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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Summary of Discussion of the roundtable on Hub-and-spoke arrangements

Annex to the Summary Record of the 132nd Meeting of the Competition Committee held on 3-4 December 2019

3-4 December 2019

This document prepared by the OECD Secretariat is a detailed summary of the discussion held during the 132nd meeting of the Competition Committee on 4 December 2019.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/hub-and-spoke-arrangements.htm>

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Summary of Discussion of the roundtable on Hub-and-spoke arrangements

On 4 December 2019, the Competition Committee held a roundtable on hub-and-spoke arrangements chaired by Professor Frédéric Jenny.

The Chair introduced the topic and noted that hub-and-spoke arrangements combine both horizontal and vertical relationships. This issue is complex, especially because, while information exchanges between parties to a vertical arrangement are likely to be pro-competitive and efficient, there are no good reasons for competitors to collude.

The roundtable was structured around three issues: economics and mechanisms of hub-and-spoke arrangements; proof, liability and the role of facilitators; and a focus on hub-and-spoke in the digital world. The expert speakers were **Rachel Brass**, partner at Gibson, Dunn & Crutcher San Francisco; **Okeoghene Odudu**, Herchel Smith lecturer, Faculty of Law and fellow in law, Emmanuel College, Cambridge; and **Matthew Bennett**, VP, Charles River & Assoc., London.

The **Secretariat** introduced the topic and defined a hub-and-spoke arrangement as a cartel between competitors in one market (the spokes) that is co-ordinated through a vertically related intermediary (the hub), where information exchanges between the competitors are mostly or solely indirect. Usually, such arrangements involve retailers and suppliers. Often, retailers are responsible for initiating information exchanges through a supplier, which acts in this case as a hub; however, these roles may be reversed.

The challenges and questions related to the analysis of hub-and-spoke arrangements were set out as follows: A first set of questions relates to the economic incentives of the hub to enable or facilitate a cartel on the other side of the market, and the existence of enabling market structures or of typical product markets in which such arrangements are likely to occur.

Challenges of a legal nature include differentiating between legitimate vertical information exchanges and horizontal collusion through an intermediary; determining liability of spokes, especially where a spoke is merely receiving unsolicited information; determining liability of the hub, in particular regarding *mens rea* standards of proof, and, in some jurisdictions, questions regarding the ability to hold the hub, who by definition does not compete with the spokes, liable for a horizontal arrangement between the spokes.

Another set of questions relates to the treatment of hub-and-spoke arrangements in light of the analysis and treatment of resale price maintenance (RPM) agreements: while such agreements may serve as implementation devices for hub-and-spoke arrangements, they could also be unilaterally imposed by the supplier or mutually agreed between a supplier and a retailer, and can result in similar effects as hub-and-spoke arrangements.

The digital world raises particular questions. For example, some argue that algorithms are an impersonation of hub-and-spoke arrangements, while others view them as “regular” hardcore cartels. Another example is the use of platforms as a means of coordinating between vertically related actors, whether directly or indirectly, through mechanisms such as parity agreements.

Finally, enforcement challenges for competition authorities were mentioned, which may be required to show proof of at least two instances of information exchange and of the parties’ state of mind, and therefore may need to rely heavily on circumstantial evidence. Also, as

many cases involve retailers, who may be applying the same strategies across many products, authorities may have to develop means to prioritize their cases.

The Chair moved the discussion to the economics of hub-and-spoke and presented a number of

questions. First, what differentiates legitimate exchanges of information from illegitimate ones? Second, what kind of information is actually exchanged, and when is this exchange of information considered pro-competitive? When is it anti-competitive? Third, does the identity of the party which initiated the information exchange (e.g. supplier or retailer) have any bearing on the analysis? Fourth, which market structures are supportive of hub-and-spoke? And fifth, are there any pro-efficiency benefits to such agreements? If so, how should these be taken into account?

