified by civil law?

Italy

According to Italian Law, the collaboration agreement between shippers is not a “special contract” and it would qualify as a reciprocal contract that is regulated by general contract law (Book IV, Title II, Italian Civil Law).

The collaboration agreement between the shippers is akin to a consortium (i.e. an association of businesses) pursuant Article 2603 of the Italian Civil. However, this qualification seems to be not consistent with sec. 1 (no partnership clause, see no. 5 above).

Another type of contract similar to the collaboration agreement is the so called network contract (contratto di rete). Pursuant to Article 3, paragraph 4-ter of Legislative Decree no. 5 of 10.2.2009, “with the network contract more entrepreneurs pursue the goal of increasing, individually and collectively, their ability to innovate and their competitiveness on the market and, to this end, they undertake, by virtue of a common network program, to cooperate in given forms and areas which relate to their businesses or to exchange information and performances of industrial, commercial, technical and technological nature, or to exercise together one or more undertakings which are part of their businesses”.

The network contract has an innovative discipline and allows the parties to regulate freely the structure of the network (decision making bodies, common assets fund, obligations on the side of the parties).

Please note that the Italian Competition authority has issued an alert on network contracts: a network contract is compliant with competition law only if construed in a way that increases the innovation ability and the competitiveness of the participating parties (see the note of the Italian Competition Authority issued on 16.5.2011).

Belgium

The horizontal agreements between the shippers would not qualify as any type of ‘special’ contract.

France

These agreements would not qualify as special contracts under French law.

Germany

The collaboration agreement would be qualified as a normal reciprocal contract and is regulated in Book 2 of the German Civil Code. There are no special regulations for such a contract.
Spain
The contract between shippers is not specifically regulated as a matter of Spanish law. Consequently the contract would be treated as “atypical” and subject to the general provisions of the Commercial Code Chapter IV of Book I and, in default, apply the general provisions of the Civil Code Chapters I and II of Book IV.

United Kingdom
Under English law, the collaboration agreement between the shippers would be considered as a general contract, subject to ordinary principles of English contract law.

**Paragraph 2.6 The agreement between the shippers and the trustee**

The subcontractors in the different jurisdictions will comment on the provisions of the model agreement between the shippers and the trustee. Specific issues will be discussed/addressed there. We have the following more general questions.

9. The CO3-project has adopted the idea that in case supply chain partners want to start to collaborate and bundle their freight flows a neutral, impartial trustee should be involved and enter the game to ‘manage’ the collaboration between the shippers. The trustee acts in the interests of the mutual shippers and is bound to confidentiality. The shippers provide information on a confidential basis so they will not need to share competition law sensitive information to the other shippers. What is your opinion about the ‘trustee-concept’? Is it needed? Would it work?

Italy
The presence of a "trustee" is an essential and useful feature, as it allows the shippers to keep the information on shipments confidential. This way it is possible to ward the interests of each entrepreneur and, at the same time, to provide substantial grounds to support the accordance of Project CO3 with competition law.

It is however necessary to assess whether a specific trust has to be constituted or, alternatively, the role of "trustee" is going to be simply entrusted to a third and independent subject, without the need to use a specific trust instrument.

In the first case it would be necessary to decide who will act as settlor and define the related fund. This solution could be beneficial in terms of strengthening the independence and impartiality of the Trustee.

With regard to this option the following caveats should be considered.

Italian law does not specifically regulate trusts. Italy has signed the Hague Trust Convention of 1.7.1985 (ratified with Law no. 364 of 16.10.1989, entered into force on 1.1.1992) and therefore, trusts are recognized in Italy but they have to be subject to a specific foreign law that expressly regulates them.

Although trusts are commonly used also in Italian practice, it is nonetheless necessary to stress that the absence of a national applicable discipline could lead to some practical problems. In particular, there is in Italy a debate on the permissibility of a trust that does not present any element of connection with the applicable foreign law (the so called “internal trust”, i.e. a trust that regards exclusively entities, assets and rights which are located in Italy and that has no other connection to a foreign law but for the choice of applicable foreign law). The majority of Italian doctrine and jurisprudence have expressed a favourable view on the compatibility of the trust with Italian law, however the Italian Supreme Court has not yet rendered a decision on this matter.

It could be also useful to strengthen the confidentiality duty of the trustee by providing for a penalty in the case of breach of its fiduciary obligation.
Belgium

The trustee concept is a good way to ensure that actual trust is safeguarded between the shippers, particularly in the management of the flows, the calculation of the efficiencies and importantly ensuring that any efficiencies in the system are passed on by the LSPs to the shippers. In the context of horizontal cooperation, one of its most important tasks will be to avoid that any competition law liabilities are incurred by the shippers. A thorough awareness of competition law risk and the disciplined implementation of a competition law compliance policy are key to the success of the trustee’s mandate.

France

The communication of information between shippers could be an issue under competition law principles. Resorting to a trustee seems to be an efficient way to avoid such risks, provided that confidentiality is absolute.

Germany

These questions are quite difficult to answer because it is no legal appraisal. However, we assume that it could be problematically to find consensus between shippers concerning one trustee. If the shippers were successfully and named a trustee, then we think it could be a good chance to bring more efficiency into the supply chain. Moreover, this planned "trustee-system" could be hard to manage due to legal aspects of competition law.

Spain

We agree with the need for a “trustee” as a neutral and impartial party acting in the interests of the shippers and at all times maintaining the high degree of confidentiality is required. However, in Spain there is already a clear tendency for the larger freight forwarders/carriers to combine services to offer a “complete package” to their clients and also to fend off competitors.

Taking this into consideration, the problem we see in Spain is that it is precisely these larger freight forwarders/carriers who will try to enhance their monopoly by offering the service of “trustee” and if this is not closely monitored, the role of “trustee” will lose the independence and neutrality on which the entire C03-project hinges.

The figure of the “trustee” must therefore be closely defined as independent and neutral, not only because it is a new concept, but also because it must be distinguishable from the role of general freight forwarders and carriers, otherwise any blurred lines in this respect could undermine the project in Spain.

United Kingdom

We consider the ‘trustee-concept’ is a good idea and appears necessary in order to make the project work.

In particular, with competition law aspects in mind, this independent third party plays an important role in maintaining the legitimacy of the arrangement under EU and national law.

We consider the arrangement work under English law if adequate written agreements are entered into by all the parties involved.
10. The trustee can have 'offline' and 'online' tasks. Under Dutch law the contract between the shippers and the trustee would qualify as:

- an agreement for professional services in general;
- as far as the contract obliges the Trustee to perform legal acts in its own name or in the name of the shippers, but always for the benefit of the shippers (as its principals) as a mandate contract as well. Under Dutch law a mandate contract is a special form of an agreement for professional services; and
- a freight forwarding contract as far as the Trustee would perform more traditional tasks in logistics and would (in its own name or in the name of the shippers) enter into carriage contracts with LSP's or negotiate such carriage contracts between its principals, the shippers, and the LSP's.

Under Dutch law all these types of contracts are special contracts, specifically mentioned and arranged for by the Dutch Civil Code (Books 7 and 8). For instance the freight forwarding contract is described in article 8:60 of the Dutch Civil Code: "A contract to forward goods is a contract whereby one party (the forwarding agent) binds himself towards the other party (the principal) to enter, for the benefit of the latter, into one or more contracts of carriage with a carrier to transport things which are to be made available by the principal; or, it is a contract whereby the forwarding agent undertakes to include a stipulation for the benefit of the principal in one or more such contracts of carriage." Furthermore Dutch law provides for rules how to deal with 'mixed' agreements.

What would be your analysis of the contract between the shippers and the trustee in terms of qualification? In case you would come to the conclusion that the contract could be qualified under (a) special contract(s) regulated by your national civil law, can you give the various statutory definitions of these special contracts? Please also give the definition of a freight forwarding contract under your legal system.

Italy

It is not easy to determine how the contract among the shippers and the trustee could qualify under Italian law, as it contains elements of various contracts. Having taken into account the duties of the trustee as listed on page 39 of the Legal Framework (Management and services), it seems that the agreement has more similarities with an agreement for the supply of consultancy services; having taken into account the provisions of the clause on page 38 (Nature of the agreement), it looks more like a freight forwarding agreement.

a) Under Italian law there are no specific rules governing an agreement for the supply of consultancy services. The rules governing service contracts may be applicable (Articles 1655 ff. of the Italian Civil Code).

b) Pursuant to Article 1737 of the Italian Civil Code, the freight forwarding agreement is a mandate (without the power of representation, see no. 5 b) above) whereby the forwarding agent undertakes to enter into a carriage contract in his own name and on behalf of the shipper/principal and to perform all the ancillary activities. In this respect, the provision of the contract among the shippers and the trustee as it is currently drafted in page 38 of the Legal Framework is not compliant with the provisions of Italian law.
Belgium

The principal question is whether the trustee contract could be qualified as a special agreement under Belgian Transport law. If we take the example of the Act on Transport of Goods by Road, the trustee would be considered a freight forwarder if he entered into an agreement with a carrier to have goods transported in his own name but for the account of a third party. The status of freight forwarder would entail serious liabilities for the trustee.

However, we understand that there is no contractual relationship between the trustee and the LSPs. Indeed the contracts specify that the LSPs contract with each of the shippers. The role of the trustee would therefore be limited to supplying out certain services on behalf of the Shippers, but that they will not be mandating the LSPs in any way in their own name. The provision on Concrete Carriage Contracts in the Framework Carriage Contract is very clear in this respect.

As a result, the contract would qualify as a contract for the provision of services and fall within the common contract regime.

France

Under French law, “transport agents” (commissionnaire de transport) are intermediaries which organize the transport of goods for the shipper, by freely choosing the means and providers of the transport.

Qualification of the trustee as a transport agent would entail liability as to the timely delivery and condition of the goods for their entire transport.

However, we understand that the trustee would never actually receive the goods nor enter into any agreements with the LSPs. Consequently, if the role of the trustee is thus limited purely to that of a consultant and does not involve acting on the behalf of the Shippers, the contract will qualify as services agreement, with no specific liability other than common contractual liabilities.

Germany

Our analysis of the contract between the shippers and the trustee is very similar to the Dutch law. It could be qualified as an agreement for professional services in general or in the described case under the second intent as a mandate contract as well. Section 611 German Civil Code reads as follows: "By means of a service contract a person who promises services is obliged to perform the service promised, and the other party is obliged to grant the agreed remuneration". Further the freight forwarding contract is defined as follows in Section 453 of the German Commercial Code: "By virtue of the forwarding contract the forwarder is obliged to arrange for the dispatch of the goods".
Spain

Under Spanish law, the contract between shipper and the “trustee” would be treated as an “atypical” contract (not specifically regulated—see above answer B) of a “mixed” nature, given that the trustee carries out a combination of services that would normally be the subject of different individual contracts, the main contracts being lease services, brokerage and transport.

The lease service is a contract that is defined by the Civil Code Article 1544 where “one of the parties undertakes to execute a work or provide a service for the other for a certain price”. Consequently, the parties have wide freedom to agree their corresponding contractual obligations.

What you refer to as a mandate contract under Dutch law, we understand to be a brokerage contract as a matter of Spanish law (contrato de corretaje). Spanish law does not offer a definition of a brokerage contract, though it can be understood that such a contract exists where one of the parties (the broker) is obliged, in consideration for payment, to procure and promote or facilitate the celebration of a particular type of contract between one party and another.

For the contract of carriage of cargo, Law 15/2009 of the 11th November of the Contract of Carriage of Goods by Road (LCTTM) Article 2, defines a qualifying contract of carriage as one where the “carrier” promises the shipper, in consideration for payment, to transport the goods from one place to another and make those goods available to a third party as designated in the contract.

In turn, Article 4 defines the “carrier” as the party that assumes the obligation in his own name to carry the goods irrespective of whether that carrier ultimately subcontracts the actual carriage. The LCTTM Article 5.2 states that all entities that provide professional services as intermediaries in relation to the contracting of transport are obliged to contract in their own name. Thus, to the extent that the “trustee” provides “on-line” services that include acting as an intermediary between the shippers and the carriers in relation to the contract of carriage, we consider that as a matter of Spanish law, the “trustee” will be required to contract in its own name with the carriers.

Though it could be argued that the LCTTM applies only to the contract of carriage and not to the prior brokerage contract between the shipper and the trustee. Spanish legal academics are of the view that the law intends to ensure that all those who regularly intervene in the transportation service be subjected to contracts of carriage. Consequently, the “trustee” will be forced to assume the role of contractual carrier vis à vis the shipper, and thereafter the role of shipper vis à vis any actual carrier and irrespective of any express agreement to the contrary. As a carrier, the “trustee” will be liable to the shipper in the event of the improper carriage or damage to the cargo.

Finally, Spanish law does not define the contract of “freight forwarding” given that in so far as the freight forwarder intermediates in the contract of carriage, they are considered to be a carrier and as stated above, the freight forwarder is obliged to contract in its own name. That said, there is a legal definition of transport agency and of freight forwarder for the purpose of administrative law applicable to transport (Law 16/1987 of the Edict of Carriage by Land Articles 120 and 121) intended to outline the activities carried out by these entities and not intended to apply generally to private contracts.

United Kingdom

Under English law, the contract between the shippers and the trustee would be a contract for the provision of services, subject to general principles of English contract law. In so far as the trustee can perform legal acts in its own name or in the name of the shippers, but for the benefit of the shippers as the principals of the trustee, such aspects would be considered as a contract of agency under English law, subject to the general law of contract. Freight forwarding contracts can be examples of agency contracts under English law, depending on the precise role or responsibility of the freight forwarder. There is no statutory definition of a freight forwarding contract under English law. The British International Freight Association (BIFA) Standard Trading Conditions are in very common use in the UK and define ‘Freight Forwarding Services’ as ‘services of any kind relating to the carriage, consolidation, storage, handling, packing or distribution of the Goods as well as the ancillary and advisory services in connection therewith, including but not limited to customs and fiscal matters, declaring the Goods for official purposes, procuring insurance of the Goods and collecting or procuring payment or documents relating to the Goods.’
Paragraph 2.7 The framework carriage contract between the shippers and the LSP’s

The subcontractors in the different jurisdictions will comment on the provisions of the framework carriage contract between the shippers and the LSP’s. At this point we have no specific questions.

Paragraph 2.8 Areas of law

We refer to the Additional report on international private law and international transport law issues. At this point we have no specific questions.

Paragraph 2.9 Competition law aspects

11. We refer to the Additional report on competition law aspects (paragraph 3 of this transformation report). At this point we (only) want to ask whether you have other proposals, suggestions, ideas in view of competition law other than the 'safety measures' the CO3-consortium has come up with?

(i.e. involvement of the Trustee bound to confidentiality; no direct/indirect information exchange; open, transparent character of the collaboration; open/regular tenders towards carriers; collaboration open for other shippers who can add value and want to join; written arrangements (also in pre-contractual phase); if possible it might be better to avoid collaboration with direct competitors; market structure of the markets involved: stability, oligopolistic structure et cetera; total market share of the collaborating companies; the collaborations’ influence on the market; making efficiency gains and other benefits demonstrable (by objective methods), be aware of the burden of proof under article 101 (3) TFEU; find out who the consumers are; grant consumers a fair share; assessment by a competition law expert in each and any concrete case; competition law training for relevant employees within the companies[...])

Italy

In view of competition law we suggest to study in deep the following issues:
a) establishment of IT instruments that allow to certify the procedures for the transmission of data between the different players and that guarantee their confidentiality;
b) the identification of another impartial and independent entity that verifies the procedures put into place between Trustees in order to guarantee the confidentiality of the information (e.g. auditing firms);
c) employment of a satellite tracking system of the freight so that the Trustee can make periodical reports on freight traffic and fuel consumptions (in order to provide reliable data on energy savings and environmental impact).

Belgium

The above points are quite complete and similar to what we recommend in similar situations. What is important is that during a kick-off meeting, a presentation is made on the competition law risks to all involved in the daily handling of the contacts, particularly on the side of the shippers and possibly, as the case may be, the LSPs. The Trustee will be well versed in competition law as competition compliance forms one of the core elements of his task. Each consortium should have its dedicated compliance manual, containing contact details and what to do in the case of an ‘accident’. Such accident will almost certainly happen at some stage (e.g. a mix-up of documents that gives parties inadvertently an insight into their quantities, pricing or costs, but their effects can be mitigated if proper procedure is followed.

France

We refer to the observations made above for Belgium.
Germany
We just would like to stress out that an infringement of competition law could lead to disadvantages and
difficulties concerning the public procurement law in the future.

Spain
We have no additional proposals or suggestions.

United Kingdom
We have no other general suggestions on this aspect. Our advice in general would also be to seek the
opinion of a competition law expert and have a detailed analysis made in each individual case of
collaboration.

Paragraph 2.10 International private law

We refer to the Additional report on international private law and international transport law issues.
At this point we have no specific questions.

Paragraph 2.11 Trust

We have no specific questions.

Paragraph 2.12 Premises for the legal framework

We have no specific questions.

