Clusters and Competition: Legal Limits on Cooperation and Information Sharing

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Abstract

The principal objective of this paper is to raise cluster managers' awareness about antitrust laws and enforcement. The paper points to the clash between concept of clusters and cluster policies with the antitrust laws and competition policies. The authors discuss various forms of cooperation and explain why they may get clusters into trouble with antitrust enforcement authorities. A short summary of best practices for avoiding any antitrust issues is provided. Examples from EU antitrust enforcement history are used to convince the reader of the seriousness of the matter in contrast with the relative inattention it receives among the cluster community.

A. Introduction

Cooperation in clusters brings benefits to the companies involved as well as consumers and the society as a whole. However, in a society based on economic competition, excessive cooperation may turn against it. Antitrust and competition laws have been specifically designed to target the dark side of cooperative practices, which instead of enhancing welfare, lead to distortions of competitive structure of markets and to consumer harm.

Clusters and similar cooperative concepts must nowadays face great tightening of rules by the antitrust enforcement authorities all around the world. The European Commission alone has imposed billion Euros fines for antitrust law violations,

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including price fixing but also mere exchange of sensitive information between competitors about their costs, commercial strategies or processes. Yet pooling of information, sharing best practices and joint venturing are the core activities of many cluster initiatives. Cluster managers across industries need to keep in mind that limits exist to their design of cooperative projects.

The paper discusses the general framework of competition rules and law enforcement in the EU. Information sharing between competitors deserves particular attention, as do typical cooperative agreements such as joint commercialization and R&D arrangements. The paper gives a quick overview of best practices to benefit from various safe harbours that the EU competition law offers to market players. The paper provides the context in which the competition law is enforced by the European Commission and national competition authorities to give a wider perspective for international projects with global outreach.

B. EU cluster versus EU competition policies

In 1990, Michael Porter introduced his definition of a cluster as *"geographical concentration of interrelated companies, specialized suppliers, service providers, business operating in similar sectors as well as related institutions (like universities, normalization organizations and institutes as well as branch associations). In certain fields, these organizations collaborate and compete as well*",[3] which undoubtedly made the greatest impact on the current understanding of the cluster concept. Since that time, cluster initiatives have attracted interest from entrepreneurs and policy makers alike. The concept of cluster means cooperating both horizontally and vertically: clusters *"include, for example, suppliers of specialized inputs such as components, machinery, and services, and providers of specialized infrastructure. Clusters also often extend downstream to channels and customers and laterally to manufacturers of industries related by skills, technologies, or common inputs*."[4]

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[3] Michael E. Porter, *The Competitive Advantage of Nations* (1st ed. New York: Free Press, 1990).

[4] Michael E. Porter, *Clusters and the New Economics of Competition* (Harvard Business Review, November-December, 1998) p. 77-90.

At the European Commission, cluster policies have traditionally fallen among the competences of Directorate-General Enterprise and Industry ("DG Enterprise"). Yet DG Enterprise's policies do not always greatly intersect with those of another powerful directorate-general, DG Competition, the overseer of unhindered economic competition and freedom in markets.

In DG Enterprise's jargon, clusters are groups of independent companies and associated institutions that are

- Collaborating and competing;
- Geographically concentrated in one or several regions, even though the cluster may have global extensions;
- Specialised in a particular field, linked by common technologies and skills;
- Either science-based or traditional;
- Clusters can be either institutionalised (they have a proper cluster manager) or non-institutionalised.[5]

Clearly, both Mr Porter's definition and DG Enterprise experts' list contain issues, immediately catching competition lawyers' attention, such as "collaborating" "regionally concentrated" "specialised" "institutionalised". The neologism *co-opetition* produces cacophony, but also a clash of policies, even perhaps a clash of ideologies. The idea of clusters alone, that competing firms get together to discuss

[5] The European Commission, Directorate-General Enterprise, *Final Report of the Expert Group on Enterprise Clusters and Networks*, 2005, p. 9.

some common project, triggers multiple antitrust concerns. Widespread, cross-border[6] and relatively unpoliced cluster initiatives, which are what DG Enterprise has been among for, may become something of a nightmare for the competition watchdog of DG Competition.