Matthew Bennett noted that enforcement policy in this context aims to prevent firms from colluding while escaping enforcement by exchanging information through a third party. He also noted that, in general, it is relatively harder for firms to collude via indirect communication, first, because it is harder for them to indirectly agree on the subject and level of collusion and build trust; and second, because third parties may not have the same incentives as the firms that are trying to collude, in particular, incentives to facilitate collusion.

He explained that considering the retailer's incentive to reap the fruit of competition between suppliers, it is unlikely for a retailer to co-ordinate between suppliers. However, such cases could exist in particular where one or more suppliers have market power, which in turn could be used to force the retailer to take part in a hub-and-spoke scheme. Also, a retailer may have an incentive to facilitate co-ordination where the retailer shares the suppliers' monopoly profits (e.g. through side payments), or if the retailer, rather than being concerned about trading terms in themselves, is primarily focused on ensuring its terms are in parity with other retailers. He noted that there are pro-competitive reasons to allow certain information to pass between suppliers through a retailer, for example when the retailer is using information provided by one supplier to bargain with another. In view of this, the difficulties associated with indirect co-ordination, and a retailers' lack of incentive to facilitate co-ordination between suppliers, he believes competition authorities should exercise caution when pursuing such cases.

Regarding cases involving suppliers acting as hubs for retailers, he noted, first, that suppliers too may lack incentive to facilitate collusion between retailers, as raising prices at the retail level will not necessarily benefit the supplier. However, here again this may not be the case when the supplier enjoys a share of the monopoly profit or when the supplier is focused on ensuring trading terms parity with other suppliers. Also, a supplier may facilitate exchange of information between retailers in order to increase its bargaining power, as collusion resulting in higher prices downstream may reduce retailer pressure on the supplier to reduce wholesale prices. As opposed to the previous setting, there are no strong pro-competitive reasons for a supplier to pass information back and forth between retailers. For this reason, he believes this type of setting is more concerning than the one involving retailers as hubs and suppliers as spokes.

He concluded by noting that evidence of information flows should not be sufficient ground for enforcement, due to the strong pro-competitive rationale of information exchanges.

Australia commented that its experience contradicts the assumption that suppliers are uncomfortable with retailers raising prices. In many cases, suppliers wish to maintain high prices because they own a prestige brand or because higher retail prices can increase their profits.

Greece asked why, in the case supplier-retailer-supplier hub-and-spoke, the focus is on market power, as opposed to focusing on bargaining power as is in the case of retailer-supplier-retailer hub-and-spoke. Also, considering the aim is to prove collusion, Greece asked whether it was suggested to change the order of assessment and to prove a restriction of competition first, or whether different ways to identify bargaining or market power were suggested at the level of establishing the existence of the collusive element.

Matthew Bennett explained that lower retail prices allow the supplier to sell more products and high retail margins lead to higher prices and fewer sales. This is why, in general, suppliers do not wish to facilitate collusion among retailers. However, there may be cases, such as those described by Australia, where incentives are different. Generally, more market power equals more bargaining power. His point was to discuss characteristics of markets in which the aforementioned information exchanges may be more problematic. Spokes with market power may coerce the hub to exchange information, as refusal may lead to the hub being delisted.

Turkey faced the challenge of distinguishing between legitimate and illegitimate information exchanges. The Turkish Competition Authority uncovered evidence of tire retailers transferring information to their suppliers about other suppliers' prices in the process of negotiating lower prices. Referring to the Tesco decision, the Board found that under these circumstances, retailers could not be regarded as restricting competition by object. The Board also noted that the evidence regarding the suppliers' intentions did not support a finding they had violated the law, and that a supplier may have legitimate reasons for providing retailers with information on prices as well as for requesting information about competitors' prices. Finally, an effects analysis did not support a decision to take enforcement action in this case. In another case, the computer and video game case, the Board found no causality between the information exchanged and the retailers' pricing decisions, and therefore could not conclude a horizontal agreement existed.

