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COMPETITION COMMITTEE****Hub-and-spoke arrangements – Note by Colombia**

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<http://www.oecd.org/daf/competition/hub-and-spoke-arrangements.htm>

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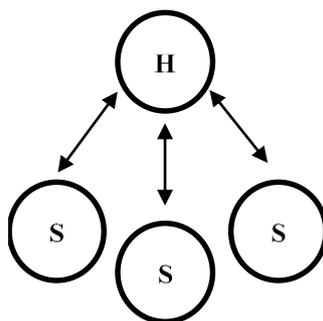
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Colombia

1. A synthesis of the characteristics of Hub-and-Spoke arrangements

1. “Hub and Spoke” schemes have allowed competition authorities around the world to detect horizontal agreements through evidence of information exchanges between vertically related players¹. The ‘hub’ has been identified by international literature as well as by the case law as a common agent (e.g. a manufacturer, a retailer or a service provider) between horizontally related players (the spokes) that has a relevant degree of competitive influence over them. In the context of the scheme, the spokes are horizontally coordinated only or mostly because of their interaction with their common hub (Harrington, 2018).
2. For the purpose of this contribution we will consider the following types of vertically organized collusion with a horizontal effect.
3. *First type of Hub-and-Spoke Scheme.* In this scheme the hub is an upstream agent that uses its position as a common supplier to impart business related directions that result in the horizontal coordination of the spokes. Figure 1 shows the first type.

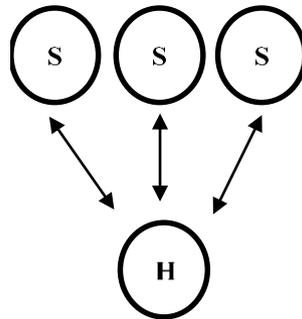
Figure 1.



4. *Second type of Hub-and-Spoke Scheme.* In this scheme the hub is a downstream agent that uses its position as common retailer to foster a coordination among the spokes to restraint competition in the upstream market. Figure 2 shows the second type.

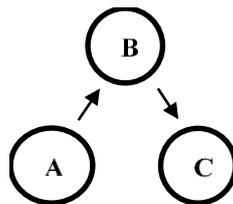
¹ The cases: *Interstate Circuit, Inc., et al. v. United States* 306 U.S. 208 (1939), *Toys "R" Us, Inc. v. FTC*, 126 F.T.C. 415, 585 n.49 (F.T.C. October 14, 1998), *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015)

Figure 2.



5. *Third type of Hub-and Spoke Scheme.* Let us note that in the first two schemes the hub has the primary role. This account will be relevant later for the burden of proof and liability analysis. The third scheme considers the spokes as the primary agents of the collusion. In this case the spokes are competitors and take advantage of the fact that they share a common hub to exchange information that might be consider of strategic value. Figure 3 shows the third type.

Figure 3.



6. Under this scheme, both the information exchanges and the later adoption of wherever condition was set through them have been considered by academics as the assent of the agreements by the parties, hence, of the anticompetitive behavior (Odudu, pp.207, 2013).

7. All of these types of Hub-and-Spoke schemes have in common the fact that the parties involved seem to have preferred indirect exchanges of information in order to achieve a coordinated, hence collusive, behavior. We believe that some of the reasons that underlie such choice are the following. First, that exchanges of strategic information between competitors by means of a third and common party may harden the detection of the cartel by the authority. As information exchanges aren't unlawful per se, the determination whether the exchange is pro-competitive or anticompetitive may step ahead of the detection relationship that's being held "behind-the-scenes". Second, the role of the hub in the three scenarios is decisive and for that reason appealing for the participants of the scheme. The power of the hub to reach each one of the scopes under a legitimate relationship under competition provisions facilitates a mutual understanding and a collusion that is hard to detect (Orbach, pp. 15, 2016).

8. The following section is aimed at answering the question of the interpretation of the scheme under the Colombian competition regime so to identify the legal tools available in our jurisdiction to prosecute such indirect types of collusion. The following section will address the practical enforcement challenges that arise and finally the last one will pose the ways in which competition authorities can deal with the challenges.