But clusters are not the first phenomenon that has led to a clash between these two DGs. In late 70ties, the EU encountered what was called a crisis cartel. DG Enterprise designed policies and bolstered private initiatives to restructure some sectors of European industry, which were suffering from overcapacity and overstocking. In the eyes of a conservative DG Competition, however, this seemed to potentially jeopardize the very basics of ordoliberalistic[7] foundations of the common market, barriers of which the European Communities had been tearing down with so much effort.[8]

The clash was fierce but DG Enterprise emerged victorious. DG Competition conceded that in some cases, agreements between undertakings, which simultaneously decrease their production capacities, are not agreements within the scope of EU antitrust rules. But today, few lawyers and Commission officials would admit such

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6 The European Commission introduced in 2008 a new strategy focusing on developing cluster excellence through trans-national cluster cooperation. In addition, the Commission oriented its activities on facilitation of networking on different levels and integrating cluster policies through implementation of different instruments e.g. PRO INNO Europe, Regions of Knowledge, Europe INNOVA initiative, and ERAWATCH, new platforms, partnerships and funding programmes for clusters collaboration started to emerge, for example, the European Innovation Platform for Clusters, industry/sector oriented partnerships (e.g. EcoCluP cluster partnership, ABCEurope cluster partnership, European Aerospace Cluster Partnership EACP) or the European Territorial Cooperation Programme. Cross border the European Cluster Policy Group has also stirred cooperation. 2010, Consolidated Set of Policy Recommendations on Four Themes.

7 Term „ordoliberalism“ describes antitrust policy, which is not concerned only with consumer welfare as its main objective, but also with protecting the competitive structures of the market, and competitors as well. See, for example, Gerber, *Constitutionalising the Economy: German Neo-liberalism, Competition Law and the New Europe* (1994, 42 American Journal of Comparative Law).

8 Kiran Klaus Patel, Heike Schweitzer, eds., *The Historical Foundations of EU Competition Law* (Oxford University Press, 2013), pp. 178 *et seq*.

defeat of competition policy.[9] It is essential, therefore, for cluster policymakers on the one hand, and firms and cluster organizations on the other, to realize and correctly assess impact of their initiatives on competitive structures and consumer welfare when their design cooperation.

C. Horizontal and vertical cooperation in EU competition law

The general approach is that anticompetitive agreements or practices are illegal and unenforceable. What is an anticompetitive agreement or practice is a question of course and the answer may and does differ from country to country, yet there is little doubt that a straightforward price-fixing or market-sharing cartel would be condemned as causing great harm to consumers and economy in almost every jurisdiction in the world of today. However, it is also clear that horizontal (and indeed even to a greater extent vertical) cooperation is known to bring about many efficiencies and benefits to the consumers. Legal analysis of cooperation between firms is thus a matter of striking fine balance between overregulation and underegulation of economic competition, often weighing potential threads of particular cooperative practices against their quantifiable benefits.

a) What is prohibited:

In the European Union,[10] primary law sets the basic legal framework for regulating cooperation between businesses: Article 101(1) of the Treaty on Functioning of European Union ("TFEU")[11] provides that:

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[9] For example, no such compromise was reached in years 2007-2010, when the global crisis was demolishing some sectors of EU's economy. The DG Competition stood ground and applied anti-cartel and anti-merger rules with no less Svigour, to prevent consolidation on markets where the production assets would not be driven out of the economy even if the firms themselves went bankrupt. See, for example, OECD Policy roundtables on Crisis Cartels (The OECD Global Forum on Competition, 2011).

[10] The Agreement on the European Economic Area, which entered into force on 1 January 1994, brought together the EU Member States and three EFTA States — Iceland, Liechtenstein and Norway — in the internal market. This includes application of competition law as well. The European Free Trade Association Treaty (EFTA) of 1960 has provision similar to Article 101 TFEU.

[11] One of the two basic EU treaties, the other being Treaty on European Union.

> 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.

Article 101(1) TFEU then enumerates several typical practices, which amount to agreements or concerted practices in the sense of Article 101(1), including fixing prices or any other trading conditions; limiting or controlling production, markets, technical development, or investment; sharing markets or sources of supply; discriminating between customers or suppliers parties; and others. This list is only indicative and non-exhaustive.