Sweden also faced the challenge of distinguishing between legitimate and illegitimate information exchanges in its toilet case, which was closed as the evidence gathered showed the information exchanged about prices was not sufficiently detailed to reflect an agreement, nor did it reduce market players' strategic uncertainty. In the decision to close the case, the Swedish Competition Authority noted that vertical information exchanges, which result in an agreement to fix prices or in concerted practices, are not considered pro-competitive, and that the level of concentration in the upstream and downstream markets is an important factor in assessing potential horizontal effects. The degree of market power held by the retailer requesting the supplier to maintain other retailers' prices is relevant as well.

Latvia shared its experience with a case involving retailers and a dominant supplier of building materials, who acted in concert to maintain retail prices. The evidence showed that retailers were aware of their competitors' roles in the scheme and that they took an active part in monitoring their competitors' prices; in some instances, the supplier intervened where a retailer deviated from the agreed price.

Australia expanded on a comment it had made earlier in the discussion, related to Matthew Bennet's assumption regarding suppliers' general preference to maintain a lower retail price level so as to bolster demand for their products. Australia explained that in the Laundry Detergent case, the supplier of a "must-have" product and retailers acted to maintain the price of the product, despite the supplier having implemented technological improvements, which reduced package size and lowered production and distribution costs. Experience showed that in highly concentrated markets, the suppliers and retailers may have a joint incentive to maintain higher prices.

Chile discussed the Supermarkets case, where suppliers of fresh poultry meat acted together to maintain retail prices. The Chilean Competition Tribunal established that the supermarkets undertook to sell the product above the wholesale price, that their compliance with this undertaking was dependent on their competitors' compliance with this "rule", and that they alerted the suppliers when a competitor deviated from the "rule". **The Chair** noted that this case may be on the limit between hub-and-spoke arrangements and cases of horizontal collusion among retailers.

South Africa shared its experience with a case that arose in the context of a merger between automobile manufacturer Daimler-Chrysler and a number of retail outlets. Independent retailers complained that Daimler-Chrysler set out to create a hub-and-spoke strategy to their disadvantage. The tribunal found this strategy permissible in this context in light of the existence of strong inter-brand competition. South Africa noted that it is likely to characterise hub-and-spoke arrangements as possible violations of provisions against RPM agreements, rather than provisions prohibiting horizontal arrangements, so as to avoid arguments related to the characterisation of the arrangement as a vertical one.

Singapore shared its experience dealing with a joint venture that raised concerns for exchanges of information between joint venture stakeholders that were all competitors in the poultry industry. Ultimately, Singapore approved the joint venture in light of its benefit to the public, subject to conditions designed to prevent information exchanges between the shareholders of the joint venture that could be detrimental to competition.

Matthew Bennett noted that the all cases discussed seem to have gone beyond mere indirect information exchanges and that many have really been cases of straightforward coordination with facilitating information exchanges.

The Chair moved the discussion to elements of proof and liability.

Rachel Brass explained that in the United States, in addition to civil litigation of hub-and-spoke cases in the supplier-retailer context, there has recently been an increase in buy-side cases, alleging hub-and-spoke arrangements are used to coerce the lowering of prices of goods sold into a downstream retail system. While these buy-side cases are in their infancy, and their outcomes are yet unknown, it seems the same legal standards would apply to both sell-side supplier-retailer and buy-side types of cases.

She then noted that, in the United States, proving the existence of a rim, i.e. a connection between the spokes, is a prerequisite for proving collusion in the hub-and-spoke context. This is because of scepticism towards the idea that mere information exchanges, even among competitors, are a violation of the law, and also because nearly all vertical arrangements, including, on the federal level, RPM, are presumptively legal. For this reason, retailer-supplier discussions on pricing are ordinary.