Paragraph “General”

12. If you have any other relevant remarks with respect to the Report on the legal framework for
horizontal collaboration in the supply chain, please touch on those briefly below.

Italy
A final remark should be made with respect to the issue of the exchange of information. The personal
data processing is governed by Legislative Decree no. 196 of 30.6.2003 that provides rules concerning
the modalities of the processing of personal data, the access to the information system, its protection,
the consent to be given by the data subject. Should the exchange of information not be in conflict with
the competition rules (please see the comments on the additional report regarding competition law
aspects), the data protection act should in any event be complied with.

Belgium
The study has been quite thorough – we have no further remarks for Belgium.

France
No further remarks for France.

Germany
We have nothing relevant to add to the report on the legal framework for horizontal collaboration in the
supply chain.
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<tr>
<th>Country</th>
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<tr>
<td>Spain</td>
<td>We have no additional comments.</td>
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<tr>
<td>United Kingdom</td>
<td>We have no other general remarks.</td>
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3. **COMPETITION LAW ASPECTS**

3.1 Additional report regarding competition law aspects

3.2 Comments on the Additional report regarding competition law aspects of legal specialists from other relevant EU jurisdictions (*Italy, Belgium, France, Germany, Spain, United Kingdom*)
CO³.

ADDITIONAL REPORT ON THE LEGAL FRAMEWORK FOR HORIZONTAL COLLABORATION IN THE SUPPLY CHAIN REGARDING COMPETITION LAW ASPECTS

By Jikke Biermasz, Esther Glerum - Van Aalst and Mirjam Louws, Kneppelhout & Korthals N.V.

COLLABORATION CONCEPTS FOR CO-MODALITY’ (CO³)

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8. **IN CONCLUSION**
1. **Introduction: Legal Aspects on Competition Law**

In this Additional report on the Legal Framework for Horizontal Collaboration in the supply chain and model legal agreements (Deliverables D 2.8 and D 2.7) we will give more detailed information regarding the legal obstacles that (prospective) participants to a horizontal collaboration (project) in the supply chain might face in view of competition law. Without a doubt competition law is one of the main concerns of market participants when they are considering horizontal collaboration. Market participants have cold feet and that is understandable. Does competition law preclude or allow horizontal collaboration between shippers in the supply chain? And if it is not prohibited, what rules of play need to be observed?

Up until the date of this report, within the C03-project we have only been able to outline the basic principles and some best practices, but we have realised that in case we really want to make progress and meet the existing market need for hold we need to make further inroads into competition law and become more specific. This said, it should immediately be noted that in respect of competition law we will never be able to give hard and fast rules in advance. As indicated before competition law has a factual nature. With regards to the factual nature the written and oral arrangements between the participants matter, as well as how the collaboration partners act in practice. Furthermore, the economic and legal context of horizontal collaborations is essential (such as market positions, market functioning, market transparency et cetera). Therefore, the baseline will always be that we advise to have every specific collaboration be reviewed and assessed by a competition law expert. Competition authorities no longer exempt individual agreements and collaborations, but require companies to make a self-assessment. Hence, it is opportune to call in professional support. On the one hand this can help companies to identify and clarify the potential pitfalls, and on the other hand can hopefully take away the concerns companies generally and sometimes unnecessarily have in respect of horizontal collaboration.

In addition to a more detailed description of the competition law playing field, this Additional report will assist companies in making their self-assessment and, by doing so, hopefully improve their ability to explore their collaboration and the involved competition risks.

In view of competition law (also referred to as antitrust law) all sorts of questions can arise, such as for instance:

- What is the influence of the (direct) collaboration on and between (non)-competitors? Is it better not to collaborate with competitors or does the market in which the participants operate have no appreciable effect?
- What is the influence of the negotiation power of the parties? Is the market share of the parties relevant?
- What is the degree to which third parties need to have access to the collaboration in order to keep out of the danger zone of the exclusion of (potential) competitors? What effect will an ‘open’ character of the collaboration have on its stability?
- When is information exchange a hard-core restriction, what (kind of) information can be exchanged and to what extent?
- What is the role of the Trustee, which functions is he trusted with? Does the introduction of a Trustee have a positive effect in respect of the prevention of the exchange of competition law sensitive information between the shippers?
- Assuming that the collaboration leads to positive effects, such as efficiency gains by the method of gain sharing, reduction of costs, reduction of greenhouse gas emissions (GHG), what specifically does this mean for the participants? In order to be on the safe side, can they anticipate on the exemption of the cartel prohibition?
- If so, what efficiency gains can be taken into account and how can parties make the benefits demonstrable? Does a cleaner environment also count towards the gains? And what about less congestion?
• To what extent do the shippers individually have to offer their consumers a ‘fair share of the benefits’? And who are these consumers?

This only is a selection of the numerous questions that may arise. In this Additional report we will try to address the relevant questions, although we realise that in view of competition law there will always be additional questions.

The information contained in this Additional report is a recapitulation of the legislation of the European Commission including the two Guidelines: the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (TFEU) (2011) and the other on the application of article 101 (3) TFEU (formerly Article 81(3) Treaty Establishing the European Community (TEC)) (hereinafter jointly referred to as ‘The Guidelines’ and individually as Horizontal Guidelines on the application of article 101 (1) and Guidelines on the application of article 101 (3)), together with the settled case law of the Court of Justice of the European Union (hereinafter: ECJ).

The Guidelines provide guidance in how the European Commission will apply the cartel prohibition and its related exemptions in individual cases and how courts and competition authorities will apply article 101 TFEU. Saying this, it is not the role of the Commission to tell what the law is, but they have the role of giving guidance for others to relate to. The ECJ and the Court of the ECJ (formerly known as the Court of First Instance) need to comment explicitly on what they see as part of an assessment in the agreements for instance as regards the economic context and how a weighing between article 101 (1) and article 101 (3) TFEU is to be conducted.

Bear in mind however, that each case must be assessed on its own merits (case-by-case)\(^1\) taken into account the cartel prohibition and in conformity with the general principles set out in the Guidelines. The Guidelines aim to provide guidance to companies in their assessment of a collaboration, but this does not mean that they guarantee ‘safe harbors’ for each individual collaboration. The other side of the coin is that we don’t want to create a ‘chilling effect’: the object of competition law is to discourage restrictive arrangements or practices and not to stand in the way of arrangements and practices that generate efficiency gains.

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\(^1\) The Commission reaffirmed its policy in the Sugar case that there is no per se approach to information exchanges, but that a case-by-case approach is fundamental, C 40/73 (1975) ECR 1663.
2. THE STRUCTURE OF ARTICLE 101 (1) AND (3) TFEU ON HORIZONTAL COLLABORATION AGREEMENTS

2.1 Assessment

The assessment under article 101 TFEU consists of two parts. The first step is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anticompetitive object or actual or potential anticompetitive effects. Article 101 (1) TFEU reads as follows:

"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any trading conditions;
(b) limit or control productions, markets, technical development or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby displacing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Article 101 (1) TFEU only applies when an agreement is found to be anticompetitive to an appreciable extent. If so, article 101 (3) TFEU provides for an exemption on four cumulative conditions:

"The provisions of paragraph 1 may be declared inapplicable in the case of:
- any agreement of category of agreements between undertakings,
- decision or category of decisions by associations or undertakings,
- any concerted practice or category of concerted practices,
which contributes to improving the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerted restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of elimination competition in respect of a substantial part of the products in question."

Collaborations can be horizontal and vertical. Collaboration is 'horizontal' if an agreement is entered into between actual or potential competitors. The assessment whether or not parties compete with each other has to be based on its merits. Whether or not parties can theoretically enter another competitors' market is in principle not sufficient; there has to be some kind of an indication that such chance is real. It is obvious that two steel manufacturers are competitors, because they are active in the same product market. On the other hand if these two competitors are active in different geographic markets (e.g. Chile and Europe) they will only be considered competitors in the sense of the Guidelines if they are potentially competing. In general, horizontal agreements between competitors are considered more harmful to the competitiveness on the market than vertical agreements between e.g. suppliers and their purchasers. It should be noted that the fact that, for

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2 Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraphs 10-11.

3 Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 1.

4 Vertical agreements, however, also fall under the Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.
instance public authorities encourage or approve horizontal collaboration does not directly mean that it is permissible under article 101 TFEU.\textsuperscript{5}

\subsection*{2.2 Object versus effect}

Article 101 TFEU only applies to agreements between independent undertakings and to horizontal or vertical agreements which may affect trade between Member States.\textsuperscript{6} It should be borne in mind that article 101 (1) TFEU prohibits agreements of which the object or effect is to prevent, restrict and/or distort competition.\textsuperscript{7} In respect of the 'object', according to the settled case law of the ECJ, regard must be taken to the factual context of the agreement, the goals the agreement seeks to achieve and the economic and legal context. In respect of the 'effect' the agreement must reduce the parties' decision-making independence.\textsuperscript{8} A general principle underlying article 101 (1) TFEU which is expressed in EU case law is that each economic entity must determine independently the policy, which it intends to adopt on the market.\textsuperscript{9} A type of coordination of behavior or collusion between undertakings falling within the scope of article 101 (1) TFEU is where at least one undertaking vis-à-vis another undertaking undertakes to adopt a certain market conduct, or if as a result of contacts between undertakings, uncertainty as to their market conduct is eliminated or at least substantially reduced.\textsuperscript{10} However, a horizontal agreement between competitors, on the basis of objective factors, which would not be able to independently carry out the project or activity covered by the collaboration, e.g. due to the limited technical capabilities of the parties, will normally not give rise to anticompetitive effects within the meaning of article 101 (1) TFEU, unless the parties could have accomplished the same result with less stringent restrictions. The burden of proof is on the competition authority involved. For instance, in the transport sector spare capacity is an efficient mechanism. In the case \textit{European Night Services} the Commission recognised this because the railway undertakings were unable to offer the new services alone, as a result of which it decided that their collaboration did not infringe article 101 TFEU.\textsuperscript{11}

\subsection*{2.3 Preview on information exchange}

Within the CO3-project (and in a broad sense within horizontal collaboration (project) there might be difficulties in the concept of 'information (data) exchange' (as explained below). As a general rule restrictive practices include: agreements floating, rigging or otherwise influencing prices; agreements reducing output by, for example, ceasing production, distribution, purchase, marketing or by transacting a limited volume of the products or services; agreements allocating markets by, for instance, the division, distribution, allocation or imposition of portions or segments of an existing or upcoming market; and any agreements setting, rigging or coordinating tenders. Such agreements between actual or potential competitors are considered hard-core restrictions and therefore prohibited without a necessity of further inquiry into the parties' business purposes or into the anticompetitive, procompetitive and overall effects. However, this is the extreme view. In essence, a participant to a horizontal collaboration (project) needs to be aware that the horizontal collaboration agreement in question does not lead to the disclosure of \textit{strategic information} thereby increasing the likelihood of coordination among the parties within or outside the field of the collaboration, nor achieve significant commonality of costs, so that the parties may more easily coordinate market prices and output.\textsuperscript{12}

\begin{thebibliography}{99}
\bibitem{note5} For example, Case C-280/08 P, Deutsche Telekom, paragraphs 80-81.
\bibitem{note6} Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 15.
\bibitem{note7} Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements paragraphs 23-31.
\bibitem{note8} Case C-7/95 P, John Deere, paragraph 88 which we will discuss later.
\bibitem{note9} Case C-49/92 P, Anic Partecipazioni, 8 July 1999, ECR I-4125.
\bibitem{note10} Joined cases T-25/95 and others, Cimenters CRR, [2000] ECR II-491, par. 1849 and 1852; and Joined Cases T-202/98 and others, British Sugar, [2001] ECR II-2035, paragraphs 58 to 60.
\bibitem{note12} Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 35.
\end{thebibliography}
3. **The Exemptions under Article 101 (3) TFEU**

3.1 **Article 101 (3) TFEU**

The second step, which only becomes relevant in case a collaboration is anticompetitive to an appreciable extent, is to determine whether or not the four exemptions of article 101 (3) TFEU (as mentioned under paragraph 2.1 above) are fulfilled. The latter is conducted exclusively within the framework laid down by article 101 (3) TFEU.\(^{13}\) In the case of non-restrictive agreements there is no need to examine any benefits generated by the collaboration. Nevertheless, we think it is important to know the (general) principles so that companies can anticipate on these issues, by way of safety net if that would comfort them. It is important to be aware that the Treaty on the Functioning of the European Union puts the burden of proof on the company invoking the benefit of this exemption. Thus, make sure that in the horizontal collaboration exemptions can be proven by, for instance the gain sharing method of the Trustee (see paragraph 3.2 below). In this respect we advise to take all reasonable precautions. The four conditions of article 101 (3) TFEU are - in short - efficiency gains, a fair share for consumers, indispensability of the restriction and no elimination of competition.\(^{14}\) These conditions are cumulative and exhaustive. So, the collaboration in question needs to fulfill all conditions to be exempted.

3.2 **Efficiency gains**

The first condition addresses the efficiency gains\(^{15}\). It is very important to substantiate these gains in more detail because according to the case law of the ECJ only objective benefits\(^{16}\) can be taken into account and not the subjective opinion of the parties.\(^{17}\) Therefore, speculations and general declarations in respect of the efficiencies are not sufficient. According to the Commission the following must be verified:

a) The objective nature of the claimed efficiencies;
b) The sufficient causal link between the (restrictive) agreement and the efficiencies;
c) The likelihood and magnitude of each claimed efficiency; and
d) How and when each claimed efficiency would be achieved.\(^{18}\)

Furthermore the undertakings must reasonably calculate or estimate the value of the efficiency benefits and describe in detail how the related amount has been computed. They must also define the methods by which the efficiencies have been or will be accomplished. The data submitted must be verifiable so that there can be sufficient certainty that the efficiencies have appeared or are likely to appear. There are different types of efficiencies listed in article 101 (3) TFEU. In the CO3-project the efficiencies stem from an integration of economic activities whereby undertakings combine their assets to achieve what they could not achieve just as efficient on their own, or whereby they entrust another undertaking with tasks that can be performed more efficiently by that other undertaking (i.e.  

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\(^{13}\) Case, T-65/98, Van den Bergh Foods, 23 October 2003, paragraph 107: “Article 85 of the Treaty (currently 101, red.) expressly provides, in its third paragraph, for the exemption of agreements that restrict competition where they satisfy a number of conditions, in particular where they are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. It is only within the specific framework of that provision that the pro and anticompetitive aspects of a restriction may be weighed” and Case T-112/89, Métrope television (M6) /Commission, 18 September 2001, paragraph 74, where the Court of First Instance held that it is only in the precise framework of article 101 (3) that the pro- and anticompetitive aspects of a restriction may be weighed.

\(^{14}\) See paragraph 2.1 of this Additional report: ‘The provisions of paragraph 1 may be declared inapplicable in the case of:
- any agreement of category of agreements between undertakings,
- decision or category of decisions by associations or undertakings,
- any concerted practice or category of concerted practices,
which contributes to improving the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting benefit (…)’. See in more detail paragraph 2.3 of the Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.

\(^{15}\) Case C-56/64 and 58/66, Consten and Grundig, [1966] ECR 429.

\(^{17}\) Case T-65/98, Van den Bergh Foods, 23 October 2003, paragraph 1).

\(^{18}\) Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC), paragraph 51.
Within the CO3-project the aspect of cost efficiencies is one the main benefits the collaboration leads to. The Commission indicates this several times in its Guidelines. One important source of cost savings is, for instance the development of a new production method. Another important source is the collaboration resulting from an integration of existing assets. Cost efficiencies may also result from economies of scale, i.e. lessening costs per unit of output as output increases. The Commission specifies in paragraph 66 of the Guidelines on the application of Article 101(3) TFEU an example of an ‘accepted’ cost efficiency which is more or less comparable with the subject matter (horizontal collaboration in the supply chain) that forms the object of research of the CO3-project:

“To give an example: (...) For instance, the cost of operating a truck is virtually the same regardless of whether it is almost empty, half-full or full. Agreements whereby undertakings combine their logistics may allow them to increase the load factors and reduce the number of vehicles employed. Larger scale may also allow for better division of labor leading to lower unit costs. Firms may achieve economies of scale in respect of all parts of the value chain, including research and development, production, distribution and marketing. Learning economies constitute a related type of efficiency. As experience is gained in using a particular production process or in performing particular tasks, productively may increase because the process is made to run more efficiently or because the task is performed more quickly.”

3.3 "Fair share" for consumers

According to the second condition of article 101 (3) TFEU consumers (or customers) must receive a ‘fair share’ of the efficiencies created by the restrictive agreement. During the CO3-project this aspects leads to a lack of clarity and causes uncertainty among participants. Once again, this rule only applies in case the Commission has labelled the agreement as restricting competition. By the term ‘consumers’ the Commission meant to cover all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, such as natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, ‘consumers’ of the parties to the agreement and following purchasers includes the entire downstream market.20 Where two downstream markets are related, efficiencies achieved on separate markets can be taken into account provided that the consumer groups affected by the restriction and those benefiting from the efficiency gains are substantially the same.21

One question returns again and again during the meetings of CO3. What efficiency gains can be taken into account? Does a cleaner environment count? And what about less congestion?

