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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Executive Summary 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 Executive Summary by the OECD Secretariat contains the key findings from the discussion held during the 132nd Meeting of the Competition Committee on 3-4 December 2019.

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

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Executive summary

By the Secretariat*

The OECD Competition Committee held a Roundtable on hub-and-spoke arrangements in December 2019. Based on the background paper prepared by the Secretariat, written submissions from delegates, and the contributions by expert panellists and delegates to the discussion, the following key points emerged:

1. Hub-and-spoke arrangements are agreements between competitors in one market (the spokes) co-ordinated by vertically related intermediaries (the hub), mostly through information exchanges. Since information exchanges in vertical arrangements are usually pro-competitive, it can be difficult to differentiate between legitimate exchanges and indirect horizontal collusion.

Hub-and-spoke arrangements differ from traditional horizontal cartels in the lack of direct communication between the horizontal competitors, although the negative market outcomes may be the same – both can result in a hard-core price-fixing cartel. In a hub-and-spoke arrangement, communication typically takes place via bilateral exchanges between the common hub (for example a common supplier) and the spokes (for example retailers of the same product), thus any information exchanges between the competing spokes occur only indirectly. These arrangements can take different forms, depending on whether the hub is active on the upstream supply or downstream retail level. At the same time, information exchanges between suppliers and retailers are a necessary and usually pro-competitive practice. Thus, unlike in horizontal cartels, the strategic nature of information exchanged cannot be the determining criterion for an unlawful hub-and-spoke arrangement, as non-competing vertically related firms normally exchange competitively sensitive information in their business relationships. This may go as far as exchanges about forward-looking pricing information. Therefore, competition authorities may need to find evidence of the parties' intention to restrict horizontal competition or other "plus factors". Competition agencies will also need to differentiate carefully between tough bargaining practices that can involve legitimate references to a competitor's offer, and attempts to co-ordinate the behaviour of horizontal competitors.

2. In order to determine which markets show a higher risk for the emergence of hub-and-spoke arrangements, and where vertical exchanges are more likely to result in an anti-competitive outcome such as an indirect competitor co-ordination, attention should be paid to market structures and the alignment of incentives between the hub and the spokes.

Competition authorities may need to investigate which products or market structures are more prone to such indirect collusion, and should identify the incentives of a hub to enable co-ordination on the spoke level. Generally, it would seem unlikely for a retailer to co-ordinate collusion on the suppliers' level, as the reduced competition on the supply level would lead to increased input costs and lower margins. Similarly, suppliers may lack incentives to act as hubs for retailers' co-ordination as increasing prices downstream may lead to a reduction of sales volumes. However, and in line with the economic theory of vertical restraints, market power on one or both sides of the market, or parallel actions in a

* This executive summary does not necessarily represent the consensus view of the Competition Committee. It identifies key points from the discussion at the roundtable, including the views of a panel of experts, the delegates' oral and written contributions, and the background note prepared by the OECD Secretariat.

network of relationships, can make hub-and-spoke collusion more likely, and can a margin increases on the supplier and retail level. Theory and case practice suggest that oligopolistic market structures favour hub-and-spoke arrangements, thus market power on one market level, mostly purchasing power on the retail side, can be conducive to hub-and-spoke type of arrangements, and may explain how incentives of two opposed market sides may be aligned. Case practice shows examples of various incentive alignments or even unilateral exercises of market power in hub-and-spoke type arrangements for all types of cases.

3. The legal assessment and actual enforcement against hub-and-spoke arrangements can be challenging. Jurisdictions have found different approaches to proving such arrangements, but actual jurisprudence is rare outside the US and the UK, as are full-fledged hub-and-spoke cases.

The main hurdle that all agencies need to overcome is to prove how two or more exchanges between vertical actors in a supply chain that individually could be perfectly legal can be linked in a way to establish an indirect horizontal collusion. In order to hold all vertically and horizontally related parties liable for an infringement, there needs to be a proven awareness if not intent of a passing on of competitively sensitive information for the purpose of market co-ordination. A firm cannot be fined for a conduct of other actors that it could not foresee, and at least implicitly consented to. In the US, according to the case law, authorities need to prove the existence of a rim connecting the competing spokes. Lacking direct communication or agreements, the condition to prove a rim allows distinguishing presumptively legal vertical agreements from illegal horizontal agreements. The existence of such a rim can for instance be inferred from vertical information exchanges that have no legitimate business reason, actions that are conditional on similar or identical courses of conduct by competitors or a significant departure from past business practices.