The EU concept of an undertaking is actually very close to the economic term of a firm or business; it does not break along legal entities but inclines to a more down to earth understanding of economic entities.[12] Accordingly, cooperation between companies within one group would fall out of scope of antitrust rules. However, the concept of undertaking is rather wide in scope, and covers corporations, but also partnerships, individuals, trade associations, liberal professions, state-owned corporations and cooperatives.[13]

Article 101(1) TFEU covers not only agreements, but also concerted practices. In other words, any practice restricting competition will be caught by the prohibition whatever its form. A vitally important language for clusters is that Article 101(1) TFEU also applies to decisions of associations of any form such as cooperatives, professional bodies or interests groups, where no formal agreements are made, but instead, voting and common action takes place.

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[12] See to this effect the judgment of the Court of Justice of the EU (the „CJEU" giving a binding interpretation of EU law), in case C-41/90 *Horner and Elser v Macroton GmbH* [1991] ECR I-1979 (the term undertaking covers any entity engaged in an economic activity regardless of its legal status and the way in which it tis financed).

[13] R. Whish, *Competition Law* (Oxford University Press, 6th edn, 2009), pp. 82-91.

In order to be caught by antitrust rules, an agreement or practice has to have an anti-competitive object, or at least anti-competitive effects. Restrictions by object are the most hard-core antitrust violations such as price-fixing or market-sharing cartels, but may also be simple exchanges of information or sensitive data concerning prices, costs or levels of production.[14] Other agreements and practices may still produce restrictive effects on competition such as driving prices higher or excluding other competitors out of the market (so called anti-competitive foreclosure).[15] Effects restricting the competition may be hard to spot and prove.[16]

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[14] The European Commission's Guidelines on Horizontal cooperation agreements define restriction by object as follows: Restrictions of competition by object are those that by their very nature have the potential to restrict competition within the meaning of Article 101(1). It is not necessary to examine the actual or potential effects of an agreement on the market once its anti-competitive object has been established. According to the settled case law of the CJEU, in order to assess whether an agreement has an anti-competitive object, regard must be had to the content of the agreement, the objectives it seeks to attain, and the economic and legal context of which it forms part. In addition, although the parties' intention is not a necessary factor in determining whether an agreement has an anti-competitive object, the Commission may nevertheless take this aspect into account in its analysis. *See* Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [Official Journal C 11 of 14.1.2011], paras. 24 and 25.

[15] Guidelines on Horizontal cooperation agreements define in para. 27 restriction by object as follows: For an agreement to have restrictive effects on competition within the meaning of Article 101(1) it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. Agreements can have such effects by appreciably reducing competition between the parties to the agreement or between any one of them and third parties. This means that the agreement must reduce the parties' decision-making independence, either due to obligations contained in the agreement, which regulate the market conduct of at least one of the parties or by influencing the market conduct of at least one of the parties by causing a change in its incentives.

[16] Guidelines on Horizontal cooperation agreements, para. 29: the assessment of whether a horizontal co-operation agreement has restrictive effects on competition within the meaning of Article 101(1) must be made in comparison to the actual legal and economic context in which competition would occur in the absence of the agreement with all of its alleged restrictions (that is to say, in the absence of the agreement as it stands (if already implemented) or as envisaged (if not yet implemented) at the time of assessment). Hence, in order to prove actual or potential restrictive effects on competition, it is necessary to take into account competition between the parties and competition from third parties, in particular actual or potential competition that would have existed in the absence of the

b) What may be allowed:

The whole point of clusters is to bring about efficiencies. The DG Enterprise expert group reported that clusters have a positive influence on:

- Innovation and competitiveness;
- Skill formation and information;
- Growth and long-term business dynamics[17]

Antitrust rules do reflect that cooperation may generate efficiencies but the antitrust policymakers are sometimes concerned about who actually benefits from such efficiencies at the end of the day. Article 101(3) TFEU provides that the prohibition on agreements and practices may be declared inapplicable in case of agreements, practices or decisions of associations, which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

In a simple language, to benefit from such an exemption, the cooperation between firms must lead to actual demonstrable efficiencies but also must be kept to necessary minimum, must not eliminate competition entirely and must transfer some of the benefits to final consumers. These cumulative requirements are very difficult to fulfil in practice and competition authorities (the European Commission but also national authorities) have been strict in assessing individual exemptions on the basis of Article 101(3).