With respect to environmental protection and CO2-reduction the Commission has a positive view. However, the Guidelines do not contain a separate chapter on 'environmental agreements' as was the case in the previous Guidelines. Neither does the case-law of the ECJ address this topic in relation to the fair share of consumers. This subject is more appropriately dealt with in the standardisation chapter of the Horizontal Guidelines on the application of article 101 (1) TFEU.22 Collaboration which increases the environmental protection can lead to economic benefits for consumers.23

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19 Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC), paragraph 66.
20 These consumers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles, Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC), paragraph 84.
21 See paragraph 7 and further of the Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.
22 See for instance announcement (COM (96) 561 def. regarding environmental covenants of 27th November 1996, points 27-29, and article 3, sub 1, under f, of the Decision nr. 2179/98/EG of the European Parliament and the Council of 24.9.1998 (PB 275
Horizontal Guidelines on the application of article 101 (1) TFEU give an example with respect to a Research and Development (R&D) agreement in which vehicles would consume less fuel and therefore emit less CO2. The Horizontal Guidelines on the application of article 101 (1) mention in paragraph 14924:

"Analysis: Since neither company's R&D effort is aimed at a completely new product, the markets to consider are those for the existing components and for the licensing of relevant technology. The parties' combined market share on both the OEM market (35 %) and, in particular, on the technology market (45 %) are quite high. However, the parties will continue to manufacture and sell the components separately. In addition, there are several competing technologies, which are regularly improved. Moreover, the vehicle manufacturers who do not currently license their technology are also potential entrants on the technology market and thus constrain the ability of the parties to profitably raise prices. To the extent that the joint venture has restrictive effects on competition within the meaning of Article 101(1), it is likely that it would fulfill the criteria of Article 101(3). For the assessment under Article 101(3) it would be necessary to take into account that consumers will benefit from a lower consumption of fuel." (underlining authors)

Analogously it can be said that the reduction of CO2 can play a role, but this will not give a guarantee that the (horizontal) agreement in question has fulfilled the criteria of article 101 (3) TFEU.

Furthermore a 'fair share' indicates that the pass-on of (substantial) profits must at least compensate consumers for any actual or probable negative impact caused to them by the restriction of competition found under article 101 (1) TFEU, only if the collaboration has a negative impact or effect. This test is market specific. For instance, the impact of an indirect information exchange cartel25 on consumers' welfare depends on the negotiating power in the vertical relationship (retailer-supplier). If the supplier has this negotiating power, the agreement, comparable to a vertical restriction, can be welfare improving (e.g. by reducing double marginalisation). When retailers have the negotiating power, the agreement can be closer to a horizontal agreement enabling retailers to use the supplier to improve their collusive practices, leading to a loss of welfare.26 In assessing the extent to which cost efficiencies are likely to be passed on to consumers several factors are important to take into account, such as27:

- the characteristics and structure of the market;
- the nature and magnitude of the efficiency gains;
- the elasticity of demand;
- the magnitude of the restriction of competition;
- the nature of the products;
- the market position of competitors;
- the market position of buyers (upstream and downstream markets).

This is more an economic test than a legal one. Usually, all relevant factors must be taken into consideration. Unless of course the collaboration is not (potentially) anticompetitive to an

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24 The underlying facts of this case are as follows: two engineering companies that produce vehicle components agree to set up a joint venture to combine their R&D efforts to improve the production and performance of an existing component. The production of that component would also have a positive effect on the environment. Vehicles would consume less fuel and therefore emit less CO2. The companies pool their existing technology licensing businesses in the area, but will continue to manufacture and sell the components separately. The two companies have market shares in the Union of 15 % and 20 % on the Original Equipment Manufacturer (OEM) product market. There are two other major competitors together with several in-house research programmes by large vehicle manufacturers. On the world-wide market for the licensing of technology for those products the parties have shares of 20 % and 25 %, measured in terms of revenue generated, and there are two other major technologies. The product life cycle for the component is typically two to three years. In each of the last five years one of the major companies has introduced a new version or upgrade."

25 So, from competitor A to competitor B through a third party C.


27 Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC), paragraph 96 e.v.
appreciable extent but, that said, the general line of thought is that if the restrictive effects are relatively limited and the efficiencies are substantial it is likely that a fair share of the cost savings will be passed on to consumers. Another important factor to establish the likelihood of compensation is the nature of the efficiency gains, which is another economic aspect. According to the Guidelines consumers are more likely to receive a fair share of the cost efficiencies in case variable costs are reduced (which fluctuate according to the volume of the production) than in case of fixed costs reductions.

With respect to the consumer pass-on also qualitative efficiencies such as new and improved products, creating sufficient value for consumers to compensate for the possible anticompetitive effects of the agreement. In other words, the consumers are better off than without the horizontal agreement. We hereby remark that if the transport cost component is only a small part of the total price of the product itself (for instance 5 %) consumers won’t be harmed disproportionately. Once, the ECJ has ruled that the mere improvement in the supply chain was sufficient to prove that the agreement produced (relatively) substantial efficiencies for consumers. In addition, the decisive factor is the overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers.

The European Commission says in its Guidelines on the application of article 101 (3) that all positive effects are reserved for article 101 (3) TFEU. However, at the same time they open for an assessment of positive effects on inter-brand competition within the scope of article 101 (1) TFEU (the cartel ban). In this context we also refer to the case Consten and Grundig in which the ECJ held that:

"improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition." 30

Arguably it can be said that in case there is no restriction at all, there won’t be any negative effects for the consumers. Depending on the collaboration in question this aspect is certainly worth considering.

3.4 Indispensability of the restriction

Regarding the third condition, the agreement must not impose restrictions, which are indispensable to the achievement of the efficiencies created by the agreement in question. This condition is similar to a proportionality test. The question is not whether in the absence of the restriction the agreement would not have been concluded, but whether more efficiencies are produced with the agreement or restriction than in the absence of the agreement of restriction. In other words, a restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialise. Unfortunately the Guidelines do not mention under which circumstances the intensification of horizontal transparency between competitors is considered indispensable for the accomplishment of positive effects, because increase of transparency is one of the main competition elements 'at play' in the CO3-project.

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28 See Case C-26/76, Metro / Commission, 25 October 1977, paragraph 47: "According to the contested decisions the conditions of supply for wholesalers under the cooperation agreement are such as to provide direct benefit for consumers in that they ensure continued supply supplies and the provisions of a wider range of goods by retailers for private customers. Furthermore, the lively competition existing on the market In electronic equipment for leisure purposes exercises sufficient pressure to induce Saba and the wholesalers to pass on to consumers the benefits arising from the rationalization of production and the distribution system based on the cooperation agreement".

29 Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC), paragraph 11 and 18 (h).

30 See joined cases 56/64 & 58/64, Consten and Grundig / Commission, 13 July 1966.

31 See paragraph 92 of the Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC): "The more substantial the impact of the agreement on competition, the more likely it is that consumers will suffer in the long run".
3.5 Rest competition

According to the last condition the agreement must not afford the companies the possibility of eliminating competition. In other words, there must be some kind of 'remaining competition'. In this last condition the Commission recognises the fact that rivalry between companies (non-competitors/competitors) is an essential driver of economic efficiency, including dynamic efficiencies in the sense of innovation. Innovation is the core of the CO3-project and therefore for the horizontal collaboration in the supply chain. In this respect market shares are relevant, but the actual effect on competition cannot be evaluated solely on this basis. The factual market conduct of the parties can provide insight into the impact of the agreement (market power). We will discuss the last topic in more detail further.

The general conclusion is that the Commission is gradually handling the criteria of article 101 (1) TFEU in a less dogmatic way. Nonetheless the Commission strongly opposes against hard-core restrictions, as we will see in the following paragraph. In any event, from the two Guidelines we know what we cannot do.
4. (IN)DIRECT INFORMATION EXCHANGE: AN OVERVIEW

4.1 Forms and types of information

In the Horizontal Guidelines on the application of article 101 (1), the Commission dedicates a section (Section 2) to (in)direct information exchanges. In the first paragraph of this section, the Commission notes:

"Information exchange can take various forms. Firstly, data can be directly shared between competitors. Secondly, data can be shared indirectly through a common agency (for example, a trade association) or a third party such as a market research organization or through the companies suppliers or retailers". (underlining authors)

In addition, the Commission takes a broad view by explaining that:

"an information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion. Consequently, sharing of strategic data between competitors amounts to concertation".

Thus, be aware of practices that provide increased opportunities to exchange via retailers sensitive market information, such as for instance information related to future pricing, promotional plans or advertising campaigns.32

The mere existence of an agreement or a concerted practice does not automatically give rise to a restriction of competition.33 First of all the type of information to be exchanged should always be checked. Information which is identifiable and gives insight in future prices and quantities will give a presumption of restriction. This presumption, however, can be rebutted.

See for instance the T-Mobile case.34 T-Mobile discussed the reduction of standard dealer remunerations for postpaid subscriptions. What mattered was not so much the number of meetings held between the participating undertakings but rather whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical collaboration between them for the risks of competition. In fact, one single meeting/occasion may already be too much! In this respect, we emphasize that the criteria of ‘collaboration’ necessary for determining the existence of a concerted practice are to be understood in the light of the provisions of the Treaty on competition. This implies that each company must determine independently its policy on the internal market.35 However, this does not deprive companies of the right to adjust their behavior intelligently to the existing or anticipated conduct of their competitors.

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32 See Guidelines on Vertical Restraints, paragraph 212. Vertical agreements are agreements for the sale and purchase of goods or services which are entered into between companies operating at different levels of the production or distribution chain. Distribution agreements between manufacturers and wholesalers or retailers are typical examples of vertical agreements. Vertical agreements which simply determine the price and quantity for a specific sale and purchase transaction do not normally restrict competition. However, a restriction of competition may occur if the agreement contains restraints on the supplier or the buyer. These vertical restraints may not only have negative effects, but also positive effects. They may for instance help a manufacturer to enter a new market, or avoid the situation whereby one distributor ‘free rides’ on the promotional efforts of another distributor, or allow a supplier to depreciate an investment made for a particular client. Whether a vertical agreement actually restricts competition and whether in that case the benefits outweigh the anti-competitive effects will often depend on the market structure. In principle, this requires an individual assessment.

33 Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 60.

34 See case C-8/06, T-Mobile Nederland, 4 June 2009, paragraph 26; Case C-89/93 Houtslijp, Jurisp. 1993, p. 1307, paragraph 63.

4.2 The term “exchange”

The term 'exchange' has been interpreted broadly and exists in two varieties: a consensual exchange and an one-sided exchange. It is preferable that the horizontal agreement between the shippers includes a specific clause that addresses this subject, namely that the Shippers explicitly mention that they don’t want to receive the identifiable information from one another.\(^{36}\) In other words, both the Shippers and the Logistics Service Providers (LSP’s or individual LSP) have a 'passive' role in the collaboration, while the 'Trustee' is the party who has an 'active' role. The Trustee is not deemed a (contractual or factual) carrier as he does not obtain possession of the goods and he does not undertake their delivery. Typically he does not perform the transport. He acts as a neutral and impartial manager of the collaboration between the shippers, as a service provider who has different 'offline' and 'online' functions and possibly also acts as an agent by making the arrangements with the parties who do carry the goods (the LSP’s) and by making arrangements so far as they may be necessary for the immediate step between the ship and the rail, the customs and so forth. This view is in our opinion the right one because the individual Shippers will disclose information with respect to their cargo volumes only to the Trustee and not to each other. The Trustee is obliged to keep this information confidential and will only use the information with respect to the cargo of the individual Shippers to combine the flow of their cargo. The Trustee will also keep information about the precise allocation of freight costs confidential. Carriage contracts with respect to a specific cargo will be entered into by the individual Shippers with the individual LSP’s directly (it is not a multi-party agreement). The Trustee will not become a party to these carriage contracts. Furthermore, the information collected by the Trustee is not relevant for its own market position: otherwise the collaboration would entail the risk that the Trustee would artificially influence the prices on the market. Don’t take this with a grain of salt, because according to the Commission and the case-law of the ECJ not only the written arrangements, but likewise the factual behavior of the parties in practice are important to consider whether or not the agreement or concerted practice is restricted under article 101 (1) TFEU. It can thus be said that the Trustee is a complete new function within the logistic market.

4.3 Important factor regarding the structure of the market

Information exchange is not as such restrictive, even if agreed between competitors, but only in its factual and legal context, in particular depending on its extent and the market structure.\(^{37}\) This is important because transparency in a competitive market characterised by many buyers and sellers can increase competition, according to the Commission. Both the Court of First Instance (at that time 'of first instance')\(^{38}\) and the ECJ have upheld the Commission’s view on this point. We already have mentioned several decisions of the ECJ. But also decisions of the ECJ are more concentrated on the aspect of information exchange. Hereinafter we will mention some of the important cases to give an insight in the view of the courts. It is worth mentioning that transparency exists in two varieties: the vertical, which is unambiguously positive for competition, and the horizontal form, which requires a

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\(^{36}\) Case C-199/92 P, Hüls, 1999 ECR I-4287, paragraphs 160, 171-172 (about Polypropylene products) : "It follows, first, that the concept of a concerted practice, as it results from the actual terms of article 81(1) EC, implies, besides undertakings' consenting with each other, subsequent conduct on the market, and a relationship of cause and effect between the two. (...) Hüls also maintains that, even if it took part in meetings, it gave price instructions taking up the meetings' advice only three times, between July and November 1982, and those instructions were purely internal and never communicated to customers. Those initiatives were never put into practice by Hüls, which is of decisive importance for the purposes of a finding that there was no collusion between producers, but only concerted practices; in Hüls' case, there was no practice on the market corresponding to the concerted action. Thus those price instructions would have had no effect on the market whatsoever, since the sales offices did not pass them on to customers. Hüls carried out an independent price policy, pursuing, in its own interests, a policy of investing in special products in order to disengage from loss-making mass products. (...)Mere participation by Hüls in a few isolated meetings does not warrant the conclusion that it took part in price agreements in the form of implementing their results".


\(^{38}\) The Court of First Instance in John Deere case ruled at paragraph 49: "Transparency and the consequent reduction of uncertainty only strengthen competition in highly competitive markets", and also case T-34/92, Piaggio and New Holland Ford v. Commission, 1994, ECR II-905, "... on a truly competitive market transparency between traders is in principle likely to lead to the intensification of competition between suppliers, since in such a situation the fact that a trader takes into account information made available to him in order to adjust his conduct on the market is not likely, having regard to the atomized nature of the supply, to reduce or remove for the other traders any uncertainty about the foreseeable nature of its competitors' conduct".

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special justification because of its collusion-increasing prospective (as is mainly the case in oligopolistic markets).^{39}

Information systems which collect data do not in themselves affect competition.^{40} This depends on several factors. In the Steel Beams case the Court prohibited such a system because of the oligopolistic nature of the market and stated:

"It follows that, in choosing the oligopolistic structure of the relevant market as one of the criteria of assessment, without seeking to establish whether the market was highly concentrated, the Court of First Instance did not infringe Article 65 (1) of the ECSC Treaty as it must be interpreted in the light of the Court's case-law relating to exchanges of information. (...) The finding that, in the present case, the beams market was oligopolistic in structure is an assessment of fact which is not subject to review by the Court in appeal proceedings. That is true also of the finding that the products were homogenous. (...) It is clear that the information exchange systems in question reduced the degree of uncertainty as to the operation of the market, the Court of First Instance was right to conclude, (...) that those systems clearly affected the participants' decision-making independence."^{41}

In its earlier decision Wirtschaftsverenigung Stahl^{42}, the outcome also heavily relied on the concentrated nature of the steel industry in Germany, and on the existence of structural links between the participants. The Commission clearly held that:

"By eliminating any hidden competition in the market, the information exchange reduces considerably the advantage to be gained by an undertaking from competitive action and tends to dissuade it from trying to increase its market share".

Information systems which include commercially sensitive and sufficiently current (e.g. monthly) information which competitors normally keep secret and do not reveal to other competitors may have as their object or effect a distortion or restraint of competition by increasing market transparency and allowing one competitor to detect in advance another competitor's strategy or to identify competitive behavior such as parallel imports. Such information could for instance be: capacity operation, production, order received and order backlog, selling prices, price announcements, costs and marketing plans.

We refer to the case UK Agricultural Tractor Registration Exchange versus John Deere, which is the landmark case shaping the law in this area. The Commission prohibited an agreement between the main tractor suppliers in the UK to exchange information identifying the origin of tractors imported, sold and registered in the UK. The Court (of First Instance) confirmed this by saying (paragraphs 86-90):

"First of all, according to the case-law of the Court (...) the criteria of coordination and cooperation necessary for determining the existence of a concerted practice, far from requiring an actual 'plan' to have been worked out, are to be understood in the light of the concept inherent in the Treaty provisions on competition, according to which each trader must determine independently the policy which he intends to adopt on the common market and the conditions which he intends to offer to his customers. According to the same case-law (...) although it is correct to say that this requirement of independence does not deprive traders of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such traders, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard

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^{40} Case 4/36.069, Wirtschaftsverenigung Stahl, Commissions' decision of 26 November 1997, paragraph 39.

