

# Legal Aspect of Sharing Information in Business Clusters

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## ***Abstract in Czech - Stručná anotace příspěvku***

*Příspěvek se věnuje problematice sdílení informací v podnikatelských klastrech. Výsledky rešerše ukázaly, že je toto téma naprosto opomíjeno, přestože zákon hledí na podnikatelské klastry stejně jako na jakákoli jiná podnikatelská uskupení, tedy i činnost klastrů musí být v souladu především se zákonem č. 143/2001 sb. o ochraně hospodářské soutěže a směrnicemi EU.*

*Byl proveden dotazníkový předprůzkum ve vybraném vzorku podnikatelských klastrů, jehož výsledky potvrdily předchozí hypotézy a ukázaly kterým směrem by se hlavní průzkum měl vydat. Vyhodnocení se pokouší kvantifikovat zjištěné skutečnosti ve třech hlavních oblastech: povědomí pracovníků o původním účelu klastrů, o pravidlech pro sdílení informací a právní povědomí problematiky.*

## **1. Introduction**

Czech Republic turned to market mechanism in 1989. Czech economy has changed from directive economy to functional free market mechanism of valid EU member in the last 18 years. Competition and especially its protection is dynamic sector with very quickly changing conditions [1-3]. Establishing and creating of business clusters it is a very important way how to support economic situation of small and middle size companies.

The aim of this entry is to focus an attention to business clusters and their compliance with competition law.

## **2. Essential definitions**

First of all let's remind basic legal definitions of expressions used in this area such as market mechanism, economic competition, competitor, unfair competition and business cluster.

### **2.1 Market mechanism**

It is a basic process in market mechanism that allows allocating limited sources between reciprocal competing economical activities. Competitors on the side of supply are allowed to dispose their available sources and competitors on the side of demand are allowed without restraint chooses alternative supply. The principle of economic competition is a gain motivated effort of subjects on the both sides of supply and demand.

The system of market mechanism is a various and always developing collection of compromises and ways out with relative sufficiency of:

- Freedom (government interventions are orientated on improving of competition conditions of market)
- Private ownership
- Liberty
- Information
- Market stimulations

The base of market mechanism system is an economic competition

### **2.2 Economic competition**

We call *economic competition* the process of competing of individuals and fictitious persons (corporations) in economic field with purpose of economic welfare. Competitors (participants of competition) have right to freely develop their economic activities and to cooperate with

each other in competition. Participants of economic competition are ought to legally respect obligatory rules of economic competition and must not presume on participation in competition. The acting of participants must not be in discrepancy with good manners of competition and must not harm other competitors or consumers. In such a case it would be called unfair trade practices and illegal restraining of economic competition.

Healthy competitive environment is being described with global competition force that affects activities of each company in the same way. Distributors, customers and consumers profits from such an economic competition are today almost permanent innovation and improvement of products and services, better conditions for guarantee, etc.

### **2.3 Competitors**

Competitors are individuals and fictitious persons (corporations) competing in economic field. Competitors are meant not only firms and businessmen. We have to consider e.g. farmers, lawyers, doctors, artists, interpreters and non-profit-making organizations, thus any other subjects of society that can enter economic relations.

### **2.4 Unfair competition**

Acting in economic competition that is in conflict with good manners of competition and is able to harm other competitors or consumers is called unfair competition. It is forbidden.

### **2.5 Instruments for protection of economic competition**

Main aim of competition law is to secure that markets in the Czech Republic stay competitive while compliance of acts of competition subjects with the law leads to profits of not only consumers but also concurrent users. These, who respect the law would avoid to disfavoured results that could possibly, if law's not respected, happen. These results may be quite serious involving e.g.:

- Investigation of the Office for the Protection of Competition (OPC) including checking some very important private information
- Penalty up to 10 per cent of the last accounting period turn-over
- Deals between companies, not respecting the law, will be not valid and observance of such deals not compulsory and unenforceable
- Reversed ad, loss of image and a good will
- Possibility of being judged by those who sustains loss by such acting.

#### **2.5.1 Compliance program**

It is absolutely necessary that the content of each program must be optimized to specific needs of each business and should include at least these basic principles:

- Support of program from management
- Suitable procedures and methods
- Advanced competition law education of employees
- Classification and controlling of program behavior

The program shows basic frame securing that not only employees, but also by the all company, respect the law. This program also helps with identifying problems with an unfair behavior at the very beginning and let accept arrangements against it. Early unfolding of unfair acting and further cooperating with OPC can lead especially in case of cartel deals to applying moderate mode in punishment (so-called leniency program). Formal implementation of Compliance program to respect competition law by ordinary employees, managers and top managers is suitable especially for companies with a large market share. It is not a purpose of OPC to approve Compliance programs of each participant company. Programs must be created and judged by particular competitors, who can easily react on changing needs,

requests and aims of their organizations and therefore be responsible for usefulness and meaning of program.