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agreement. This comparison does not take into account any potential efficiency gains generated by the agreement, as these will only be assessed under Article 101(3).

[17] The European Commission, Directorate-General Enterprise, *Final Report of the Expert Group on Enterprise Clusters and Networks*, 2005, p. 9.

c) What is allowed:

What may be particularly interesting for clusters are the block exemptions, which codify the otherwise complicated application of Article 101(3) into very simple formal rules. If the agreement in question meets block exemption criteria, it is automatically cleared of any potential violation of antitrust rules.

First and foremost, the so-called *de minimis* notice is a soft-law instrument of the European Commission guaranteeing that if there is a horizontal cooperation between competing firms, which have together up to 10% market share in the relevant market, or a vertical cooperation between non-competing firms, which have up to 15% market share in their respective relevant markets, the cooperation is deemed not violating antitrust rules, unless the firms in question commit some of the specifically defined hard-core practices.[18]

This *de minimis* safe harbour is very convenient for clusters, which often combine SMEs of not too much of an aggregate or individual market share. But defining the relevant market may be tricky. Some industries operate on what is today effectively a European or global scope markets, but other sectors may still encounter transportation barriers, customer preferences or other factors that narrow their markets down to national or even local frontiers and may suffer from increased market shares. It is vital that clusters first do their research to appropriately define their product and geographic markets where they are active[19] to be able to benefit from *de minimis* and other block exemption instruments offered by the European Commission.

The EU law offers another way how to safely apply conditions of Article 101(3) TFEU to reach a safe harbour in case firms and clusters cannot benefit from the *de minimis* exception. There are numerous agreement- or sector-specific block exemptions on both horizontal and vertical cooperation. Each time an agreement falls

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[18] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) [Official Journal C 368 of 22.12.2001].

[19] See Notice on the definition of relevant market for the purposes of Community competition law [Official Journal C 372 , 09/12/1997 P. 0005 – 0013].

square within the block exemption criteria, the cooperation is safe from being challenged as anti-competitive.

1. Contractual cooperation

As set out above, clusters may entertain horizontal cooperation between as well as vertical cooperation (a half-way between total vertical integration and supply-purchase independence), or mix of both.

a) Horizontal agreements

Horizontally, firms conclude agreements such as research and development agreements ranging from outsourcing R&D activities to joint research or even marketing of new products.[20] Production agreements serve to join production capacities and other assets of two or more firms to produce jointly or outsource the whole production process or its part (subcontracting agreements).[21] Purchasing agreements are typical arrangement for horizontal clusters to pool their resources for purchase of inputs, to increase their buyer power and lower prices.[22] Commercialisation agreements bring about cooperation in selling, distribution or promotion of substitute products between competitors.[23] Standardisation agreements have as their primary objective the definition of technical or quality requirements to ensure compatibility and interoperatibily of products and systems.[24]

Possible antitrust concerns relating to such horizontal agreements are obvious – firms may tend to limit their output, by outsourcing and subcontracting divide customers or markets and drive prices up as a result, or push other competitors out of the market. Threads of such collusion may not always be outweighed by resulting efficiencies.

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20 Guidelines on Horizontal cooperation agreements, para. 111.

21 *ibid*, para. 150.

22 *ibid*, para. 194.

23 *ibid*, para. 225.

24 *ibid*, para. 257.

Some horizontal agreements may be covered by block exemptions, such as block exemption regulation for categories of research and development agreements,[25] and block exemption regulation on categories of specialisation agreements.[26] A very important block exemption applies to transfers of technology (such as know-how and other intellectual property rights) to competitors, either partner in cluster or outside of any institutionalized partnership.[27]

Agreements, which fall into the scope of Article 101(1) TFEU, are not *de minimis* and are not covered by these block exemptions or failing their criteria (by exceeding the allowed market share limit, for example) are prohibited, unless they can individually meet the exemption criteria of Article 101(3) TFEU.

b) Vertical agreements

Vertical cooperation takes form of agreements on agency to purchase or sell products and services on behalf of the principal(s)[28] or subcontracting, by which firms provide technology or equipment to a subcontractor that will produce specific products on exclusive basis for those contracting firms.[29] Vertical agreements may also serve in support to other cooperative arrangements to protect trademarks, copyright, know-how and other intellectual property rights. But a typical vertical agreement would be

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25 Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements [OJ L 335, 18.12.2010, p. 36].