2. Interpreting “Hub and Spoke Arrangements” under Colombian Competition Regime

9. The essential characteristic of Hub-and-spoke arrangements is that they combine vertical and horizontal elements, and that the horizontal co-ordination is typically an indirect one². This fact works for the study of the scheme as a whole in the sense that both relations have to be analyzed individually beforehand. In fact, as it was well noted by Vereecken y Odudu, one of the challenges in addressing Hub-and-spoke arrangements is to differentiate if the situation under scrutiny is a horizontal agreement, a vertical agreement with horizontal effects or if it is a complex scheme that comprises both (Vereecken, pp. 5 y Odudu pp. 240).

10. That is then the task of this section: first, to interpret the elements of Hub-and-Spoke scheme individually under Colombian competition laws. And then, interpret the scheme as a whole. For that purpose, we will study the vertical relation of the scheme from the perspective of the acts of influence. Later we will study the whole scheme from the concerted practices point of view.

2.1. Acts of influence by a traditional hub: Retailer, manufacturer or common service provider

11. The following are relevant cases undertaken by the SIC in which vertical arrangements regarding Resale Price Maintenance were discussed. In these cases, the upstream hub influences the pricing policies of its suppliers which results in their coordination without communication. The rules that resulted from the analysis of the cases work as input for the interpretation of the behaviors (e.g. information exchanges) that put together the scheme. For each case, we present some relevant facts and we highlight the elements of the scheme in light of the Colombian competition laws.

12. Colombian competition regime prohibits agreements or covenants that have the objective of limiting competition³. To that effect there's a complete system of provisions that identify behaviors that meet this prohibition, such as: abuse of dominant position and anticompetitive acts and practices. Acts differ from agreements in the sense that they are unilateral conducts characterized by an agent, no matter its nature, that either infringes competition provisions directly or promotes market distortions by other agents.

13. To influence a company or a market agent to increase the price of its products or services or to cease to reduce its prices, is prohibited under Colombian competition laws⁴. Such behaviors may raise competition concerns and could work as the starting point for the detection of a possible Hub-and-Spoke scheme when horizontal effects are observable.

14. *SIC v Coltavira (1999)*. The case concerns the production and further distribution of water volumetric meters. The company (Coltavira) subject to the investigation by the SIC produced volumetric meters which were later purchased and distributed (Superintendencia de Industria y Comercio, 1999). Throughout a series of communications between 1997 and 1998, Coltavira prohibited two of its distributors to offer discounts of more than 10% over the listed prices. The SIC concluded there was an unlawful act of

² OECD (2018), Call for contributions for the Roundtable on “Hub-and-Spoke Arrangements”.

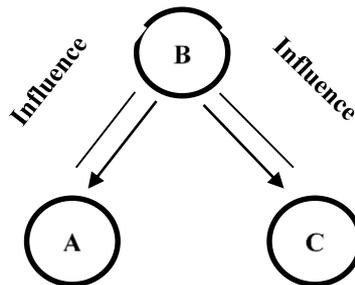
³ Article 1 of the Law No. 155 of 1959

⁴ Article 48 of the Decree No. 2153 of 1992

influence from the supplier because it was aimed at restricting competition downstream through the establishment of pricing conditions to two of its distributors.

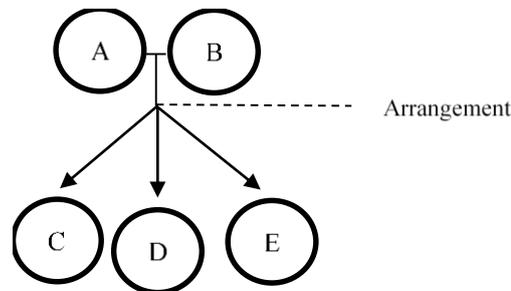
15. This case considered the supplier as an agent with enough power to influence the competitive behavior of its distributors. Let us note that this case represents the view in which the hub is the primary agent and for that reason the only one responsible for the exclusionary objectives on its behavior.

Figure 4. represents the situation.



16. *SIC v Molinos Roa y Florhuila (2015)*. This case follows the common form of a Hub-and-Spoke scheme. The SIC fined two rice suppliers that were integrated in the upstream market for influencing their distributors into a common price policy (Superintendencia de Industria y Comercio, 2015). They conveyed with their distributors the minimum sale price of the product for the consumers. They also agreed on a sanction consisting of the interruption of commercial relations for three months in case the distributors didn't comply with the covenant.