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being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market. (...) that ... on a truly competitive market transparency between traders is in principle likely to lead to the intensification of competition between the suppliers, since in such a situation, the fact that a trader takes into account information made available to him in order to adjust conduct on the market is not likely having regard to the atomized nature of supply, to reduce or remove for the other traders any uncertainty about the foreseeable nature of its competitors conduct. On the other hand ... general use, as between suppliers, of exchanges of precise information at short intervals, identifying registered vehicles and the law of registration is, on a highly concentrated oligopolistic marketing in which competition is already greatly reduced and exchange of information facilitated, likely to impair considerably the competition which exists between traders. In such circumstances, the sharing, upon a regular and frequent basis, of information concerning the operation of the market had the effect of periodically revealing to all competitors the market positions and strategies of the various individual competitors. Furthermore, provision of the information in question to all supplies presupposes an agreement, or at any rate a tacit agreement, between the traders to define the boundaries of dealers sales territories by reference to the United Kingdom postcode system, as well an institutional framework enabling information to be exchanged between the traders through the trade association to which they belong and, secondly, having regard to the frequency of such information and its systematic nature, it also enables a given trader to forecast more precisely the conduct of its competitors, so reducing or removing the degree or uncertainty about the operation of the market which would have existed in the absence of such an exchange of information.” (underlining authors)

The Court concluded that the information exchange system reduces or removes the degree of uncertainty as to the operation of the market. Therefore the system is likely to have an adverse influence on competition between manufacturers.

In its Retail Market Monitoring Report the Commission focuses on the operation of the supply chain in the European Commission’s attempt to provide a comprehensive analysis of the retail sector so as to identify possible market malfunctioning. It is generally felt that this has not yet been expressed in a manner capable of distinguishing of two situations. On the one hand a situation in which companies may, and sometimes must, share information with trading partners (such as the Shippers, LSP’s and Trustee cooperating in the consortium), and on the other hand situations in which competitors use a common trading partner as a conduit through which to facilitate anticompetitive conduct.

4.4 Important parameters

Regarding the exchange of information several factors are important according to the case-law of the ECJ and the Horizontal Guidelines on the application of article 101 (1). In a nutshell these are:

- **Market characteristics**, such as the concentration which can influence the mutual relationship, the level of transparency by which the information exchanged can be used to determine the activities of the competitor(s), the stability of the market, the symmetry and the complexity of the market(s) involved. The competitive outcome of an information exchange depends not only on the initial characteristics of the market in which it takes place, but also on how the type of information exchanged may alter those characteristics. In this respect the transport sector per

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45 Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 77 and Case C-238/05, Asseff/Equifax, paragraph 54.
se has a special place in the Commission’s competition policy. The main problems when applying the competition rules in the transport sector are the ‘classical’ forms of restriction of the competition such as price fixing, capacity and market sharing and collective refusal of access to essential facilities under article 101 TFEU. The substantive rules of the special transport regulations are to be interpreted in the same way as article 101 TFEU. Regarding the aspect of market power of the parties to a horizontal collaboration see further paragraph 6 below.

- **Characteristics of the information exchange:**
  - strategic value: The strategic relevance of the exchanges may depend on the specific market context, the parties intent to the exchange, the age of the data and its aggregation, how frequently it was exchanged, and the number of dimensions in which the firms compete (see hereafter). As mentioned before, the aspect that raises the specter of anticompetitive conduct is not so much the information exchange, but the exclusion of some competitors from valuable collaboration or, more generally, a useful facility. In other words, it may be a competitive disadvantage not to belong to this trade association.
  - the parties’ intent in sharing information and the timing of the exchange: Commercially sensitive information is legitimately disclosed in the context of negotiating an agreement and fixing its terms. Once an agreement is reached or terms are established, there may no longer be a legitimate basis for disclosure of certain types of information and intention to restrict competition may be inferred. In other words, what do the parties want to achieve? It should also be noted that even a private exchange of information on future intentions will only have an anticompetitive effect if the future market supply can react and adjust to the new information exchanged. That means that if supply conditions are already set by the time the information is exchanged, then no anticompetitive effect is likely to be generated;
  - the age of the data exchanged. Is the information historical or future based? The older the data, the harder it is to be used to infer future conduct from a competitor, and the less useful it is to serve as a monitoring scheme to potential deviations from coordination between competitors;
  - public/non-public information: In general, exchanges of information of a genuinely public character are unlikely to constitute an infringement of article 101 (1) TFEU. This kind of information can be described as generally and equally accessible to all competitors and customers;
  - public/non-public exchange of information: An information exchange is public if it makes the exchanged data equally accessible to all competitors and customers. The fact that information is exchanged in public may decrease the likelihood of a collusive outcome on the market to the extent that non-collaborating companies, as well as customers may be able to constrain potential restrictive effect on competition. However, the possibility cannot be entirely excluded that even this kind of exchange may constitute a collusive outcome in the market;
  - is the exchanged information aggregated or does it concern individual companies? Aggregated data is defined as data in which the identification of an individualised firm is not possible, such as the information exchange from the Shippers to the Trustee on a confidential basis in the CO3-project. Efficiency benefits can most likely be obtained through the

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66 The Council issued special regulations with respect to the transport sector: For road, rail and inland waterways, 1017/68, sea transport 4056/86 and air transport 3975/87 and 2410/92.
69 Deutsche Bahn, CFI October 21, 1997, ECR II-1689, paragraph 77.
70 In its important judgment of John Deere (T-35/92) the Court decided likewise.
71 See for instance a UK case in which the negotiations took place outside this context and instead occurred after the agreement would have been reached, Case CP/98/71/01 Price-Fixing of Reflective Football Bait (2003).
72 See joined Cases T-191/98 and others, Atlantic Container Line (TACA), (2003) ECR II-3275, paragraph 1154. This may not be the case if the exchange underpins a cartel.
73 Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 94.
exchange of aggregate data, while the exchange of individual data raises the potential for a collusive outcome. In fact, the publication of aggregate data of costs and production by trade firms may benefit suppliers and customers by allowing them a clearer picture of the market place, permitting more informed choices to be made, and allowing for a more efficient adaption to changing market conditions;

- the structure and control of the exchange of information. Is the information exchanged between competitors directly or indirectly by means of a third party?;
- the adoption of safeguards by the parties to ensure consistence of confidentiality;
- the frequency of the information exchange: It depends on the structure of the market whether a particular information exchange can restrict competition (to an appreciable extent).\textsuperscript{54} For instance, in the T-Mobile case of the ECJ the court ruled that one single meeting in which the competitors discussed their business strategies was enough for the Commission to assume the restrictive effect on competition in the telecom market (see also paragraph 4.1 of this Additional report).

As indicated before, the Horizontal Guidelines on the application of article 101 (1) identify the exchange of ‘individualised data regarding intended future prices or quantities’ as a restriction in object.\textsuperscript{55} This definition may be too broad in so far as any public communication of future prices or quantities is considered a restriction by object, unless the firms ‘are fully committed to sell in the future at (these) prices’. Literally this would arguably classify as a restriction by object price advertisements that have non-binding effect – as is the case for most price advertisements. It seems clear from the Horizontal Guidelines on the application of article 101 (1), however, that this is not what the Guidelines envisage. It is obviously stated that “the Commission will pay particular attention to the legal and economic context in which the information exchange takes place”.\textsuperscript{56} The standard of the case law of the ECJ is also more flexible, taking into account the content and objectives of the agreement and its legal and economic context.\textsuperscript{57}

Quantity data may include data on market shares, territories or sales to customer groups. Price data may include prices paid for inputs (cost data). In the CO3-project information regarding volume/quantity data will be shared with the Trustee in order to facilitate a high standard of sustainable transport of goods, but also some information concerning transport costs. In the aforementioned case T-Mobile the Court ruled that:

“An exchange of information between competitors is tainted with an anticompetitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings”.

In the self-assessment test the undertakings have to be aware of this important issue. In general we think that the horizontal collaboration in the supply chain will not result in ‘removing uncertainties between undertakings’, but merely in removing ‘inefficient transportation’. But, in any case, be aware that exchanges which have an anticompetitive effect are prohibited.

The concept of information exchange has an important connection with the so called ‘hub-and-spoke’ collusion which will be discussed in the following paragraph.

\textsuperscript{54} This mostly depends on the market structure and whether a long-term agreement exists.
\textsuperscript{55} Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraphs 72 – 74.
\textsuperscript{56} Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 72.
\textsuperscript{57} For instance, AG Kokott's Opinion in C-8/08, T-Mobile Netherlands, 4 June 2009, paragraph 39 and the judgment numbers 27-29.
5. Hub-and-Spoke

5.1 Hub-and-Spoke phenomenon

As mentioned before, companies that collude rather than compete will soon be in violation of antitrust law. Competitors (the spokes) may collude directly with each other or do so through a third party (the hub). This is called a 'hub-and-spoke' agreement. As said before, the European Commission identifies the disclosure of information that 'enable(s) undertakings to be aware of market strategies of their competitor' as a main concern. The ECJ also demonstrates this concern in Erbau-Jacquery / La Hesbignonne. However, the Guidelines do not specifically address the 'hub-and-spoke' phenomenon. The general principles set out in the Guidelines will equally apply to this type of arrangements. However, in this context it is interesting what the authors of the Comments on the draft of these Guidelines mention. Namely that:

"(...) hub-and-spoke arrangements also raise issues not currently covered in the Draft Guidelines, particularly regarding the exchange of information within the distribution chain (e.g., in the context of trading negotiations between retailers and suppliers). In particular, recent UK case law had highlighted the concept of an indirect concerted practice between competing retailers based on the exchange of confidential information between them via common supplier. It is important that undertakings are able to distinguish between situations in which retailers can share information with suppliers for legitimate (often pro-competitive) reasons (e.g., bargaining) and situations in which retailers will be considered to be effectively using the supplier as a “go between” for the anticompetitive exchange of information. In this regard, it may be useful for the Commission to highlight that actual knowledge (and not merely constructive knowledge) of the role being played by the supplier is required of both the retailers and its competitor in order for a concerted practice to be established. This not only seems a sensible approach for providing business with sufficient legal certainty to guide information exchange within the supply chain, but is also the most consistent interpretation of “hub and spoke” arrangement with existing EU case law, under which a concerted practice can only be found where undertakings “knowingly substitute practical co-operation between themselves for the risks of competition.” More generally the Commission’s approach to exchanges of information amongst competitors through a third-party “conduits” or indirect “signaling” behaviour would be clarified.

The key lesson is simple: exchanges of price information are always sensitive from a competition law point of view, especially where those plans relate to future price intentions. To what extent are the competitors able to exchange information in the context of their negotiations? There can be legitimate reasons for customers and suppliers to discuss prices with their competitors (in trying to negotiate a better deal). Companies should be extremely wary of providing information in the hope or expectation that it will be passed on to its competitor(s). Since 1974 the Commission has made it very clear that according to article 101 (1) TFEU it is in principle prohibited for a producer to communicate to his competitors the essential elements of his price policy such as price lists, the discounts and terms of trade he applies, the rates and date of any change to them and the special

58 Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 58.
62 Cases 48, 49 and 51-57/69, ICI / Commission, 1972 ECR 619, paragraph 64.
63 An indication of a prohibited hub-and-spoke agreement can be found in Argus, Littlewoods / JJB Sports. 2005/1071, 1074 and 1623 (paragraph 141); “(i) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one), (ii) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and (iii) C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition."
exceptions he grants to specific customers. In the Cobelpa case, the Commission confirmed that the exchange of information concerning price discounts, price increases, reductions, rebates and general terms of sale, supply and/or payment, can only be explained by ‘the desire to coordinate market strategies and to create conditions of competition diverging from normal market conditions, by replacing the risks of pricing competition by practical cooperation’.

5.2 Indications

The examples mentioned in the Horizontal Guidelines on the application of article 101 (1) (which lead to a restriction according to Article 101 (1) TFEU) cover subjects, such as the direct exchange of individual information about current occupancy rates and revenues. In paragraph 224 the situation is described in which three competing manufactures A, B and C entrust an independent joint purchasing organization with the purchase of product X, which is an intermediary product used by the three parties for the production of their final product Z. All information necessary for the purchases (quality specifications, quantities, delivery dates, and maximum purchase prices) is only disclosed to the joint purchasing organization, not to the other parties. This organization agrees upon the purchasing prices with the suppliers. The Horizontal Guidelines on the application of article 101 (1) state:

"Since there is no direct information exchange between the parties, the transfer of information necessary for the purchasers to the joint purchasing organization is unlikely to lead to a collusive outcome. Consequently, the exchange of information is unlikely to give rise to restrictive effects on competition within the meaning of article 101 (1)."

This is an important sentence in view of horizontal collaboration between shippers in the supply chain, i.e. it (again) gives reason to believe that the horizontal collaboration in the supply chain will not restrict competition. In the legal structure of the horizontal collaboration between the Shippers in the supply chain the information exchange phenomenon has been solved by involving a neutral, independent third party, the Trustee, to collect the data from the individual Shippers and to compare these data (no (direct) information exchange). Furthermore the application of the Shapley Value by the Trustee as objective and fair gain sharing mechanism to allocate the mutual cost savings to the individual Shippers does not entail the disclosure of (historical) transport and other costs. In cases such as the CO3-project the information on the structure of the market is disseminated by an independent Trustee whose activity is to monitor markets and collect and compile industry data and market studies of the market players. Despite the fact that those market studies are a means to disseminate sensitive information, so far the Commission has never challenged such activities as illegal. There are several reasons why:

- using specialised consultants like the independent Trustee, for gathering market intelligence allows costs savings which increase the company’s business efficiency;
- in these cases there is no real exchange of information between competitors, since information is independently collected by the third party. Confidential information generally cannot be disclosed to competitors. One possible exception is when the information is delivered to an independent third party, for instance for purposes of gathering statistical studies which do allow the identification of the study participants. Moreover there is no real exchange because the Trustee is obliged to keep the sensitive information confidential and only use the information for the purpose for which it has been provided/collected. In the

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66 Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 107.
67 For more information about the Shapley Value and other efficiencies obtained by the collaboration in the supply chain we refer to the Operational Report by F. Crujssen of Argus-I available at the CO3-website, www.co3-project.eu.
horizontal collaboration the individual Shippers pass on the information about the freight volumes they are expected to contract out to transport service providers to the Trustee. The Trustee asks the (LSP) LSP’s what (he) they would charge for the transport of the bundled cargo. The Trustee informs each individual shipper of the transport costs it is ‘accountable’ for. In this way the information is not identifiable and no secret, sensitive and/or strategic information will be exchanged amongst the Shippers and between Shippers and LSP or LSP’s. The individual Shipper will only be able to evaluated its own current transport costs (in the case the Shipper bundles its freight flow) against its own historic transport costs in the situation that the Shipper was not yet collaborating.
6. THE IMPORTANCE OF MARKET SHARES IN THE CONTEXT OF THE EXCHANGE OF INFORMATION

Depending on the market position of the parties and the concentration of the market, several factors should be considered, such as the stability of the market shares over time, entry barriers, the likelihood of market entry, and the countervailing power of buyers/suppliers (see also paragraph 4.4 above). The term ‘market power’ is an important tool to establish whether or not there are anti- or procompetitive effects. The starting point for the analysis of market power is the position of the parties in the markets affected by the collaboration. In markets that can be entered by 'new' players sufficiently easy, a horizontal collaboration agreement without hard-core restrictions will normally not immediately be expected to give rise to anticompetitive effects.\(^{69}\) Market power is "the ability to profitably maintain prices above competitive levels for a period of time or profitably maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a period of time"\(^ {70}\). In that context market power is not the problem per se, but the ability to set high prices.

In addition, market power is a matter of degree. What is the position of the parties (inter alia Shippers, LSP's) on the market? Market share and concentration will either create or increase market power. To carry out the analysis in this respect, the relevant market(s) has/have to be defined, using the Commission's Notice on the definition of the relevant market\(^ {71}\), and the parties' combined market share calculated. But also in other regulations, such as the ‘De Minimis Notice’\(^ {72}\) and legislation on a national level there can be approximations to calculate these shares. If the combined market share is low (for instance 5 %), the agreement is unlikely to give rise to anticompetitive effects.

The scope of the term 'low' to express a market share, may very well depend on the market, as well as the particulars of the agreement and the parties involved. We cannot give an actual market share threshold given the wide-ranging variety of the horizontal collaborations and their different potential effects.

With respect to the aforementioned information rules with respect to exit and entry has been included in the model legal agreements we have developed. In this respect it might be useful for the Shippers who are already collaborating to make an offer once in a while to third parties (e.g. Shippers) who also want to collaborate, of course providing that those third parties add value to the collaboration. The Shippers even could give instruction to the Trustee to always pro-actively keep searching for synergies between the combined freight flow of the existing collaboration partners and the freight flow of other shippers who could enter the game and increase the efficiency of the collaboration. In respect of the bargaining power of the joint Shipper in a(n) existing collaboration through a Trustee towards the transport sector, in view of transparency and giving more transport companies a chance to serve the joint Shippers, it can be advisable to periodically hold open tenders. This way the collaboration keeps an open and transparent character.