26 Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements [Official Journal L 335, 18.12.2010, p. 43].

27 Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements [OJ L 93, 28.3.2014].

28 Guidelines for the assessment of vertical restraints (Commission notice) [Official Journal C 130, 19.05.2010, p. 1], para. 22.

29 *ibid,* para. 22.

the distribution agreement, which may be employed by clusters whose firms already cooperate horizontally to operate the distribution network for them.

Antitrust risks of vertical agreements between suppliers and independent distributors are those of single-branding and exclusive dealing, which may lead to an anti-competitive foreclosure. But the mainstream view is that vertical agreements are less dangerous to competition than horizontal cooperation, and therefore the EU approach is to block exempt generally all vertical agreements unless their amount to hard-core restrictions, such as territorial restrictions, single branding and exclusive dealing over long periods of time, or selective distribution systems without any reasonable business logic.[30] An important special block exemption applies to distribution in motor vehicles sector.[31]

c) Sectorial exemptions

Some sectors of economy are regulated separately due to very different competitive conditions prevailing in their markets. Block exemptions related to whole economic sectors cover both horizontal and vertical cooperation, but their scope of application is usually narrowly defined. The Commission grants block exemption to insurance sector,[32] postal services[33], air, maritime, rail, road and inland waterways transport.[34] Very narrow and specific exemptions also apply in agriculture[35] and fisheries.[36]

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30 Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [Official Journal L 102, 23.4.2010, p. 1-7].

31 Commission Regulation 461/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector.

32 Commission Regulation (EC) of 24 March 2010 on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector [OJ L 83, 30.3.2010, p. 1-7].

33 Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (98/C 39/02).

For horizontal, vertical, or mixed cooperation, firms may either enter into agreements or set up a jointly controlled company. Depending on the design and functionality of such a joint venture, this cooperation may be either assessed in light of Article 101(1) TFEU on agreements between competitors, or under specialized rules for mergers and acquisitions.[37]

2. Informal cooperation – sharing sensitive information

A massive exchange of information between members is the paramount activity of any cluster. What cluster managers sometimes do not realize is that a mere exchange of sensitive information may amount to a severe restrictive practice caught by antitrust rules.

The history of EU law enforcement knows the infamous *T-Mobile* case, in which the European Commission held as a straightforward evidence of a cartel a single meeting between telecommunication competitors, where they discussed prices and exchanged

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[34] Council Regulation (EC) No 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (Codified version) (Official Journal L 148, 11.6.2009), Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), Council Regulation (EEC) No 1017/68 applying rules of competition to transport by rail, road and inland waterway.

[35] Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007.

[36] Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000.

[37] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [Official Journal L 24, 29.01.2004, p. 1-22].

other sensitive data.[38] The exchange of strategic data between competitors is deemed to reduce independent decision-making by the firms, diminish their incentives to compete and thus facilitate anticompetitive collusion.

Sensitive information may be any data that reduce strategic uncertainty in the market, such as prices (including discounts, rebates etc.), lists of customers and suppliers, production costs and quantities, production capacity, turnover, and sales, but also very cluster-specific information such as investments, marketing plans, technologies and R&D programs and their results.[39]

There is a scale to the strategic importance of data according to the actuality, coverage and other qualities. Obviously, current prices sorted along products or customers are the most flagrant strategic information, whereas historic and aggregate price data, not sorted by years and products (such as historic sales, for example), are less potentially damaging the competition between firms. The logic dictates that publicly available data are less problematic if communicated and relied upon by competing firms.[40] Although it has been said that one instance of information exchange may be enough to commit an antitrust violation, the increased frequency of exchange may even work to exacerbate the risk.