She briefly discussed the Toys"R"Us case from the 1970's, which is the standard for hub-and-spoke cases in the United States. In that case, Toys"R"Us concluded a set of separate vertical arrangements with its suppliers, designed to assure that it would receive the most favoured trading terms and enjoy exclusivity over certain products. This conduct was found to be unlawful because Toys"R"Us assured each supplier that other suppliers would join the scheme, and because the suppliers themselves conditioned their agreement on other suppliers' joining in. This type of commitment was also very relevant to the Interstate Circuit decision from 1939.

She proceeded to discuss examples of possible methods for proving a common understanding among the spokes. One example is where a vertical arrangement with one spoke is contingent on vertical arrangements with other spokes having the same restraint. However, the fact that a spoke is aware of restraints imposed on other spokes (e.g. RPM),

in itself is not sufficient to prove unlawfulness. Other examples include deviation from prior practice (e.g. the Australian Laundry Detergent case), actions taken against a participant's business interests (which are sometimes correlated with side payments or other incentives), and a high level of communication between the spokes.

She concluded by briefly discussing developments in buy-side hub-and-spoke litigation. These have centered on allegations that franchisors serve as hubs facilitating conspiracy among franchisees. These cases could touch on issues related to the purchase of inputs by the franchisees, but their current focus is on restraints regarding labour, such as no-poach and non-solicitation provisions, and the sharing of information regarding wages within the franchise system. These cases are in their infancy and may be the place where concepts of the law regarding hub-and-spoke evolve in the coming years.

Okeoghene Odudu explained that the standards applied to hub-and-spoke cases in the EU derive from those applied to horizontal exchanges of information. Under article 101, and as stated in the EU's 1973 Sugar case, undertakings must act independently. This obligation of independence means that undertakings must refrain from directly or indirectly transferring or exchanging information with their competitors. What types of information and from what sources can an undertaking receive and take into account and still be considered to act independently? The answer in the horizontal context is easier and the standard is clear, because, as the courts in the UK have ruled, transfer of *strategic* information to a competitor is abnormal. In such cases, the mere transfer of such information is suspicious and this is sufficient to infer an intention to restrict competition. Undertakings that are not in competition are not subject to the same obligation of independence and may exchange what would count as strategic information if passed to a competitor. A problem arises when firms that are not in competition have a contractual partner in common with their competitor. The challenge is to prevent this structure being exploited so that the common contractual partner is used to pass information between the competing undertakings. Controlling information exchanges in this hub-and-spoke context is more challenging because an intention to restrict competition is difficult to infer from the type of information exchanged between non-competing business partners, because, as the UK Court of Appeal ruled, strategic information is normally exchanged in such a business relationship.

The focus is on evidence regarding the players' intentions to restrict competition. In the Tesco case in the UK, the Tribunal noted such intentions may be inferred when there is evidence of unnecessary information being transferred; the inference is stronger when unnecessary information is both given and received by the same party. This, however, does not solve the problem of proving infringements when the information exchanged is considered necessary.

He then discussed sources of evidence in such cases, and noted that the hub, which has the best information about the arrangement, cannot apply for leniency in some jurisdictions because it does not compete in the relevant market; in others, the hub might not be eligible for leniency as it is considered to be the instigator of the violation. This is why there has been a shift towards RPM cases while highlighting their horizontal elements. Typically, there is evidence of an RPM agreement, complaints, and policing, which are all used to try and prove the existence of a horizontal agreement. In the UK, such propositions were not accepted by the court.

Portugal is investigating whether supermarket chains were coordinating prices of a number of fast moving consumer goods through their suppliers. In Portugal's experience, a key issue is to determine whether the type of information exchanged exceeded what was necessary and legitimate in a normal vertical relationship and, instead, was being used to promote horizontal collusion.