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\(^{69}\) Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 47.

\(^{70}\) Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 39.


\(^{72}\) See http://ec.europa.eu/competition/antitrust/legislation/deminimis.html. Recently, on 25 June 2014, the European Commission has published its new De Minimis Notice, see C(2014) 4136 final: "(...) Agreements may also fall outside Article 101(1) of the Treaty because they are not capable of appreciably affecting trade between Member States. This Notice does not indicate what constitutes an appreciable effect on trade between Member States. Guidance to that effect is to be found in the Commission’s Notice on effect on trade,4 in which the Commission quantifies, with the help of the combination of a 5% market share threshold and a EUR 40 million turnover threshold, which agreements are in principle not capable of appreciably affecting trade between Member States. Such agreements normally fall outside Article 101(1) of the Treaty even if they have as their object the prevention, restriction or distortion of competition (...)". See also 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.
7. **Procompetitive Aspects: The Influence of the Benefits**

In the Horizontal Guidelines on the application of article 101 (1) the Commission admit that horizontal collaboration can lead to substantial economic benefits.\(^{73}\) This is also in accordance with the changing approximation of the Commission; it has moved from a rather formalistic (\textit{per se}) approach towards a more economic-based approach. According to the Horizontal Guidelines on the application of article 101 (1) economic criteria (such as market power) form a key element of the assessment under article 101 (1) TFEU.\(^{74}\) Clearance under art 101 (3) TFEU may be granted if the agreement leads to economic benefits, in particular (transport) cost savings, quantity discounts, sharing of risks, an increase of investments, pooling of know-how, enhancing product quality and variety, and a faster launch of innovation.\(^{75}\) We hereby note that ‘restriction’ has a different meaning for economists than practiced by lawyers. Economists use the term to refer to a market outcome in which prices are above the competitive level. In law, the existence of restriction merely describes a precondition for the application of article 101 TFEU and analogous provisions.\(^{76}\) The risk of anticompetitive collusion between the participants may be reduced by construing a ‘Chinese wall’ upon the exchange of competitively sensitive information.\(^{77}\) In that case there is no (real) (direct) exchange of information between parties in the collaboration. The general tendency of the Commission is to object to joint marketing arrangements between competitors, except where the joint marketing is justified by exceptional (sector-specific) circumstances, in particular in the transport sector.\(^{78}\)

With respect to the economic effects of the hub-and-spoke agreement on competition in the market, no clarity can be given on beforehand. The effects are rather ambiguous and dependent on the actual situation and future developments in that situation.\(^{79}\) To understand whether such agreements should be forbidden, the distribution of negotiating power is crucial. In most horizontal agreements consumers are hurt by driven hub-and-spoke collusion. According to case-law, information exchange through a common supplier must be treated as a \textit{per se} prohibited cartel. The economic mechanism behind indirect information exchange is not always well understood. The aforementioned approach is not compatible with economic research which tends to show that a common supplier is rarely capable of influencing interactions among competitors.\(^{80}\) Odudo notes for instance that:

\begin{quote}
"The additional challenge [...] in the hub-and-spoke context is to explain why (the supplier) is involved (...) in the indirect information disclosure. It has been argued that (the supplier) has no incentive to police (the retailers’) horizontal arrangement and strong incentives to do just the opposite".\(^{91}\)
\end{quote}

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\(^{73}\) Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 2.

\(^{74}\) Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraph 5.

\(^{75}\) Powertrain – GM/Fiat, D. Comm. aug 16, 2000, IP/00/932. However, cost savings that are caused by the mere exercise of power and which do not benefit customers cannot be taken into account: Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paragraphs 36-37.


\(^{79}\) The literature regarding the hub-and-spoke collusion on an economic view is rather scarce: Odudo 2011 discusses relevant cases and gives some informal economic arguments about the logic of this type of agreement. Kuhn (2001) discusses the consequences of information exchange for competition policy but does not explicitly deal with hub-and-spoke agreements. Gerlach (2009) studies information exchange in a model of collusion with varying demand. He shows that communication between horizontal firms can in some circumstances improve collusion and consumers welfare by facilitating coordination.


In the CO3-project the Trustee has been chosen in order to act as an independent intermediary instead of, for instance, the LSP or on of the Shippers as *primus inter pares*. In principle, the Trustee absolutely has no interest in, for instance, influencing prices. Taking the above into account we assess that the hub-and-spoke phenomenon will not cause trouble in the horizontal collaboration between the Shippers.
8. **In Conclusion**

In general, we can conclude that the (legal) possibilities to collaborate horizontally in the supply chain are there and should not be directly considered ‘unsafe’ from an antitrust perspective. The innovative concept of collaboration between the Shippers, resulting in various efficiency gains, other (public) benefits and improvements in logistics, with the Trustee as third party advisor bound to strict confidentiality and as manager of the collaboration in an open cooperation with the LSPs appreciating also the legitimate interests of the transport sector, could, when implemented and carried out the right way, hardly lead to serious objections and a restriction of competition. We need to reduce CO2 emissions and find a solution for Europe’s clogging road infrastructure. So who could in all reasonableness be against the contribution that collaboration between shippers in the supply chain can make to achieve nowadays and future logistic challenges? No one can persevere that driving in separate trucks with half-full loads is better than driving together with a full truck load, as long as this ‘cargo-pooling’ does not affect competition on the shelves of the stores. It has been said before and we keep repeating this, the object of competition law is to discourage practices that restrict competition, the object is not to obstruct or discourage efficiency gains. However, that does not mean that from a competition law point of view there are no points of special attention and concern.

Collaboration among shippers and carriers in the transportation industry facilitates more efficient and cost-effective business solutions that cannot be accomplished by companies operating independently, due to the economies of scale and scope.

Hopefully we have given more insight in the competition law aspects on horizontal collaboration between shippers in the supply chain. Be aware that direct information exchange of strategic identifiable information, such as prices, production, stock levels et cetera remain hard-core restrictions (the so called ‘black-listed’ practices).

Neither is the indirect exchange from A to C through B allowed. The Trustee, in its ‘offline’ (management) and ‘online’ (operational) tasks, is the party who solves this problem. In the model legal agreement between the Shippers and in the model legal agreement between the Shippers and the Trustee we have taken into account competition law aspects. The legal framework has been set up in a way that the (indirect) exchange of competition law sensitive information (such as price and volume information) between the Shippers can be avoided. This information will only be shared with an independent third party, the Trustee, which will be bound to confidentiality.

Mind also that a best practice is to give the collaboration an open and transparent character. In theory it should always be possible for third parties to enter the game provided that those third parties add value to the collaboration (non-discriminatory approach) to be calculated in an objective and fair manner on the basis of the Shapley Value. From a competition law point of view, the danger zone is entered when parties start to cut-off or squeeze out others (exclusion). It can be advisable (and of course not only from a competition law point of view but also from the management side of the collaboration) to give the Trustee the instruction to actively search out for synergies with other participants that can contribute to the efficiency. In relation towards the transport sector it can be an idea to periodically hold open tenders.

Furthermore the CO3-consortium makes separate recommendations. Although we do not state that horizontal collaboration between direct competitors is prohibited, ideally, from an antitrust standpoint, the collaboration, as far as possible, should be between companies that are not in the same product market. It is advisable – if possible - to ensure on beforehand that the collaboration is eligible for an exemption to the cartel prohibition by way of a safety net. Therefore, Shippers need to make demonstrable the efficiency gains and other benefits that have been achieved. This also counts - of course on an individual level - for ensuring that the consumers of individual participants are
being granted a fair share of the resulting benefits. This mostly depends on the structure of the market and the market power of the participants.

Furthermore, during the negotiations about entering into an agreement the parties have to be aware (in particular the Shippers mutually and reciprocally) that haste makes waste: don’t collaborate too soon and take a well-considered decision. Also in the pre-contractual phase information exchange has to be avoided. For the rest we advise to call in the expert opinion of in-house counsels or external competition law experts and have the self-assessment checked in each concrete case of collaboration. We also recommend to give the relevant employees within the company that want to start to collaborate a competition law training so that they will hear the alarm bells ringing as soon as they will come near the danger zone. Again, not only the written arrangements are important, but also the concrete behavior in practice.
3.2 Comments on the additional report regarding competition law aspects of relevant EU jurisdictions

Please read the Additional report regarding competition law aspects carefully and comment on it by filling in the questionnaire below. Please fill in the section below if you have anything relevant to add to this from the perspective of your national legal system. Apart from what you have already noted in the questionnaire on paragraph 2.9, question 11 relevant remarks can be touched upon briefly.

Italy

1. According to the Italian Competition Authority and Administrative Courts, to agree upon the exchange of information is prohibited under section 2 (1), Law no. 287 of 10.10.1990 - Italian Competition and Fair Trading Act (Decision no. 13622/2004 - Ras-Generali/Iama I/575 Consulting and Decision no.8546/2000, RC Cars, I/377). It is important to note that the Italian Courts tend to look with particular severity at the practices of “information exchange” as they are regarded as anti-competitive agreements, on the grounds that they are likely to encourage collusion between the parties (Cons. Stato, judgement no. 9565 of 29.12.2010).

2. Furthermore, the field of transport and logistics industry is under the scope of the Italian Competition Authority. In June 2011, the Authority concluded an investigation on several international logistics companies and on the National Federation of Enterprises of International Freight with the ascertainment of a restrictive agreement pursuant to article 101 of the Treaty on the Functioning of the European Union. The agreement engendered a concerted increase in the prices for international shipping by road to and from Italy. The investigation's findings enabled the Authority to ascertain the coordination of the commercial strategies of the main operators in the market for international shipping by road to and from Italy. In particular, the practices ascertained in the course of the investigation were designed to coordinate price increases for international shipping by land, and the parties justified these hikes as resulting from upward trends in production costs, such as gas oil, highway tolls and administrative costs. The coordination took place in the context of numerous regularly-held meetings scheduled on the initiative of the trade association and during which the companies exchanged sensitive information on cost structures in order to reach an agreement on price increases offered for the different services on the market (see Decision No.22521/2011, International Logistics I/722). In the aforementioned case some companies had expressly agreed upon the increase of rates. It is interesting to note that even the sharing of information relating to costs (which might concern the CO3-project) was an important circumstance in the assessment of an agreement prohibited under competition law.

3. One of the central features of the CO3-project is the possibility to prove the existence of a fair share for consumers in terms of environmental protection (benefits in the form of lower consumption of fuel). Because on this specific matter there are no specific decisions by the Competition Authority and/or the administrative courts, there is no case law that can provide significant further details. As a consequence, paragraph 149 of the Horizontal Guidelines is a reference point for the study of this issue in Italian law too.

4. With reference to issue concerning “vertical agreement” we have no further comments under the prospective of national competition law.

Belgium

First of all, we believe that the competition law analysis covers all relevant aspects of EU competition law that could occur in the event of coordinated logistics as is the case here. Belgian competition law is entirely in line with the EU regime and therefore there is no need to provide a separate analysis for this jurisdiction.

France

There are no particularities under French law.
**Germany**

There are no particularities under German Law. The National Competition Law is very similar to the law of the European Union. The result of this harmonization is the basically synchronization of both legal systems without relevant further and stronger regulations under German Competition Law.

**Spain**

We agree with all comments. As we state in relation to the LOI, the competition law aspects and the exemption to the general rule that this CO3 Project relies on, must be made clear from the outset.

**United Kingdom**

We have no additional comments from our national law perspective and would refer also to our comments at paragraph 2.9, question 11 under “United Kingdom”.

4. INTERNATIONAL PRIVATE LAW AND INTERNATIONAL TRANSPORT LAW ASPECTS

4.1 Additional report regarding international private law and international transport law aspects

4.2 Comments on the Additional report regarding international private law and international transport law aspects by legal specialists from other relevant EU jurisdictions (Italy, Belgium, France, Germany, Spain, United Kingdom)
CO³:

ADDITIONAL REPORT TO THE REPORT ON THE LEGAL FRAMEWORK FOR HORIZONTAL COLLABORATION IN THE SUPPLY CHAIN AND MODEL LEGAL AGREEMENTS REGARDING INTERNATIONAL PRIVATE LAW AND INTERNATIONAL TRANSPORT LAW ASPECTS

By Jikke Biermasz and Mirjam Louws, Kneppelhout & Korthals N.V.

COLLABORATION CONCEPTS FOR CO-MODALITY’ (CO³)

The presented foreground was generated with the assistance of financial support from the European Union: The research leading to these results (which is an Additional report to the Deliverables D 2.8 ‘Report on the legal framework’ and D 2.7 ‘Written finalized agreements’ and forms a part of Deliverable D2.9 ‘Legal framework transformation’) has received funding from the European Union’s Seventh Framework Program ([FP7/2007-2013- SST-2011-RTD-1-7.6]) under grant agreement n°284926
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1. Introduction: an international character

Parties to a proposed horizontal collaboration in the supply chain have to realize that it is a complicated work to implement this collaboration in contracts in a good way. As we have stated in the Report on the legal framework (Deliverable D2.8)\(^\text{82}\), there are many complicating factors. First of all, different groups of market participants are involved in a horizontal collaboration in the supply chain. There are shippers, intermediaries and LSP’s. The cooperation has horizontal aspects (collaboration between the shippers) and vertical elements (contracts between shippers and (logistic) service providers) as well. Furthermore, within the legal context of horizontal collaboration in the supply chain various areas of law are involved. This requires a multidisciplinary approach.

Last but certainly not least, horizontal collaboration in the supply chain has a pre-eminence international character. Frequently, parties from different countries will be involved and trade/transport lanes will cross borders. As a consequence of this international private law implications need to be taken into account.

Another area of law however that should be given special attention within the framework of horizontal collaboration between shippers in the supply chain is international transport law. Although this area of law exists for an important part of, at least is based on, international transport conventions and is therefore used to deal with an international playing field, one needs to realize that transport law has its particularities. To a large extent transport law has a mandatory character. There are separate regimes for different modalities. Furthermore, transport law has a very formal nature, expressed by short time bars, liability limitations and strict rules with respect to the title to claim and jurisdiction.

In legal practice international transport law issues can not be evaluated without also taken international private law into account. The CMR-convention – for example – provides for a jurisdiction provision which, by absence of a jurisdiction clause in the transport contract between the parties, gives different national courts jurisdiction at the same time, which in legal practice frequently leads to so-called ‘forum shopping’.

In the Report on the legal framework (Deliverable D2.8) we have identified what needs to be achieved by a legal framework for horizontal collaboration in the supply chain. We have stated that written contracts should facilitate a smooth working of the collaboration, that the various contractual relationships need to be coordinated and that the total framework has to provide legal certainty. Clarity with respect to the (inter)national law that applies to the contracts as well as with respect to the national court that will have jurisdiction in case of disputes contributes to the predictability and therefore to legal certainty.

Talking about unpredictability, at international level one type of carriage contract stands out. This is the multimodal transport contract. Unimodal carriage of goods by road, rail, inland waterways and sea has been regulated on an international level by mandatory applicable transport conventions, such as for example the CMR-convention, for a long time. In this respect multimodal carriage contracts, by which the shipper and the carrier expressly agree in the contract that the transport will include different modalities or leave the modality/modalities open at the option of the carrier, are the odd man out.

One of the main problems in logistics in the EU has been, and still is, that far too much carriage of goods is performed unimodally, and not by the ‘cleaner’ environmental friendlier modalities such as rail and inland waterways, but by road carriage alone. This has caused severe problems particularly in central Europe, where both trade and environment are suffering from an ineffective transport industry with growing problems of congestion and pollution. One of the main goals of CO3 is that

\(^{82}\) We refer to paragraph 2.2.
horizontal collaboration in the supply chain leads to environmental protection and market participants take this more and more into account when planning their freight. This can be realized by multimodal transport as smart solution to face nowadays and future logistic problems by switching modalities. For transport modalities as rail and inland waterways a critical mass is needed to become efficient. The bundling of the freight flows of different shippers increases the volume. That way it can actually become possible ‘to take the train’. In this respect it can be regarded a shortcoming that an international legal regime on multimodal carriage is lacking. Up until now a lot depends on the regulation of the multimodal transport contract included in the national law that applies to the contract. As a consequence the landscape is fragmented.

In this additional report we will focus on the international private law and international transport law aspects in greater detail. This is also relevant in the comparative law exercise that we will carry out.

2. International private law

International private law has as its object to regulate the problems that can arise from the concurrence of different national legal systems in international legal relationships under civil law. Traditionally, international private law is subdivided in three main subjects: The first subject is the competence of national courts in cases with international aspects: the international jurisdiction law. The second subject is the so-called conflict of laws. This part of international private law relates to the question which national civil law applies to international legal relationships. The third part is the international execution law.

Every nation has its own international private law. As such, international private law is not international law, but is in fact national law. International conventions and EU Regulations however form important sources of Dutch international private law and of course also of the international private law in other EU member states. In Europe the international jurisdiction law and the conflict of laws has been harmonized for the greater part.