Information exchange, which is accessory to some horizontal contractual cooperation covered by some of the block exemptions mentioned above, should be exempted as well if it does not exceed the scope of exempted cooperation. Any information outside of block exemptions, which reduces strategic uncertainty, must be individually assessed in the light of Article 101(3) TFEU criteria, and may draw unwanted attention of enforcement authorities.

Universities and research institutions are often members of one or more clusters. Internationalisation, in which universities particularly excel, gives them a great

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[38] Judgment of the CJEU in Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlandse Mededingingsautoriteit* [1991], ECR I-04529.

[39] See the abovementioned Guidelines on Horizontal cooperation agreements, para. 86.

[40] Although unilateral public disclosures of sensitive data may be problematic, if they serve to facilitate tacit collusion in the market.

influence over the knowledge and behaviour of clusters and their members. But also universities and research bodies must ensure that their work does not serve as a vehicle for illegal information exchange. Very sensitive in this regard are organised platforms for voluminous information sharing, such as benchmarking software with databases updated on a regular basis. Such systems may facilitate collusion not only between cluster members, but also between clusters in the same sector, and may be very damaging to the competition in particular product and geographic market. Universities also may be held accountable for antitrust violations, if they engage in commercial activities, such as product development and research for private sector.

3. Institutionalised cooperation - decisions and meetings of associations

Clusters in the modern sense are organized. They may be simple platforms for meetings, but the more common setups are rather advanced forms of legal entities, such as associations or cooperatives to administer cluster's day-to-day affairs. Members may confer a wide range of activities to be conducted on their behalf by cluster managers, such as organisation, joint performance of selected commercial activities, diagnostics and internationalisation.

Article 101(1) TFEU specifically mentions that decisions of associations of competitors may amount to a prohibited restriction, because associations may be easily misused as vehicles for cartelisation. Typically, an association decision, requiring requires all members to harmonize pricing policies, is tantamount to a classic price cartel. But the association meetings may be particularly challenging even without any intent to commit antitrust violation. Meetings between members, who are competitors at the same time, are extremely susceptible to exchange of sensitive information amenable to tacit collusion.

Cluster managers should ensure adoption and close adherence to internal compliance documents, including code of conduct in cluster meetings between the members. A lawyer with competition law expertise should monitor each meeting, take meeting minutes and then have them approved by legal departments of the cluster and members alike. If it happens that sensitive information gets divulged in the meeting, the competitors must publically and clearly distance themselves from that meeting

and activity, or be held accountable for the whole cartel only because of their mere presence.

D. Summary of best practice

It goes to the European Commission's credit that it is doing its best to explain its procedures and approach in competition law enforcement through various guidelines and notices to bolster legal certainty and confidence in pursuing efficiencies of the market players involved.

Apart from already mentioned documents, the Commission has issued guidance on application of Article 101(1) to horizontal and vertical agreements,[41] setting of fines,[42] notice on leniency applications (protection of whistle-blowers),[43] cooperation of competition authorities,[44] courts,[45] handling of complaints,[46] and explanatory document related to application of problematic concepts of EU competition law, such as definition of relevant market[47] or the effect on trade.[48] The Commission keeps

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41 Commission Guidelines on Vertical Restraints (2010/C 130/01).

42 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 Official Journal C 210, 1.09.2006, p. 2-5.

43 Commission notice on immunity from fines and reduction of fines in cartel cases Official Journal C 298, 8.12.2006, p. 17.

44 Commission Notice on cooperation within the Network of Competition Authorities Official Journal C 101, 27.04.2004, p. 43-53.

45 Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC Official Journal C 101, 27.04.2004, p. 54-64.

46 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty Official Journal C 101, 27.04.2004, p. 65-77.

47 Commission notice on the definition of the relevant market for the purposes of Community competition law Official Journal C 372, 9.12.1997, p. 5–13.