Regarding the interplay between RPM and hub-and-spoke arrangements, Portugal noted that where retailers have buyer power, RPM arrangements may be used as a means of co-ordination. This is particularly true where the initiative to enforce RPM comes from a retailer, and where retailers are given assurances that their competitors will follow the same course of action. Cases where all parties' incentives become aligned in this way are more consistent with a horizontal conspiracy than with "pure" RPM. Regarding the burden of proof in such cases, under EU law related to concerted practices it is sufficient for a retailer to have reasonably foreseen that similar interactions are occurring between the supplier and the retailer's competitors to infer intent or awareness of a concerted practice. However, more straightforward evidence of competitors' awareness of the scheme may be available. Finally, distinguishing between pure RPM and a horizontal conspiracy is important, albeit both of them being "by object" infringements, as the latter is considered a more severe infringement and is subject to heavier fines.

Hungary investigated whether six wholesalers co-ordinated through a supplier. Lacking local precedent or guidelines, Hungary applied the legal tests developed in the UK, but the evidence was insufficient to prove an infringement and the case was closed.

Australia's courts have adopted a similar approach to the one prevalent in the United States, i.e. a focus on showing the rim and on proving a common understanding between competitors. In one case, the Rugby League sought to exclude a competing league by concluding a series of exclusivity agreements with Rugby teams. Despite there being no evidence of direct contact between the rugby clubs, on appeal, the Full Court inferred that a consensus had been reached on the grounds that all clubs were aware that every other club was offered the same agreement at the same time. The Court found the clubs' business actions only made sense under the expectation that other clubs would follow the same path. However, in the more recent Laundry Detergent case, the courts were unwilling to make a similar inference. Because this case was decided before the enactment of concerted practice provisions in Australia, future cases' outcomes might be different.

Japan briefly discussed the details of the Paramount Bed case, in which the dominant supplier acted to exclude competitors and maintained prices in the downstream market. Based on its various experiences including this case, Japan shared Australia's view regarding suppliers' incentives to raise retail prices, although simple model-based economic theories would predict other outcomes. When officials working in government ministries and agencies, local governments and state-owned enterprises function as a hub in collusive biddings in the public sector, Japan has taken legal measures against Ministries and Agencies involved under the relevant law, and also issued criminal accusations against one official. As a result, recently, there have been fewer cases of such Ministries officials' involvement.

Korea discussed the LGSC case, where that company - a supplier for three competing software companies, instigated a hub-and-spoke bid rigging conspiracy. LGSC argued it was not the software companies' competitor and therefore should not be liable, but the Court rejected this argument. The Court ruled that LGSC's role as supplier does not preclude it from being liable for a conspiracy among its competing clients. The Court also found that LGSC had instigated, facilitated and induced collusion and ruled that abetting collusion may in itself violate the Law. Finally, the Court noted that LGSC's interests were in line with the software companies' interests.

The Chair then asked **Belgium** whether the case discussed in its contribution was that of a hub-and-spoke arrangement or rather of a web of vertical arrangements. Belgium explained that in light of the evidence of information exchanges and of repeated co-ordinated increases of prices, it was not deemed necessary to establish which of the companies acted as hubs and which acted as spokes. In reality, it is likely that a number of

hub-and-spoke arrangements existed. Belgium noted it would have been difficult to identify the exact roles the parties played as there was evidence of market power held by some suppliers and some retailers. Under these circumstances, identifying the extent of parties' market power and the role they played in the arrangement could only be done on a brand by brand basis. In response to Okeoghene Odudu's question, Belgium clarified the evidence, which established the existence of a cluster of agreements and of co-ordinated practices, but which would probably be insufficient to prove the existence of a cartel, and that the case was settled.

The Chair asked the **European Commission** why it had not pursued any hub-and-spoke cases so far. The Commission replied that the assessment of collusion in such cases is more complex than in strictly horizontal and vertical arrangements. The Commission is particularly attentive to the risks to competition in the digital sector, in particular risks posed by online platforms and third party algorithms, which in some cases might facilitate co-ordination among competitors. The Commission noted that it had dealt with hub-and-spoke concerns in its commitment decision in the Apple e-Book case, though the focus of the case concerned evidence of direct horizontal exchanges of information amongst the publishers. Regarding RPM, the Commission noted that its recent experience provided some indications that RPM may, in some instances, have been driven by retailers who informed their suppliers about competitors' low prices and requested them to intervene. Finally, the Commission briefly discussed the European Court of Justice's Judgement in *Eturas*, a case referred by the Lithuanian Competition Council in 2016, which is of particular importance to the issue at hand. In that case, the Court ruled that undertakings may be found liable for an infringement even if they do not have full knowledge of the anticompetitive behaviour of the other parties if it can be shown that they could have reasonably foreseen such behaviour and were prepared to accept the risks it entailed.