## **2.6 Business cluster**

Business cluster has to be understood as a group of firms, individuals, universities and other institutions connected to each other in some particular specialization or cross specializations, vertically or horizontally, sharing information, costs of development, marketing etc. in order to development of each member.

According to definition of OECD is business cluster an important instrument to support competitive economics. It defines clusters as a “net of companies, institutions producing knowledge, supporting institutions (centres for transfer of technologies, scientific and technological parks etc.) and customers connected all together into manufacturing chain, that produce added value.” Philosophy of clusters overreaches networking of companies, because uses every form of knowledge sharing and overreaches traditional sector analysis.

Business clusters offer an option for the basic aim of government strategy of industrial development of the Czech Republic, which is better competitiveness. Some important aims of this strategy are: to support clusters and nets based on cooperation by focusing on research and development that leads to new products and processes, to support effective dialog between government, regions and relevant agencies, to obtain the largest possible economic effect with limited sources of government and state support funds, etc.

## **3. Possibility of incompliance with competition law in business clusters**

The brief research has been done in the field of sharing and gathering information in business clusters. On the one hand clusters gain massive support from government (CzechInvest Agency), on the other hand Office for the Protection of competition (the Office) in Brno ([www.compet.cz](http://www.compet.cz)) judges clusters as any other deals so there must be the same respect of the competition law<sup>1</sup>. It doesn't dispute competitors' right to fuse for purpose of effective cooperation, but the competition must not be harmed or at least, moderate disturbance<sup>2</sup> must be equilibrated with advantage for the other participants of competition, especially for customers.

In the case of clusters it is clear that cooperation is between competitors (rivals in horizontal relationship and suppliers in vertical relationship) and the risk of breaking the competition rule can be very serious. It is strictly forbidden among the other things collectively gather information concerning of prices, planned sales volume and other sensitive or strategic data, which use could lead to direct or indirect fixing the prices, sales volume control, dividing of market etc.

### **3.1 How to share information?**

The way how to share information is different in group of firms and individual company. There must be rules for gathering and sharing information in such a group not to harm competition law. Gathering information should always be done outside of cluster by the third person, not connected with cluster with some security standards. It is possible to have a manager of cluster doing this kind of job, but the risk is higher. There should be absolutely independent specialist doing it to be sure the risk is low. There should always be the reason well defined for gathering information and the compliance with the competition law

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1 The basic legal enactment is article 81 and 82 from Agreement about foundation of European community and the law number 143/2001 about protection of industrial competition. Both of these documents include list of forbidden deals and practices.

2 If a smaller number of small competitors starts cooperate to compete transnational company, it is possible to consider such a cooperation even useful. For such cases exists rule called *de minimis*

evaluated. It is not possible to gather information, which general helpfulness cannot be properly claimed.

Only historical data should be collected and the participants of cluster should get such information in aggregated and anonymous form in which wouldn't be possible their next individualization.

Collective gathering of data by authority of cluster concerning of e. g. prices, sales volume, purchase, export, import, investment, research, know-how and specialization is problematic, especially if happens in individual form for each member of cluster and if uses present or supposed future data. From many decisions of the Office and European commission results that discussion between competitors concerning of intended market behaviour of individuals, e. g. intended price making steps, marketing, business strategies, contracts, capacity utilization etc. can be, especially on concentrated markets with smaller number of competitors as anti-competitiveness behaviour.

The discussion of survey results should be in the similar way, thus general, harmless information. It is highly appropriate this harmless data equalize to the third person on demand or publish them.

### **3.2 Facts of previous research**

Study of literature and consultations with lawyers and specialists from the Office have helped to find out following:

- a) There really is some danger of breaking the competition rules in the field of gathering and use of information
- b) The Office hasn't solved any problem of breaking the rules yet and it doesn't have high priority nowadays
- c) Compliance programme or equivalent programme has not been considered by the Office and its use in any czech company is a question.
- d) Even if companies are fully responsible for their behaviour, field of competition law is not being considered as basic manager knowledge.

## **4. Results of preparatory questionnaire**

The reason for preparatory questionnaire was to confirm my hypothesis concerning of possible law violation in business clusters.

### **4.1 Questions in questionnaire**

Because this was only preparatory questionnaire, according to results some questions will need to be changed and some other added.

- a) What does "Compliance programme" says to you?
- b) Does any form of ethic codex exist in your cluster that declares compliance with competition law?
- c) Do you debate about risk of unfair competitive behaviour?
- d) What do you know about competition law?
- e) Can you tell cluster from cartel?
- f) Why is your company member of the cluster?
- g) Is it possible for the market leader to become member of business cluster?
- h) Do you share information?
- i) What kind of information does your cluster share?
- j) Which way is being used to collect and use data?
- k) Who in your cluster does have access to collected data?
- l) How much do you know about law violation risk?