3. Rome I: applicable law

As regards the applicable law in the EU member states Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (‘Rome I’) gives the relevant rules. In the Rome I-Regulation a traditional method of finding the applicable law is used.

This method consists of two steps. First of all characterizing the private international law system to use (by qualifying the contract) and secondly the identification of the applicable law.

Article 3 of Rome I states first and foremost that parties have the freedom of choice with respect to the national civil law they want to apply to their contract. This choice of law shall be made expressly or clearly be demonstrated by the contract. Article 3 covers the subject ‘Freedom of choice’ and reads – in so far as relevant here - as follows:

“1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.
2. (...) 
3. (...) 
4. (...) 
5. (...) 

“[..]"
In the Report on the legal framework we have advised to include choice of law clauses expressly or clearly in the horizontal collaboration contracts to avoid the difficulties regarding the applicable law. This increases predictability and legal certainty. Furthermore, the different contracts can be coordinated if parties would decide to apply the same national law to the contract between the shippers and the contract between the shippers and the trustee.

Thus, the core seems to be simple: a contract is in principle governed by the law chosen by the parties. This is also true in respect of transport contracts, although the national law the parties will choose will normally be of minor importance. International transport law is the domain of mandatory applicable international transport conventions and therefore of uniform private law. In case of international transport of goods by road the CMR-convention applies, in case of international carriage of goods on inland waterways the CMNI-convention and in case of international rail transport COTIF-CIM applies. The national law the parties choose to apply to their contract applies only additionally. It fills the gaps - if any - in the convention regime.

This is clearly different in case of multimodal carriage contracts. There, the applicable national law has the lead. It has to be determined on the basis of the applicable national transport law on multimodal carriage contracts, which kind of (international or national) rules apply to the different transport legs. As we will see there are different ways in which national transport law deals with multimodal transport contracts.

But, what if the parties to a contract have not included a choice of law clause in their contract?

If parties have not entered a choice of law clause in their contract, article 4 'Applicable law in absence of choice' of the Rome I-Regulation provides for rules to determine the applicable national law. Article 4 reads - in so far as relevant here - as follows:

"1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
(a) (.-.);
(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
(c) (.-.);
(d) (.-.);
(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;
(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.
2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.
3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply."
4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected”.

The first step is the qualification of the contract. If the type of contract is mentioned explicitly in article 4, paragraph 1, under sub a up to and including h, the specific conflict rules need to be applied. Where the contract is not covered by article 4, paragraph 1, the contract is governed by the law of the country where the party required to effect the characteristic performance has his habitual residence (paragraph 2). Paragraph 3 contains an exception clause with respect to the first two paragraphs. Finally, article 2, paragraph 4 of Rome I prescribes that in case the applicable national law cannot be established pursuant to the paragraphs 1 and 2, the law of the country most closely connected applies.

The sections 5 to 8 contain conflict rules with respect to other special contracts.

Within the framework of horizontal collaboration in the supply chain article 5 is worth mentioning because it gives the rules of conflict of law regarding carriage contracts to the extent that the law applicable has not been chosen by the parties in accordance with article 3. Normally the national law of the country will apply where the carrier has his habitual residence, provided that the place of receipt or the place of delivery of the goods or the residence of the consignor is also situated in that country.

Now we know the rules to determine the applicable law, we can make an analysis with respect to the three contracts which form a part of CO3’s legal framework.

With respect to the collaboration agreement between the shippers, we come to the conclusion that Rome I does not provide for a clear criterion to determine the applicable law if the shippers would not make a choice of law in accordance with article 3. The collaboration contract between the shippers is a contract sui generis not mentioned in article 4, paragraph 1, sub a-h or the articles 5 to 8 of Rome I.

Without a choice of law the agreement will be governed ‘by the law of the country with which it is most closely connected’ (article 4, paragraph 4). Of course this is a vague criterion. In the collaboration between the shippers there is no ‘characteristic performer’. It depends on the situation how easy or how difficult it will be to resolve the issue. In case of a collaboration agreement between three French shippers who will bundle their freight on international transport lanes, it will probably not be difficult to find the most closely connected national law. As a rule, that will be French law. That may however become difficult in case of a collaboration between a Dutch, Belgium and Spanish shipper. A collaboration between shippers from different countries is not inconceivable, certainly not on long-distance transport lanes. And think also of the example of international backhauling collaboration(s) (projects).

By absence of a choice of law clause, the contract between the mutual shippers and the trustee will be governed by the law of the court where this service provider has its habitual residence (article 4, paragraph 1, sub b Rome I).

In our opinion the collaboration agreement between the shippers and the agreement between the shippers and the trustee will normally be closely related. Therefore, it would be undesirable if different national laws would apply to the contract. Synchronized choice of law clauses can prevent this.

Furthermore the carriage contracts of the shippers with the LSP(s) will in most of the cases be governed by mandatory applicable international conventions such as for instance the CMR (road), CMNI (inland waterways) or the COTIF-CIM (railway). In addition, it is possible to appoint a national
legal system that applies additionally to the international convention. By absence of such choice of law article 5 of Rome I prescribes how to find the national law applicable to carriage contracts.

Article 5 focuses on 'Contracts of carriage' and reads - in so far as relevant here - as follows:

"1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.
2. (…)
3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply".

In case the habitual residence of the carrier is in the same country as the place of receipt or delivery or the habitual residence of the consignor, the law of this country applies. In case these requirements are not fulfilled, the law of the country in which the place of delivery - if agreed - is situated applies. Article 5, paragraph 3 Rome I contains an exemption clause. In case it would appear from all circumstances that the contract is more closely connected to another national law, that law applies.

It can be useful to also include a choice of law clause in the carriage contract although, at least, in case of international unimodal transport contracts this is of less importance in view of the fact that normally such contract will be governed by mandatory applicable international transport law, such as the CMR or CMNI convention.

Again, a choice of law clause in a transport contract can have major significance in case of multimodal transport contracts. We will go deeper into this later.

4. Brussels I: international jurisdiction

In accordance with article 23, paragraph 1, of the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I') parties have room to choose the forum that seems most likely to cater their wishes.

Article 23, paragraph 1 of the Brussels I-Regulation reads:

"Article 23
If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

in writing or evidenced in writing; or
in a form which accords with practices which the parties have established between themselves; or
(a) in international trade or commerce, in a form which accords with usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

[…]."
The basic rule of Brussels I is that parties to a contract are free to agree on which national court(s) will have jurisdiction. Such jurisdiction clause shall be deemed exclusive unless the parties have agreed otherwise.

Since jurisdiction clauses should be made in writing parties have to include them in their (written) contract. We advise the participants to a horizontal collaboration to enter jurisdiction clauses into their contracts. Preferably, the national court which has competence with respect to the contract and possible disputes should be able to apply its own national law. Choice of law and jurisdiction clauses should therefore preferably be synchronized. That contributes to the predictability and quality of court decisions.

With respect to the framework carriage contract, parties also need to take into account the strict rules with respect to jurisdiction and jurisdiction clauses included in the international conventions. Because, the Brussels I-Regulation only applies insofar it does not conflict with the international conventions.  

5. Multimodal transport contracts: an introduction

As a preliminary point, multimodal transport is the carriage of goods over more than one mode of transport under a single contract of carriage, as opposed to unimodal transport where the carriage is performed by one mode of transport.  

The multimodal carrier is liable for damage to or loss of the goods during the entire transport and not during a specific leg only. Identified legal holdups are the lack of an international legal regime on multimodal carrier liability as well as a massive amount of different transport documents, which leads to legal uncertainty and unpredictability.

In the past various attempts have been made to come to uniformization, but up until now without much success. The United Nation Convention on International Multimodal Transport of Goods 1980 has never actually seen the light of day. The Rotterdam Rules (formally United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea) adopted in 2008 have also not yet entered into force. The last-mentioned convention does not specifically aim at the multimodal transport, but however establishes a modern and an uniform legal regime governing transport contracts for door-to-door shipments that at least involve international sea transport.

Also the European Commission is trying to create a regional legal regime to repair the international regulatory gap. To facilitate this, the Commission wants to make the multimodal transport alternative more attractive to the industry. This goal could be reached with a harmonized liability regime and for instance an electronic transport document. In addition, the Commission also addresses several bottlenecks and thresholds keeping the industry away from developing the multimodal transport market, and developed several strategies for how to eliminate these thresholds. We will mention these thresholds which also might be relevant for parties to a horizontal collaboration in the supply chain.  

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83 See article 71 (1) Brussels I.
84 Article 1.1. of the United Nations Convention on International Multimodal Transport of Goods 1980 (which has not entered into force) defines multimodal transport as: "International multimodal transport‘ means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country".
6. Thresholds

The unpredictable liability of the multimodal carrier is an important threshold. An international multimodal transport system does not exist, as a result of which all different unimodal regimes and opt-in standard contracts apply. These relating problems are found in the time bars on protest and litigation, which court has jurisdiction, rules on carriage documentation, the possibility to rely on exonerations et cetera. To solve this problem the European Commission has suggested three alternatives:

1) Creating an uniform regional European multimodal liability regime based on an opt-out alternative. So, basically that means a system where the same level of liability applies regardless of where the loss, damage or occasion causing delay occurred. The uniform system has several legal holdups. The main is however that an uniform system does not do justice to the mixed character of the contract. The particularities of the various legs and transport modalities used can not be taken into account properly.

-or-

2) Implementing a multimodal liability regime based on a mandatory or optional (modified) network system, in which the rules on liability are connected to the mode of transport where the loss, damage or occasion causing delay occurred. It creates a flamboyant patchwork. Dutch national transport law provides for such a system. The problems existing in a (network or chameleon) system are fourfold. Firstly, in case the loss remains unlocalised, no convention is applicable. The law applicable has to be found in the applicable national transport law, at least provided that this law gives a regulation of the multimodal transport contract. In the second place there are differences between the existing unimodal systems that apply to the legs, such as liability exemptions, time bars and liability limits. Thirdly, there are differences in interpretation with respect to the scope of application of carriage conventions and in the last place ‘annexing’ by other modes leads to conflicts.

-or-

3) Creating a modified system which is a middle-way between the abovementioned systems. In practice use is being made of contractual standard rules like the UNCTAD/ICC Rules.

In conclusion, food for thought also on EU level, the battle has not yet been decided.

7. Law applicable in case of multimodal transport

Which legal regime is deemed applicable depends on several factors such as for example:

- the nature and the extent of the multimodal contract;
- the modes of transport which have been accounted for in the contract;
- the way the modes were accounted for;
- what documents have been drawn up.

To determine the applicable international and national rules that govern a multimodal transport contract, we first have to identify the applicable national law on the basis of Rome I. In the

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86 To illustrate this problem a global overview: for sea carriage the limitations vary from £ 100/pk (Hague Rules), 2 SDR/kg or 666,67 SDR/pk (Hague Visby Rules), 2,5 SDR/kg or 835 SDR/pk (Hamburg Rules). For Inland Waterways a limit of 2 SDR/kg or 666,67 SDR/tonnage applies (CMNI). For road carriage a limit of 8,33 SDR/kg applies (CMR). In case of rail transport a limit of 17 SDR/kg (Warsaw and Montreal Convention).

87 There are some Rules, such as the ICC Uniform Rules for a combined transport document (URC), FIATA combined transport bill of lading and the BIMCO/INCA Combioc, but they lack the stature of mandatory international legislation. The result

Netherlands the transport law included in Title 2, section 2 of Book 8 of the Dutch Civil Code contains a regulation of the multimodal transport contract (articles 8:40-8:52 DCC). The Dutch legislator has implemented a network system, i.e. a system by which the legal relationships between the parties are regulated by the rules that apply to the part of the multimodal transport on which the subject rights and obligations have arisen. The definition in article 8:40 DCC reads as follows:

“A contract of combined carriage of goods is a contract of carriage of goods whereby the carrier (combined transport operator) binds himself towards the consignor, in one and the same contract, to the effect that carriage will take place in part by sea, inland waterway, road, rail, air, pipeline or by means of any other mode of transport”.

Dutch law provides for a safety net in case it can not be ascertained where the fact causing the loss, damage et cetera has arisen. The carrier can only free himself of liability if he proves that this fact has not occurred during any of the parts of the multimodal transport. In other words, he has to prove that the event did not occur during the transport period. If he does not succeed in providing this proof, he is liable for the loss and his liability shall be determined according to the juridical rules which apply to that part or those parts of the multimodal transport where these facts may have arisen and from which the highest amount of damages results.

The scope of uniform international transport conventions however always has to be taken into account. Sometimes these conventions contain rules with respect to multimodal transport, such as the COTIF-CIM, which encroaches on an agreed national road transport leg before, after or in between international carriage of goods by rail.

8. In conclusion

The freedom of choice is one of the cornerstones of the system of conflict of law rules in matters of contractual obligations. Additionally, international jurisdiction law also allows parties to include a jurisdiction clause in their contract and as such give competence to the national court of their option. The advice is to make advantage of this options and synchronize the applicable national law and competent court. With respect to international carriage contracts we remark that the additional applicable national law of choice is of lesser importance. This is the domain of mandatory applicable international transport conventions. Special consideration should be given to the strict rules with respect to jurisdiction included in those conventions.

In respect of multimodal transport contracts the absence of an international transport convention can be regretted. This type of transport (contract) can contribute to flexible and cleaner logistic solutions. Horizontal collaboration in the supply chain increases volumes which makes it possible to switch from road to rail and to inland waterways. Regarding multimodal transport contracts, the applicable national law is of significant importance. On the basis of the applicable national law it is determined what international or national rules apply to the multimodal transport contract or the different parts thereof.

Pieces of the big puzzle on multimodal transport are the unpredictable liability of the multimodal carrier as well as a the number of different transport documents. As long as there is no uniform international law on multimodal transport law, we think it is preferable to enter a choice of law clause as well as an exclusive jurisdiction clause in the written contracts. If parties do not worry to do so pro-actively, they might end up in juridical wrangling.
4.2 Comments on the Additional report regarding international private law and international transport law aspects of legal specialists from other relevant EU jurisdictions (Italy, Belgium, France, Germany, Spain and United Kingdom)

Please read the Additional report regarding international private law and international transport law carefully and confirm and/or comment on it by filling in the section below. Please fill in the section below if you have anything relevant to add to this from the perspective of your national legal system.

Italy

1. In the absence of international rules concerning the liability regime in multimodal transport, the trends expressed by the Italian case law are as follows.

Whenever the issue of the liability of the multimodal carrier has been submitted to judgment, the Italian courts have always adopted an uniform liability system, whereby the liability of the carrier has been regarded in the light of the provisions of the Italian Civil Code (Articles 1678 ff.), regardless of where the loss, damage or delay occurred.


However apparently in 2006 the Supreme Court changed its opinion and in a similar case adopted the criteria of the network liability system. The court rejected the previous trend and acknowledged that the liability of the multimodal carrier should be governed by the rules applicable to the mode of transport where the loss, damage or delay has occurred (see judgment no. 13253 of 6.6.2006).

We have no knowledge of further case law adopting the network liability system. Moreover, more recent decisions rendered by local courts were in line with the uniform liability system (see the judgments of the Court of Genoa of 8.1.2008 and of the Court of Appeal of Milan of 4.4.2008).

2. We ought to mention a peculiar aspect concerning the applicability of the CMR Convention within the Italian legal system. According to the decisions of the Italian Supreme Court (with no exception: see e.g. judgments nos. 14680 of 2.10.2003, 11282 of 27.5.2005, 2529 of 7.2.2006) the provisions of the CMR Convention are not regarded as overriding mandatory provisions; therefore they are applicable to international road carriage of goods provided that the applicability of the CMR Convention was expressly agreed upon by the parties in the carriage contract or in the consignment note.

It should be added that local courts repeatedly issued opposite decisions and that legal commentators also expressed their dissent to the trend of the Supreme Court. Nevertheless we have no knowledge of decisions of the Supreme Court other than those reported above.

Belgium

In Belgium, there is no specific legislation on multimodal transportation. Belgium has a network/chameleon approach, where the law and liability follows the mode of transport, but no specific legislation in place.

France

There is no specific legislation in France on multimodal transport.
Germany

The German legislator has implemented a „network system“. The definition in Section 452 German Commercial Code reads as follows: “If carriage of goods is performed by various modes of transport on the basis of a single contract of carriage, and if, in case separate contracts have been concluded between the parties, for each party of the carriage which involved one mode of transport (leg of carriage), at least two of these contracts would have been subject to different legal rules, the provisions of the first sub-chapter („General Provisions“) shall apply to the contract, unless the following special provisions or applicable international conventions provide otherwise“. In so far the German system is quite similar to the Dutch system. In cases where it can be ascertained where the fact causing the loss, damage or delay has arisen, the applicable rules for carriers’ liability are those, which would be applicable for this mode of transport (Section 452 a German Commercial Code).

Spain

We agree with your analysis of private international law and international transport law.