The Chair asked the **United Kingdom** to explain why, as opposed to a number of recent RPM cases, there have not been any recent hub-and-spoke cases in the United Kingdom following the important cases it pursued in the previous decade. The United Kingdom noted that there was no change in its priorities in this regard. One reason for the lack of hub-and-spoke cases is better compliance. In fact, while investigating a potential hub-and-spoke infringement, the UK found evidence of suspects' commitment to compliance, and deprioritized the case. On the flip side, it is possible that parties to hub-and-spoke arrangements have found measures to avoid detection. Another reason for the lack of such cases is the difficulty of meeting the evidentiary standard, especially proving at least two exchanges of information and the parties' intent. Where evidence of collusion is lacking, the UK may regard it a purely vertical infringement, RPM for example.

Business at the OECD reiterated the need for certainty, which is undermined by different approaches to this issue. It stated its support for enforcement against cartels, and noted that in comparison with enforcement against vertical infringements, enforcement against cartels may result in higher penalties, reputational stigma, and criminal exposure. Another noteworthy difference is the inability to argue efficiencies in horizontal cases as fully as one may in vertical cases. Business at the OECD endorses the approach that vertical cases should include a detailed effects analysis. Where a hub-and-spoke theory is deployed, there should be compelling evidence of a rim of horizontal collusion; also, it should be acknowledged that there are many legitimate reasons for exchanging information within a supply chain. Businesses should have the flexibility to discuss future pricing intentions, to complain about other market players, to bargain, etc. There should be clear and compelling evidence of participants' state of mind, and not merely inferences thereof.

The Chair asked **Germany** and **Austria** to explain why they seem to be treating hub-and-spoke cases as if they were cases of RPM.

Germany operates in the same legal environment as the United Kingdom and Belgium, and its experience is similar. Germany dealt with a number of cases where there was some evidence of a mix of vertical and horizontal agreements, and believes such combinations, especially where the intermediary actively joins and reinforces the horizontal agreement, could be a substitute for a cartel. However, the evidence gathered regarding horizontal elements was not compelling, whereas the evidence pointing to an RPM infringement was. Considering the burden of meeting the legal test, Germany opted to enforce the RPM infringement.

Austria noted it had extensive experience with RPM cases, including some which exhibited hub-and-spoke elements. Cases were brought before the Supreme Court, which stated that RPM agreements were particularly negative in light of their horizontal effects, namely the stabilisation of prices, and the promotion of market transparency and planning security for retailers. Austria included two examples of hub-and-spoke arrangements in its RPM guidelines, in order to provide certainty, and received positive responses. Austria believes that the rules are now much clearer, and it appears that businesses have adapted to them.

Rachel Brass noted it was interesting to hear the different experiences of countries seeking direct evidence of a rim versus those focused on inferring the rim, and the differences regarding the treatment of RPM. She believes that in hub-and-spoke cases outside the RPM context, e.g. in cases of exclusionary conduct such as the Australian Rugby League case or other attempts to boycott competitors or restrict access to markets, where there is evidence beyond mere exchange of information, the standards in the United States seem to be in line with those in other countries.

The Chair then moved the discussion to focus on hub-and-spoke in e-commerce.