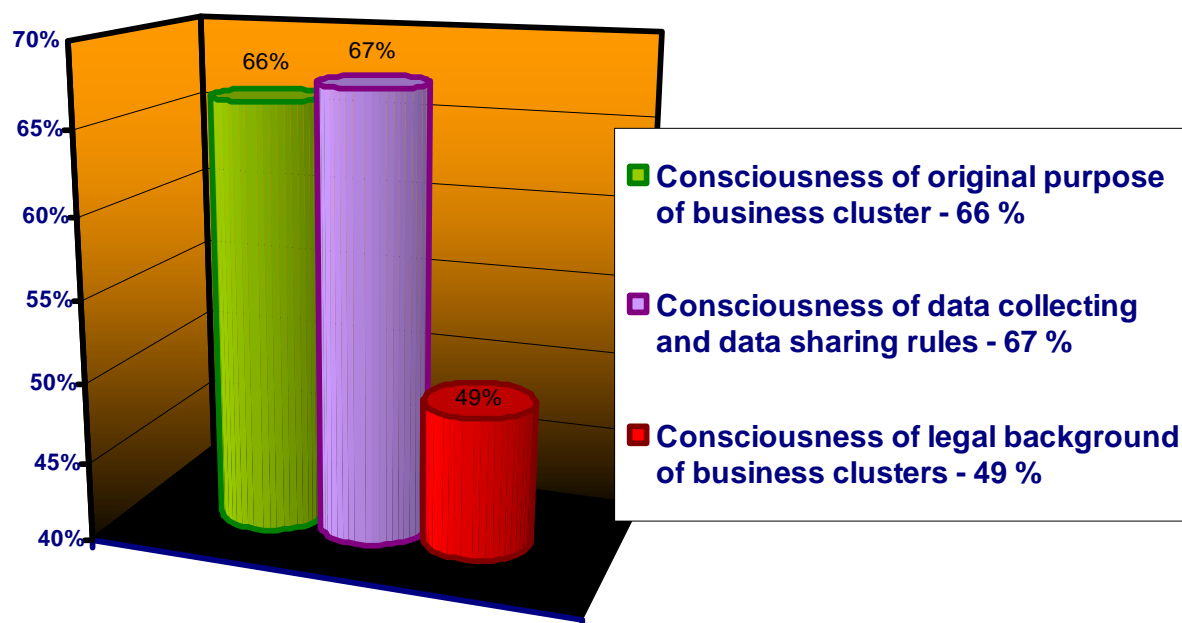
- m) Is your cluster open for new members?
- n) Do you know violation risk of economic competition within the context of activity of cluster?

## 4.2 Results of questionnaire

There was only a couple business clusters (less then 10) used for the preparatory questionnaire. Results we got were not very surprising after the previous research but I expect it to help to create another, more detailed one.

Respondents had to choose from predefined answers or could answer with they own words. Evaluation of the questionnaire has considered different stress and importance of each question, as well interactivity between various questions.

Three most important results of the questionnaire are:



*Chart #1: Data evaluation*

### 4.2.1 Consciousness of original purpose of business cluster

As seen on chart #1, the answers concerning of original purpose of business clusters, difference of clusters and cartels have reached 66 %. It means that respondents have clear opinion in what do they expect from partnership like business cluster is. This opinion has been found mostly correct and harmless from the legal point of view. Nevertheless there was one alarming answer which said that “cooperation is better then competition” and some other answers describing business cluster as an instrument of competitiveness against large players at the market.

The line between cluster and cartel may be very thin and the real meaning and purpose of business cluster should be 100 % clear.

### 4.2.2 Consciousness of data collecting and data sharing rules

As before, respondents have shown basic knowledge and consciousness of rules how to collect data and information. From the research is clear, that the high level risk of breaking

the competition rules concerning of data operations has not been introduced to everyone. Again, alarming answer said that members of cluster share all strategic information. If it has been meant like having one huge database of information about e.g. customers, it could be judged like a serious violation of competition law.

#### **4.2.3 Consciousness of legal background of business clusters**

The last part of the research has been concerning in managers' consciousness of legal background of business clusters. And it needs to be said, respondents have felt here. The support of government in business clusters and other kinds of cooperation is being so massive, that companies simply do not think about the other side of the coin.

### **5. Conclusion**

How is mentioned above in consciousness of cluster members is currently being part of my survey. I have drawn conclusions from the preparatory questionnaire

The all subject looks like not very important object of interest of companies or government from my survey. The possibility of breaking the competition rules in clusters are underestimated because nowadays is being "in" to support clusters as a very important part of economics of the Czech Republic. We all are equal before the law and if not today, one day it may cause serious problems to clusters not respecting this basic rules.

I do understand that the nowadays effort of cluster members is fully in activities leading to establishing functional cluster, where business companies are in touch with academic research and development, with other companies in horizontal or vertical relationship, with regional authorities and the legal impact is neglected.

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