As a matter of Spanish law, a multimodal carriage is regulated by Law 15/2009 of the 11th November on the Contract of Carriage of Goods by Road (LCTTM) and at Article 67 states:

“For the purpose of this law, multimodal refers to the contract of carriage between the shipper and the carrier to transport goods by more than one means of transport, including carriage by land, irrespective of the number of intervening carriers“.

LCTTM Article 68 applies the network system, whereby each leg of the carriage is regulated by the specific legislation applicable to the specific mode of transport where the damage or loss occurred and in the event that it is impossible to determine when and where the damage or loss occurred, the LCTTM applies by default to the road carrier.

United Kingdom

We agree with the analysis from our national law perspective. The analysis and legal effect of a multimodal transport contract under English will depend on factors such as the different modes of transport involved, what particular documents are used for respective modes of transport, and the extent to which applicable Conventions on international carriage of goods will regulate the respective modes of transport involved. In the UK, a modified network system applies to the multimodal regime, in which the rules on liability are connected to the mode of transport where the loss, damage, delay (etcetera) occurred.
5. **INTERFACE WITH COMMERCIAL PRACTICE: INTERVIEWS AND LESSONS LEARNED FROM TEST CASES**

5.1 Introduction

5.2 Questionnaire interviews market participants

5.3 Interview round

5.3.1 Summary

5.3.2 Interviews shippers

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5.3.4 Interviews logistics service providers

5.4 Lessons learned from test cases

5.4.1 Bundling road partnership between two shippers

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5. INTERFACE WITH COMMERCIAL PRACTICE: INTERVIEWS AND LESSONS LEARNED FROM TEST CASES

5.1 Introduction

One of the main missions of the CO3-project has been to draw up a legal framework and model legal agreements that - of course after being customized to the concrete situation - could actually be used in practice. Apart from the fact that the legal framework, the model legal agreements, the general report and the additional reports have been evaluated by legal specialists from other relevant European jurisdictions against their own national legal systems (Deliverable D2.9 'Legal framework transformation'), we have done more.

We wanted to have feedback from commercial practice and on the basis of that validate the practicability of the legal framework the CO3-project has developed. We have executed to additional actions to level with practice.

In the first place the legal framework and ideas have been 'tested' during interviews with the legal departments of market participants, mainly of members of the CO3 high Level Industry Board.

Furthermore, we have evaluated the experiences acquired in four CO3 test-cases, but then from a legal perspective. This way, we have tried to deduct what legal lessons can be learned from those pilot cases.

During the interviews relevant legal aspects of horizontal collaboration between shippers in the supply chain have been discussed as well as more general aspects as management of legal processes within the companies and coordination of commercial and legal processes. Representatives (of the legal departments) of three shippers, one trustee and two logistics service providers have been interviewed. All interviewees of legal departments were of senior level.

5.2 Questionnaire interviews market participants

The interviews held with three shippers, two logistics service providers and one trustee covered general issues such as entering into contracts, the role of legal departments in the success of horizontal collaboration (projects), the pre-contractual phase, (European) competition law, the role of the trustee and the legal structure that has been developed in the CO3-project. As preparation on the actual interview the participants have received additional information consisting of the basic report on the legal aspects (D 2.8 'Report on the legal framework'), a PowerPoint presentation and a questionnaire. The following questions were listed in this questionnaire:

1. Assume that your company would consider entering into a horizontal collaboration project. Can you describe the procedures followed by your company from the pre-contractual phase to the signing of the project? What will be discussed during the pre-contractual stage? Would a LOI and/or NDA be needed? Which department would take care of the negotiations? And when will the legal department normally be involved?

2. Does your company make use of model agreements and/or standard contractual provisions? If so, is it possible under special circumstances to derogate from standard practices in view of customization? Who would decide on that? What kind of conditions are always crucial for your company and absolutely would need to be implemented in every agreement? And under which law will your contracts be enforced? Would you consider contracting under the law of another jurisdiction?

3. Has your company specialist knowledge in the field of contract law, (European) competition law, transport law and/or international private law? Would your legal department be able to make the
contracts that could serve as a basis for horizontal collaboration in the supply chain itself or would you consider to call in external legal experts to advise on such contracts?

4. What is your opinion about the legal framework for horizontal collaboration in the supply chain the CO3-project has developed (i.e. legal structure with three model agreements)? Which contractual stipulations are in your opinion of fundamental importance (i.e. gain sharing, entry/exit rules, confidentially)?

5. What steps need to be taken to provide horizontal collaboration between shippers in the supply chain with the necessary safeguards to avoid competition law risks?

6. What is your opinion regarding the involvement and the role of the trustee? What tasks should the trustee have?

7. Do you have additional remarks, recommendations and or other items that need to be addressed?

The questionnaire served as a guide for the participating companies and also to facilitate comparison between the interviews. On the basis thereof participants have given their view on the legal framework and the ideas we have developed. Since this questionnaire was not limiting and the interview had an open character, the outcomes stated below (see paragraph 5.3) reflect an outline description of the actual interviews. Not all questions were discussed and the answers were not given in writing, but orally during the interviews. Again the questionnaire was a guide, not a ‘straitjacket’. Apart from the name of the trustee, the names of the companies interviewed will remain confidential. The answers given do not necessarily reflect the companies opinion or policy. The answers given during the interviews reflect the opinions of the relevant senior (in-house) counsel/employee based on his/her professional experience.

5.3 Interview round

5.3.1 Summary

Main conclusions of the interviews we held with the legal departments of companies that are on the ‘shippers’-side are that they are favourably inclined towards horizontal collaboration in the supply chain. They are aware of the fact that it is necessary to make clear arrangements when entering into a collaboration (project). They indicate that normally they would not consider entering into a horizontal collaboration (project) with (direct) competitors. For some companies, the idea of working together with a competitor, although this would only imply bundling cargo on (a) certain trade lane(s), is simply a ‘no go’.

The involvement of the neutral trustee is seen as valuable, not only to manage the collaboration between the shippers but from a legal perspective as well. The interviewees are of the opinion that the trustee reduces the competition law risks, since the shippers do not have to share information (in)directly. But also in relation to competition law, shippers always have to stay alert, also when/though a neutral trustee is involved. The involvement of the neutral trustee is a solution to avoid risks, but must not lead to the conclusion that the risks have been taken care of for the future ‘because parties have called in the services of the trustee’. One of the legal experts rightfully commented that the involvement of the trustee is not an absolute guarantee.

The shippers already use or are open to use template contracts within their companies. Template contracts are useful as a starting point, but contracts always will need to be tailored to the concrete situation of each specific case. When a template contract is used by a person without the proper knowledge and skills, this can lead to misconceptions. In respect of (the use of) template contracts, larger companies are often faced with a dilemma. Legal departments have to make standard contracts because they can not review every single concrete contracts that is entered into by the
company. The legal department only reviews a certain percentage of all contracts and the more complex ones itself. For the rest, they have to rely on commercial departments. On the other hand, legal departments realize that contract drafting is more than only a gap-filling exercise and requires legal expertise.

The interviewed trustee recognized the importance of multilateral contracts some years ago since the company was already involved in horizontal collaboration (projects) back then.

The early involvement of legal experts is seen as important by most of the interviewees, but in practice people often act differently. The legal experts we interviewed recognized the fact that there are often misunderstandings between legal and commercial people within companies.

The main feedback of the logistics service providers is that the term ‘contract’ is perceived in practice as too formal. Template contracts are seen as useful, as long as they are easy to understand for all participants to a collaboration. In respect of horizontal collaboration project(s), a (short) initial contract period is seen as a risk by the logistics service providers since it takes time to setup and operate a horizontal collaboration. The logistics service providers see the importance of the involvement of legal experts in an early stage of a collaboration (project) to address the relevant legal aspects as well.

An issue logistics service providers face nowadays is that the negotiation power is at the side of the shippers. Shippers dominate contract negotiations. The tough competition in the transport market and the lacking of long-term carriage contracts that could enable logistics service providers to forecast, make it more difficult for logistics service providers to adopt a positive attitude towards horizontal collaboration between shippers in the supply chain and to provide a constructive contribution to new developments. We got the impression that the logistics service providers, indeed are more critical of the idea of horizontal collaboration between shippers in the supply chain than the shippers and the trustee who have a fundamentally positive attitude.

Most companies we interviewed emphasized the significant role volumes play in the success of horizontal collaboration projects. Prospective participants to a collaboration definitely need to address this important issue. Two shippers indicated that they will never commit to any volumes. For the third shipper this is however different. The position also depends on the type of product. Logistics service providers in the meantime hold their own viewpoint. They indicate that volumes and long-term transport contracts would make it far more easy for them to think along with the shippers and offer tailor-made solutions

5.3.2 Interviews shippers

Shipper 1

- The cooperation between the legal en commercial department within this company works well. The cooperation mainly depends on the person involved: experience determines to a certain extent whether or not a person is capable of identifying relevant legal questions. An in-house lawyer plays a more facilitating role in cases in which the business strategy is important. External lawyers have a different approach and can probably focus more on the legal issues.

- This company makes use of template contracts. The procedure from the pre-contractual phase until entering into contracts is regulated in guidelines. Also for future tenders the company makes use of special guidelines. It might be difficult if the proposed participants to a horizontal collaboration all have and want to use their own guidelines. This has to result in a compromise and a ‘give and take’ attitude during the negotiations.
In the pre-contractual phase this shipper prefers a NDA instead of a LOI. In a NDA parties can also include everything that is needed, such as their intentions, data exchange and commercial aspects. Assume that parties negotiate about the drafting and signing of a LOI and that for some reason - after a long period - this LOI is not executed. In such case parties would suffer costs in exchange for nothing, this shipper indicated.

In the early start of a collaboration a geographical division and disclosure of general information regarding the destination of the company’s freight flows need to be made. If the matchmaking is positive this company starts to bundle freight lanes. Within this company there is an additional ‘challenge’ with respect to the information disclosure to the trustee. This company would have to ask permission from its logistics service provider before sharing any information with a third party, disclosing information to a trustee even if that would be on a confidential basis included. This requires an additional administrative action.

This company is already involved in horizontal collaboration. Within these projects the role of the trustee has been (partly) fulfilled by an own control tower. Actually, the division that is fulfilling the trustee role solely acts as a freight forwarder. In order to avoid competition law risks this company never works together with (direct) competitors. Any prospective collaboration case has to be evaluated by its competition law division.

The following specific remarks were made:

- As a consequence of the complicated international structure of this company, standard contracts are concluded on the upper level. If the lower level decides to change something in the standard contracts, these alterations also have to be implemented in the upper level of the company. Under conditions minor changes to the standard contracts can however be made in pure national cases.
- Because of the structure of the company it is not possible to commit to any volumes and therefore also not to any penalty clauses in contracts in case volumes on a trade lane would suddenly drop down.
- A provision on the IT-security of the databank in which the data of shippers is collected should be described (in the contract between the shippers and in the contract between the shippers and the trustee).
- Concerning the invoice this company consults an external auditor. The shipper states that in the CO3-project invoicing takes place afterwards.
- For practical reasons this company is of the opinion that it could not make use of the third model contract (the skeleton carriage contract between the shippers and the logistics service providers). It would be better for this company to make a separate clause in the horizontal agreement between the shippers. In a separate clause parties could agree to make individual carriage contracts with the logistics service provider(s).
- In addition to the contracts the company advises that the parties to a collaboration would draw up a document in which references and concepts (definitions) are included to provide explanation and in order to avoid misunderstandings and interpretation differences.

Shipper 2

The cooperation between the commercial and legal people within companies depends to a large extent on the visibility and experience of the legal people involved. To a certain extent in-house legal counsels must take responsibility for good relationships.

In the pre-contractual phase a LOI or a NDA is sufficient for commercial people.

The interviewee expressed the opinion that it is very clear that (in)direct competitors will not work together, in particular within oligopolistic markets with a high competitive character and
few large players. Even before competition law aspects would come up for discussion within such businesses, the fact that it is simply not done to work together with a competitor would prevent collaboration. Meanwhile, providing information with respect to freight flows in order to investigate whether there is a bundle potential with a non-competitor, can simply be governed by a NDA.

- One possible trend concerned the interviewee. The introduction of an independent and neutral trustee is advantageous from the point of view of competition law. However, by sharing the strategic information only with the trustee, parties might think that everything is dealt with after that. The concern of the interviewee is that parties stop thinking for themselves because they will assume that they are on the safe side. After all, they have called in a trustee and they might have the idea that the trustee takes care of everything.

- The same risk lies to some extent in the availability and use of model agreements. Models can be very useful as a starting point for deliberations. However, models must be used by the right persons, and standardization must not lead to the impression that it is no longer necessary to keep thinking. Models are only models and have to be tailored to the concrete situation, taking into account the relevant facts, circumstances and arrangements. Theory does not exist in practice. Within large companies, especially, this can be an issue because the legal department can only be involved in a percentage of the cases due to capacity reasons.

**Shipper 3**

- This company is seeking actively for horizontal collaboration opportunities, however, up until now nothing concrete has happened. The company is selective with respect of the efforts it puts in opportunities. These have to be proportional. Results have to be achievable within a reasonable timeframe. If not, the company tries another opportunity out, convinced of the fact that several attempts will have to be necessary to finally hit the mark once.

- The interviewees explained that the compatibility of products is a challenge. Risks lie ahead, such as:
  - liability issues in situations were the products of a shipper cause damage to the products of another shipper because of contamination, incorrect stowage, handling and/or transport of the goods et cetera.
  - What happens in case one of the shippers does not hand over his products for carriage in time? Is this shipper liable towards the other shipper and if so to what extent? What happens if a consignment of one of the shippers suddenly gets a higher priority?

- Also rules with respect to volume variation are a point of special attention. This shippers thinks that it is necessary that the shippers commit at least to a certain period of time (not too long).

- For many reasons written contracts are required according to this shipper. For this shipper it is also very important to make clear how the cargo needs to be affixed. In this context instruction rules need to be implemented in the contract with the carrier. Therefore a tailor-made framework transport contract with carriers is always necessary. CMR-waybills which cover concrete consignments alone will not do.

- This shipper indicated that working together with competitors is not an option. Matches would have to be found with shippers producing and trading in complementary products. This shipper therefore looks for smart, out of the box solutions.

- In general, this shipper has a positive attitude towards horizontal collaboration. This kind of collaboration would in turn open up the possibility to move from road to environmental friendler modalities such as rail or inland waterways. The choice for the mode of transport depends to a great extent of the availability of supplementary cargo and delivery terms. This shipper currently has not enough frequency to switch from road to inland waterways on some transport lanes, although it is obvious that there could be a business case for transport on barges if the empty space could be filled and/or return loads would be found.
• When entering into a horizontal collaboration project this shipper would of course first think of positive effects for its own company. However, it realizes that horizontal collaboration is built on mutual trust and 'give and take'.
• In continental Europe the commercial contracts this shipper enters into are not too comprehensive; common law colleagues seem to work differently.
• If a horizontal collaboration (project) is running, it would be favorable to evaluate monthly;
• In summary this shipper is favorable towards horizontal collaboration (projects). However, for itself it still has to eliminate some initial barriers. This also has to do with the special nature of the products this company is producing and trading.

5.3.3 Interview trustee

• Tri-Vizor is a neutral offline/online trustee and facilitator of horizontal collaboration(s) (projects). Tri-Vizor mainly works with shippers. In practice, Tri-Vizor finds the preparation phase mostly characterized by an 'informal' mode of working between logistics professionals. Tri-Vizor encourages the shippers to draft and sign a LOI or a Memorandum of Understandings at some point in order to formalize their relationship and commitment in the precontractual phase. In practice however, the agreement to proceed in the operational phase is often only written down in e-mails between the supply chain managers. In Tri-vizor's experience, it is rare that legal gets involved upfront and most logistics professionals are hesitant to involve legal experts. An exception is made when the collaboration is between direct competitors; in this case the logistics people will not move before their legal counsel gives a green light (e.g. in the PepsiCo – Nestlé case). The same goes for a number of companies in the 'C03 Bratislava Group', e.g. Mondelez, Unilever and Heineken who are very attentive to legal aspects. In general, typical departments involved in the collaboration negotiations besides logistics are procurement and legal, although legal always stays in the background.

• Since 2011, Tri-Vizor runs a number of 'online orchestrated' communities in commercial exploitation or in pilot test phase, e.g. Baxter/UCB, Baxter/Donaldson, and Baxter/Carglass. These communities operate based on a standard multilateral contract between shippers, Tri-Vizor and logistics service providers (note: these contracts are proprietary documents developed at their own expense and are not available to the C03 consortium). The C03 'multilateral legal framework' has actually been based on generic input and suggestions Tri-Vizor gave to the consortium based on their practical experience as neutral orchestrator between 2008 and 2011. Also the term 'neutral trustee' has been suggested by Tri-Vizor; the very useful nuance 'online / offline' has been added by Argusl, the company which developed the gain sharing theory in the C03-project. Tri-Vizor's contracts as neutral orchestrator typically are under Belgian law, but in principle Tri-Vizor is flexible to work under other national legal systems, if that would be required. The contracts of Tri-Vizor consist of a generic part plus an addendum per bundled lane. Typical elements include selected carriers, cost and gain sharing, service levels and liability clauses.