Matthew Bennett began by discussing most favored nation (MFN) clauses in the context of online platforms, where the platform user (e.g. hotel or retailer) agrees that the price charged through the platform will be no higher than prices charged on rival platforms. He noted that, similar to RPM, MFN restricts price competition; however, the restricted price is not specific, but rather, is linked to the price offered on other platforms. The concern here is that prices become less elastic: users are less inclined to raise the price on one platform as a result of that platform's decision to charge higher commissions, because that would force the user to raise prices on other platforms as well. As a result, platforms have an incentive to raise commissions and competition between them may decline.

Despite some similarities between MFN and RPM, he advises caution before applying hub-and-spoke theories in the platform context, mainly because the concern here is reducing competition upstream, i.e. between platforms who provide services to users, whereas RPM pertains to consumer prices, and hence the theories of harm and effects may be different.

The United States shared its experience with the Apple e-Book case, while noting the definition of hub-and-spoke may or may not apply to the case. The investigation uncovered evidence of communication between Apple and five publishers, and among the publishers themselves, that established the existence of a conspiracy to raise the prices of e-books. Apple signed agency agreements with the publishers, which would allow the latter to set the prices on Apple's new e-books store, within pricing tiers mutually agreed between Apple and each publisher. Importantly, the agreements also included MFN clauses which barred the publishers from charging lower prices on other platforms. This in turn allowed the publishers to pressure Amazon to raise the prices of e-books on Amazon's platform and move Amazon to agency agreements as well. Because of the central part MFN played in this conspiracy, the publishers were prohibited from entering into MFN arrangements by

decree. However, the specific measure taken here does not mean the United States views all MFN agreements in that market to be anti-competitive.

To conclude, **the Chair** asked the experts to briefly comment on the discussion.

Okeoghene Odudu noted that he was concerned about the idea of “double inference”, where courts outside the United States may infer the existence of the rim based on parties’ intentions, which in turn could also be inferred from the evidence. He is concerned that cases could thus be pursued solely on the basis of inferences. Another concern revolves around conditional participation: sometimes, entering an agreement only makes sense if others are also bound by the same or similar terms. The question is at what point conditional participation can be perceived as taking part in a horizontal arrangement.

Rachel Brass noted that, as opposed to what seems to be the case in other jurisdictions, in the United States there is a firm resistance to inference, and decisions are based primarily on direct and circumstantial evidence, such as “plus factors”. While in some circumstances conditionality is a “plus factor”, concluding a conditional agreement in itself does not establish a cartel. She noted the focus of private practitioners on making their clients approach vertical arrangements with clear, documented, pro-competitive rationales so as to counter inferences or circumstantial evidence pointing to an infringement. Private practitioners also ascertain that less restrictive options are considered; that purported pro-competitive rationales are truly relevant in specific circumstances, especially where a particular vertical arrangement is sought in parallel throughout the entire industry; and that clients are cautious about anything that could be contemplated as enforcement or monitoring activity, which could be used as evidence for an infringement decision.

Matthew Bennett pointed out that it seems there is a group of cases where the problem lies with the nature of the arrangement in question (e.g. MFN, exclusive dealings) and not with indirect exchange of information in itself. It seems that the law’s treatment of vertical exchanges of information, which are not being used to implement a different type of agreement, is in line with the economics, which point at the pro-competitive effects of such exchanges. Courts are grappling with the nature of the relevant “plus factors” in such cases; in the United States, proof of a rim is required; in the European Union, courts contemplate inferences and consider whether proving that an unnecessary exchange of information occurred is necessary; in Korea, proof that the hub had an incentive to enter the agreement is required. Nowhere is vertical exchange of information, in itself, sufficient.

The Chair noted that he was struck by the fact some of the cases discussed were vertical RPM cases while others were horizontal agreement cases. These are not quite hub-and-spoke cases, where the information exchange in itself is the vehicle for restricting competition. The Chair believes this reflects the courts’ reluctance to be too adventurous, hence the heavy burden on competition authorities. He also noted that the differences between approaches in the United States and the European Union were very clear in the discussion, and thanked the panelists for their presentations and reactions.