48 Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty Official Journal C 101, 27.04.2004, p. 81-96.

businesses interested in best practices in the area of EU law enforcement by regularly publishing best practice notices and other explanatory material.[49]

As a short extract of these various compliance documents, the steps, which cluster managers should take to avoid any issues with competition enforcement authorities, are the following:

1. **Market definition**. Define relevant product and geographic markets of all products and services produced and provided by members of your cluster on a commercial basis.
2. **Market shares**. Asses members' market share on each level of supply chain, and aggregate market share of actual and potential member competitors.
3. **Safe harbours**. Examine the requirements of *de minimis*, agreement-specific and sector-specific block exemptions – put aside all cooperative practices, which do benefit from block exemptions safe harbours, they do not raise much antitrust concerns.
4. **Compliance documents**. Draft internal compliance documents, which will need to be adhered to during cluster meetings and all other meetings between cluster members. Point out to specific dangers of information exchange, compile a list of most sensitive issues that must not be discussed at all times, such as prices, costs, production levels, etc.
5. **Meet carefully**. For meetings at the cluster level, stick to a prepared agenda, keep minutes and avoid discussing competitively sensitive issues that are unrelated to cluster's activities.
6. **Prove your efficiencies**. If your cluster runs into troubles with a competition authority (on national or even European level), be ready to provide solid grounds for your efficiencies claims. Competition authorities require good objective evidence of how the cooperation contributes to the claimed efficiencies, how may be the efficiencies quantified and whether the consumers get some fair share.

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[49] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011/C 308/06].

7. **Precautionary principle**. Do approach the antitrust issues with care and precaution. If you suspect that members of your cluster have colluded or cartelized, do notify or advise your members to notify the competition authorities without delay to benefit form the available leniency programs and settlement schemes. Fully cooperate with the enforcement authorities, because sanctions for not doing so may aggravate penalties to your members, your cluster or its managers.

8. **Lawyer up**. Even in cluster of SMEs or very small businesses, ensure that your internal documents, agreements between competitors and minutes of cluster meetings are reviewed by either external or in-house lawyer.

9. **Educate**. As with any other regulation, knowledge and training of cluster managers, member companies and their management and personnel are the core asset for securing compliance of your cluster activities with antitrust law.

E. Enforcement of competition law

Instead of conclusion, a short excursion to the enforcement of antitrust law in major jurisdictions may give a good picture why these issues should be taken seriously.

In the EU, which covers antitrust infringements in all EU Member States if they have enough European dimension (effect on trade between Member States), the European Commission has powers to impose fine up to 10% of global turnover of the undertakings involved. The calculation of the fine is more intricate, it accounts for various factors such as the role of a firm in the infringement, damage to the economy, eventual recidivism, and the fine gets multiplied by the number of years of duration of the infringement (for example, a continuous regular exchange of information). That is why the fines can climb up to enormous amounts – the statistics are so far crowned with a record fine of 1.5 billion Euros to the firms involved in *TV and computer monitor tubes* cartel, imposed by the Commission in 2012. Two of the firms involved, Phillips and LG Electronics got fined almost 700 million Euros each.[50]

[50] Commission's cartel statistics as of 2014, available at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf

But global companies like those in the tubes cartel must face ever more enforcement all over the world. Another traditional antitrust jurisdiction – the United States of America – also fined the tubes cartel firms heavily for competition law violation affecting the US commerce and driving prices of led monitors high. Whereas in 1990 only a handful of countries had antitrust laws and authorities (USA, EU, Germany, Canada and Japan), there are over 100 countries with antitrust laws of international standard nowadays. [51]

Competition authorities have also very strong powers of investigation. They can dawn raid business or association's premises unexpectedly to inspect and collect documents, computers, and interrogate personnel. In many countries, antitrust violations may also impute criminal liability to top managers and personnel, with penalties of imprisonment or heavy fines.

Albeit clusters in Europe tend to syndicate rather medium and smaller businesses, due to difficulties in defining relevant markets, even smaller firms may find themselves with sufficient market power to catch attention by enforcement authorities. Cooperation in competitive markets may bring about great efficiencies and benefit the ultimate consumers, but firms and cluster managers must plan and execute it with caution. On the governance side of things, DG Enterprise and national cluster policymakers should communicate more with antitrust enforcers to make sense of each owns activities, and perhaps put raising competition awareness on their agenda.

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[51] In 2015, there are at least 130 countries with laws and authorities specially designed for combating antitrust issues. For further reference, see website of the US Department of Justice, Antitrust Division, and their list of competition authorities world-wide, at http://www.justice.gov/atr/contact/otheratr.html