• Tri-Vizor is of course not a law firm but is of the opinion that it has developed a good understanding of transport law over the past years. Multilateral contracts of Tri-Vizor have been developed between 2009 and 2011 with input from several attorneys and legal experts, as well as with frequent input from the legal counsels of Baxter and UCB.

• The introduction and general acceptance of a new role in the European logistics market, i.e. that of neutral trustee (offline of online), avoids competition law risks. According to Tri-Vizor, this role should be different from the role of logistics service providers, 4PL's and traditional freight forwarders.
5.3.4 Interviews logistics service providers

LSP 1

- The moment lawyers are involved in a commercial deal is normally too late, because shippers (and LSP’s) want to close the deal and their idea is this could probably not be reached with lawyers at the table. Nevertheless, this company agrees with the CO3-project group that legal specialists should be involved in an earlier stage.

- The legal framework and three model legal agreements which have been developed are rather theoretical in the opinion of this LSP. In this company’s opinion contracts bear the risk of preventing collaboration rather than assisting it. In practice it seems that the word ‘contract’ often scares off market participants. After explaining (during the interview) that a contract is not more than a set of arrangements between parties, the three interviewees agreed however that shippers who collaborate horizontally, are well-advised to make their arrangements explicit and write those down to avoid the risk of misunderstandings. The interviewees are of the opinion that the notion ‘contract’ calls up negative sentiments; in that respect to their opinion ‘understanding of arrangements’ could be a good alternative.

- The company (again a LSP), is involved in a collaboration, has individual contracts with the shippers and there is no formal, written contract between the shippers who collaborate. Normally, it is this company’s opinion that shippers at the most write down the intentions of their horizontal collaboration into a gentlemen’s agreement.

- According to this shipper in respect of contracts the instable flows in the supply chain are a point of special interest. If shippers and LSP’s decide to make and sign a formal contract in which they do not incorporate the necessary flexibility, they might need to hold a meeting every three months because of the constant changing flows in logistics.

- The structure existing of three model agreements developed within the CO3-project could work out in practice, provided that the framework is easy accessible. By accessibility this company means that it should be as simple as possible. An e-mail or a letter from the senior level of the company stating that the company wants to collaborate or participate in an innovative project would suffice, according to the interviewee. However, in case of (larger) investments a formal contract might be useful and even necessary. The term ‘contract’ covers more than only written formal paperwork.

- The interviewees expressed a positive view towards the trustee as an independent third party within a horizontal collaboration.

- Gain sharing can be achieved by a calculation of a third party or by direct contact with a 3PL. The problem might be that if one shipper brings in a large volume he also might demand more benefits. The gain sharing should be based on mutual benefits.

- In general, this LSP asks for an anti-trust advice in advance, for example with respect to the disclosure of sensitive data.

- In practice, this LSP notices that shippers have the negotiating power in logistics. It might be good to write a provision in a gentlemen’s agreement or a LOI that competition law aspects have been taken into consideration. The only information that will be exchanged is the quantity of the goods and their destination; prices should be left out.

- According to this LSP the procedure followed to enter into a collaboration contract will in most cases be as follows. The starting point is an analysis in which the LSP identifies the volume and
characteristics of the goods involved. If there is a match and a bundle potential, this LSP writes
down the characteristics of the data, such as what data can be exchanged and what needs to be
kept confidential, the period of time in which the data must be saved, the goals to be achieved, et
cetera. If the collaboration will then get the green light, this LSP works out how it will actually
work in practice. During this stage information about invoices and payment terms will come
into play and several questions will be discussed, such as:

- How do we deal with situations if there is not enough volume?
- What will be the effect of it?
- What happens in case of late delivery?
- What are the characteristics of the pallets?
- What are the characteristics of the products involved? Is there a contamination risk?

- The collaboration can start when these issues have been addressed in a proper way. After a
while the collaboration continues if it is beneficial to everyone. Only in case investments are to
be made, the agreement has a more formal character.

**LSP 2**

- The interviewee had basically three remarks with respect to the legal framework:

  - Firstly, logistics is a constantly moving and innovative market. Since CO3 started, plenty of
    innovative concepts of horizontal collaboration have been developed.
  - Secondly, in the supply chain a lot of new functions have been developed, like control towers,
    auditors who manage the invoicing flow, et cetera. While this company confirms the
    workability of the function of the trustee, it thinks it will be difficult to catch the role of the
    trustee in a legal contract. This LSP thinks that nowadays logistics service providers perform
    the role of the trustee, sometimes with the help of subcontractors to guarantee the
    neutrality. By doing so, logistics service providers have achieved much efficiency,
    particularly as a result of the outsourcing of invoicing flows.
  - Thirdly, the company is convinced of the fact that a horizontal collaboration will not work if
    parties only commit to a short period of time. If parties agree to collaborate for – for example
    only - two years possibly there is not enough time to ‘map’ the mutual logistic processes and
to build up trust between the parties and thus stimulate efficiency. This LSP preferably
enters into a contract for - at least - five years.

- The objects of the CO3-project are endorsed by this LSP. However, for logistics service providers
  horizontal collaboration by shippers can causes multiple difficulties:

  - Logistics service providers encounter difficulties because of the fact that, in general, shippers
    have the negotiating power in the collaboration. Logistics service providers have a more
    limited role. Logistics service providers will, in practice, never collaborate with other
    logistics service providers, the same way horizontal collaboration in the supply chain
    between shippers is developing during last years.
  - The great difficulty for logistics service providers is that the competition struggle is many
times higher and stronger comparing to the competition amongst shippers. As a result, a lot
  of logistics service providers are mistrustful and have fear and uncertainty with respect to
  horizontal collaboration. The logistic market is simply too competitive and the margins are
  very small.
  - This LSP expressed the need for long term carriage contracts on which logistics service
    providers can build on relationships with shippers, service levels and adopting a
    constructive attitude.
5.4 Lessons learned from test cases

This paragraph provides a description of the pilots projects/test cases that have been executed within the CO3-project. In each test case the factual background as well as the legal aspects have been shown. The factual background covers the most important aspects of the test case, such as the type of products involved, the origin and destination of the cargo, et cetera. This information is mainly based on the information provided in Deliverable D 2.4 ('Method and tool support for the pilot projects: a CO3 position paper') and the sources referred to in that Deliverable.

5.4.1 Bundling road partnership between two shippers

Factual background

In the first test case shipper JSP (multinational company specialized in innovative lightweight plastic applications) and shipper Hammerwerk (manufacturer of advanced metal components for the automotive and aviation industry) decided to bundle their flows on road transport. Their supply chain managers were early believers and adopters of horizontal collaboration and very active in finding possible partners to collaborate with. HS Line, a regional transport service provider in the Czech Republic, was selected as the joint logistics service provider. Tri-Vizor has acted as a neutral trustee in the initial process of creating this horizontal collaboration. The manufacturing companies have manufacturing plants located next to each other in the Czech Republic and one of their delivery addresses in the state of Baden-Württemberg in the south-east of Germany. They formed a horizontal collaboration for the co-loading of their products from the Czech Republic to south-east Germany.  

Legal framework and lessons learned

From a competition law point of view the fact that JSP and Hammerwerk are not competitors is comfortable. In the cooperation it was decided not to lay down the collaboration in a collaboration agreement due to the relative plainness of the collaboration; it concerned a simple co-loading. Although JSP and Hammerwerk did not enter into a formal contract, they did make an initial plan which was laid down in a NDA.

This collaboration demonstrated great trust between the collaboration parties supported by the trustee. However, remarks can be made with respect to the absence of written agreements. Although JSP and Hammerwerk are not competitors, it does not mean the potential disclosure of sensitive data could not be relevant between the parties. Besides that, parties who do not enter into written contracts must realize that they also have a contract when they 'only' make oral or implicit arrangements. In this case however, for now it has seemed to work out fine. In general however, CO3 advises for many reasons to lay down the mutual arrangements in written contracts.

5.4.2 Multimodal partnership between four shippers

Factual background

Four shippers (Baxter, Colruyt, Eternit and Ontex) decided to collaborate intermodal together with two logistics service providers (Corneel Geerts Transport and Transfennica). Baxter is a global healthcare company that already started a collaboration in 2011. The activities of Colruyt encompass mainly retail, wholesale and food services. Eternit, a brand of the Etex Group, manufactures and sells high-quality building materials and solutions. Ontex International produces hygienic disposables for the private label sector. Corneel Geerts Transport is a Belgian logistics service provider specialized in long distance road transport and with experience in organizing multimodal transport. Transfennica is a Dutch owned short-sea shipping company. Lastly, Tri-Vizor, a Belgium company specialized

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in horizontal collaboration, took the role of neutral trustee in the process of creating this horizontal collaboration, executing both offline and online tasks. All shippers involved are transporting between Belgium and the northwest of Spain. They formed a horizontal collaboration to create a multimodal (road – short sea – road) closed loop shipping corridor between Belgium and Spain. Upfront calculations showed that overall potential collaboration savings of more than 3% could be realized. The CO2 savings could be over 40%. Unfortunately, a last-minute unexpected drop of volume impacted this number negatively so a negative synergy was experienced during the pilot (3% cost increase for the collaboration). Actual CO2 emissions were reduced with 32% during the pilot.\(^9\)

**Legal framework and lessons learned**

In this test case, the legal relations between the shippers and between the shippers and the trustee were oral arrangements only. The parties did draw up a LOI in which they committed to a certain volume. Baxter, Colruyt, Eternit and Ontex are not (direct) competitors and of course that is favourable from a competition law point of view. The parties chose to run an operational test (period) before involving legal experts. The project ended after the test phase because of the lack of the volumes needed. The collaboration participants had agreed, to consider and discuss further formalization of their (legal) relations if the collaboration would continue after the operational test period. As said, it has not come to that point.

As the CO3-project group advocates, the carriage contracts were entered into in a direct contractual relationship between the individual shippers and the main carrier, Corneel Geerts Transport. Transfennica was subcontracted for the short-sea leg.

Coming to a verbal agreement within the collaboration was not a problem. Signing the proposed letter of intent however, took long because of a high degree of caution by the legal departments from the participants. A legal lesson learned is that, while it is understandable from a practical point of view, written contracts should be preferred above oral and implicit arrangements, because written contracts provide legal certainty and proof of the arrangements and intentions et cetera, especially in a more complex collaboration. This case showed that it is important to involve also legal departments of the shippers from the beginning when starting a horizontal collaboration. The CO3 advocated legal framework could provide support here. It provides legal certainty and uniformity and can guarantee a smooth way of working of the collaboration by clearing away potential legal obstacles.

This test case was an international case, since transport lanes crossed borders and parties from different countries were involved. It would have been advisable for the parties to take aspects of international private law into account, especially because this was a case of multimodal carriage. The collaboration was successful thanks to the mutual trust between the logistics departments of the participants. However, the insufficient transport volumes and the fact that the pick-up and drop addresses in Spain are quite far away from each other caused a negative synergy. Legal agreements about minimum volumes and including an exit clause could have prevented the sudden drop of volume (and negative synergy).

**5.4.3 Horizontal partnership in the FMCG-industry**

**Factual background**

A collaboration between four FMCG shippers has been created in the third test case. Mars Petcare France is a multinational manufacturer of petcare products. They have their head office in Orléans. United Biscuits is a multinational producer of biscuits. Saupiquet is a French specialist in canned tuna products, also active in Germany. Wrigley is a multinational manufacturer of gum products.

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The shared logistics service provider is Norbert Dentressangle, a multinational logistics service provider specialized in warehousing and road transport. Lastly, IPS Europe, a French company offering logistics services, and GOLS, a French company offering automated logistic tools, took the role of neutral trustees in the process of creating this horizontal collaboration, both executing online tasks only. Mars, being the initiator of the collaboration, took care of the offline tasks.

French retailers require full truck load (FTL) deliveries from their retailers to their warehouses. The horizontal collaboration was set up to be able to fulfil this requirement. All four shippers have factories across Europe. Within this collaboration they started shipping their products into a shared warehouse in Orléans, operated by the shared logistics service provider Norbert Dentressangle. All shippers are responsible for the inventory levels at the retailer’s warehouses since they work with vendor managed inventory. This enables daily shipping of collaborative full truck loads to the retailer’s warehouses in France from the shared warehouse by the shared logistics service provider.91

Legal framework and lessons learned

In this test case, formal written contracts have been applied between the individual shippers and the logistics service provider, and between the individual shippers and the trustee. An exit clause is included in the contracts. The shippers in this case are (partially) considered to be competitors, because they are active in the same market and serve the same customers. Therefore, a point of special interest was the compliance with competition law. A LOI has been signed between the shippers, in which they laid down their intentions. To make sure the sensitive data of one shipper would not be identifiable to other shippers, the trustee acted as a ‘Chinese wall’ between the shippers.

The drive and willingness of the shippers was a main success factor in this case study. Formal writings have been established on all three levels of the CO3 advocated legal framework: between the shippers, between the individual shippers and the logistics service provider, and between the individual shippers and the trustee. The use of these formal contracts including exit clauses increased the stability of the collaboration.

5.4.4 Horizontal partnership in fresh and chilled retail distribution

Factual background

The fourth test case includes the creation and management of a horizontal collaboration in fresh and chilled (2-4°C) retail distribution between two FMCG shippers and a logistics service provider. Nestlé is a leading nutrition, health and wellness company active in 130 countries. PepsiCo is one of the world’s leading food and beverage companies active in more than 200 countries. The shared logistics service provider is STEF, a European company that is specialized in temperature controlled logistics. Two organisations acted as neutral offline trustees in this case. The Belgilux Association of Branded products Manufacturers (BABM), an organisation that strives to build the optimal climate for A-brands in the FMCG industry to deliver value and choice to customers, started to explore possible logistics synergies in five Belgian networks for fresh and chilled goods. After a selection procedure BABM decided to collaborate with Tri-Vizor, a Belgium company specialized in horizontal collaboration, for the further offline trustee tasks. STEF took care of the online trustee tasks.

Since many FMCG shippers transport to the same distribution centers of their customers, horizontal collaboration seems promising in this industry. Manufacturers of fresh and chilled food products are often dealing with less than full truck loads in order to avoid expiration. BABM received a request from one of its members to explore possible synergies in this specific Industry. This resulted in a

horizontal collaboration in which the two shippers ship their product into a shared warehouse operated by the shared logistics service provider STEF. From here, STEF consolidates orders if the order date and ship-to address is identical for both shippers. During the first audit cost savings of 10 - 15% were realized.92

Legal framework and lessons learned

Since Nestlé and PepsiCo are competitors, their collaboration in logistics is facing the antitrust laws prohibiting direct information sharing between competitors or even indirect information exchange through a third party (meaning the information goes from competitor A to competitor B through a third party C, the so called ‘hub-and-spoke’ agreement). From the beginning, PepsiCo and Nestlé were anxious for the implications of competition law. However, the legal experts that were called in by the parties (i.e. not K&K lawyers) estimated the risk of violating this law as relatively small since non-competing product groups were in scope. In order to make sure Nestlé and PepsiCo did not see any specific relevant price or volume information from each other, additional legal firewalls were put in place. During the collaboration both extern (BABM) and intern legal experts were called in if Nestlé or PepsiCo addressed concerns relating to competition law.

In this case, individual contracts between the logistics service provider and both shippers have been signed. Certain rights and obligations of the horizontal collaboration partners were included in these contracts. A formal written contract between the shippers was not achieved because many mental and technical barriers were in the way.

A traditional service contract with some additional collaboration clauses was signed between both shippers and the logistics service provider STEF. No multilateral collaboration contract was signed. A legal expert was included in the collaboration, checking all data being sent through from shippers to trustee and the other way around. It is reported that, this involvement of a legal expert acting as an adviser during the collaboration turned out to work well.

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APPENDIX 1

Explanatory notes to model legal agreements (D 2.7 ('Written finalized agreements')) and comments on model agreements by legal specialists from other relevant European jurisdictions (Italy, Belgium, France, Germany, Spain, United Kingdom)

Part A:
Collaboration agreement between the shippers; explanatory notes and comments per section

Part B:
Agreement between the shippers and the trustee; explanatory notes and comments per section

Part C:
Skeleton carriage contract between the individual shippers and the individual LSP’s; explanatory notes and comments per section
APPENDIX 2
Details subcontractors

The assistance of the following law firms was called in to assess the legal framework, the legal concepts, (additional) reports on the legal aspects of horizontal collaboration in the supply chain as well as the three model agreements, developed within the framework of the CO3-project.

Italy
Tosetto, Weigmann e Associati, Renato Fiumalbi and Federico Restano

Belgium
McDermott Will & Emery, Wilko van Weert

Germany
Ahlers & Vogel, Burkhard Klüver

France
McDermott Will & Emery, (contact via Brussels office, see above)

Spain
Rogers & Co Abogados, Marie Rogers, David Diez Ramos, Luis Alberto, Garcia Villar

United Kingdom
Weightmans, Terry Donaghy