For the same reason, in order to establish a link between vertical exchanges that are presumptively legal individually, the case law in the UK has established a three-pronged so called “A-B-C-Test”, and asks for the proof of actual exchanges of information together with the underlying motivations and intentions. It requires in particular the proof of the parties’ state of mind (be it actual knowledge or reasonable foreseeability) about the information being transferred to influence competitors’ pricing intentions, which can be inferred from the facts of the case and the analysis of the circumstances in which the exchanges occurred.

Due to the lack of direct communications between competitors, agencies often need to rely on indirect and circumstantial evidence and analyse multiple communication streams connecting a hub and several spokes, with a view to establishing the required degree of connection between the horizontal competitors. The difficulties in meeting the established standards of proof have resulted in full-fledged hub-and-spoke cases being rare in many jurisdictions.

4. The co-ordinating hubs are by definition not competing with the spokes, which are all active on the same market level. This can create challenges for jurisdictions in assigning liability to the hub for the infringement or applying their leniency regimes.

In the US as well as the EU, hubs that co-ordinate collusion on the spokes’ level or that facilitate anti-competitive agreements between horizontal competitors can be held liable for their participation in the agreement. However, actual or potential knowledge and intent to contribute to the horizontal co-ordination need to be established. Courts have acknowledged that it is essential that hubs can be held liable in order to give full effectiveness to the prohibition of anti-competitive agreements. Other jurisdictions have less clear conditions and struggle to define the boundaries and conditions of the hub’s

liability for a horizontal infringement in the spokes' market. Competition laws that define anti-competitive agreements as agreements between competitors will find it more difficult to find the hub liable for the infringement.

The hub's position as a vertically related party can also raise interesting questions with regard to its rights and position as a leniency applicant. Leniency regimes can be tailored to horizontal competitors, and even if a leniency system would apply, the hub's co-ordination function may be interpreted as being the instigator of the agreement with the effect that leniency would not be available to it in many jurisdictions.

5. Competition authorities show a tendency to prosecute Resale Price Maintenance agreements (RPM) rather than hub-and-spoke arrangements, while highlighting their underlying horizontal elements.

A number of competition authorities have imposed significant fines on a larger number of (parallel) RPM cases, where they can be seen to fine both sides to the agreement. The decisions and related guidance show that the cases had significant horizontal elements. Since RPM is a typical tool to implement hub-and-spoke arrangements, prosecuting and fining the RPM rather than prosecuting a full-fledged hub-and-spoke arrangement may be a viable shortcut. It allows to end the infringement and to impose significant fines, while avoiding the difficulty of meeting the high evidentiary standards for hub-and-spoke arrangements. In many jurisdictions, and in particular in Europe, RPM infringements are by object restrictions and thus pose a significantly lesser challenge in terms of burden of proof. This is different in the US, where they are subject to a rule of reason analysis. Using RPM as a proxy for hub-and-spoke cases may, however, come at a cost. Depending on the jurisdiction, an RPM case may not allow for the use of the same investigation tools (dawn raids, leniency), and the fining regime can be different.

6. Online platforms, third-party algorithms, or online price monitoring and adjustment tools, can facilitate indirect co-ordination among competitors and can thus revive hub-and-spoke arrangements. While enforcers need to stay on top of the digital world developments, the current legal framework and enforcement tools seem adequate to address the risks.

Third party pricing algorithms that are used in common by horizontal competitors bear the risk of leading to co-ordinated price setting. Price monitoring and tracking software can facilitate and speed up indirect horizontal co-ordination and the exchange of up-to-date retail pricing information through a common agent, and make the monitoring of adherence by retailers to the arrangements easier. Such software also allows for immediate reactions by competitors in case of deviations, thus greatly reducing the incentive for non-compliance, given the short time span in which the competitive advantage arising from deviation could be enjoyed. At the same time, reduced bilateral communications between firms thanks to such online tools may make antitrust agencies' tasks significantly harder. Retail platforms may also assume the role of a hub to align the competitive behaviour of suppliers active on the platform. The use of certain vertical restraints such as MFN by such platforms may play a role in a hub-and-spoke context, and may result in anti-competitive horizontal effects.

Enforcers will need to keep track of online tools and their use and may need to improve their IT capacities. However, the current legal framework as such seems fit for the purpose of assessing hub-and-spoke arrangements, including in the digital world.