Figure 5. represents the situation.



17. In this case, the RPM was instrumental to achieving coordination among distributors. In addition, the “punishment” introduced by the suppliers raised the question whether the distributors would have voluntarily agreed on the covenant in the case the punishment was not included in the first place. According to the evidence, the distributors agreed on the measures only because of the punishment. The fact that the suppliers exercised an active role in coordinating the minimum sale price of the product through letters to the distributors that reminded them the punishment cleared any doubts in respect to a horizontal agreement.

18. As noted before, RPM cases analyzed by the SIC display the assessment of the authority to restrictions that occur within the scope of the vertical relation that is part of the Hub-and-Spoke scheme. These cases share a common aspect; they all consider the common hub as an instigator of the anticompetitive behavior, hence that only its behavior was

considered by the SIC as unlawful under unilateral restrictions provisions. In both cases the analysis of the SIC took the uniform behavior of the spokes as resulting primarily from the conducts exercised by the common hub, which, together with the consideration that the spokes did not communicate with each other, strengthen the argument as to an unilateral conduct (act of influence) case. Such perspective on vertical restraints may hinder the consideration of horizontal effects of the restraints as a part of an overall anticompetitive scheme.

2.2. Acts of influence by a third party: An Association

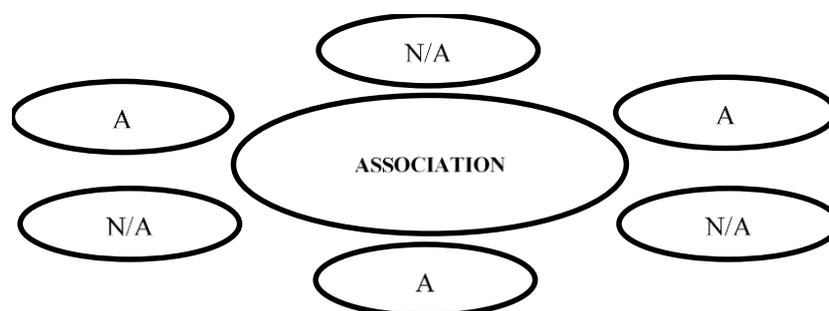
19. We propose to consider for the configuration of a Hub-and-Spoke scheme a third party other than a manufacturer, supplier or common service provider. The SIC has identified that an association may as well influence the pricing policy of a group of associated players and promote indirect horizontal collusion with the purpose to restrict the activity of non-associated players. The following are relevant cases undertaken by the SIC in which the association can be an incubator for the hub & spoke scheme.

20. *SIC v Asosubastas et al (2017)*. This case examines the conduct of the livestock auctioneers' association which is the national organization representing auctioneering firms that occupy and run the livestock auction markets of Colombia. The association played a significant role in stablishing protocols to fix percentages (0.5%) of the commission of the members and non-members in the livestock auctions (Superintendencia de Industria y Comercio, 2017). In this case the SIC established that the association was instrumental to achieving coordination among competitors. For all of these reasons, the SIC concluded that the initiative of the association was unlawful under the unilateral restriction proposes such as “acts of influence”. But also, the SIC considered that the competitors achieved mutual understanding to fix the prices of the auctions. The SIC took the view that the unlawful conduct of the association differed from the price-fixing behavior of the rivals.

21. *SIC v Sodicom et al (2016)*. The SIC fined some service stations associated and non-associated to Sodicom (the Association) for achieving a price fixing agreement through permanent communications with the Association. The SIC demonstrated that the Association facilitated information exchanges between competitors and coordinated the responses of the gas stations to requests of information that were raised by the Competition Authority when assessing price parallelism. Some executives of the association and competitors were held to have violated the Colombian competition law based on evidence that included a trade association meeting where the association made remarks to the general effect that it was time to stop passing lower wholesale service stations prices to the consumers and keep some of it for the associates. Subsequent to the meeting, however, both the members and non-members instituted the changes proposed at the meeting and - one by one- adopted the same prices in all the gasoline service stations (Superintendencia de Industria y Comercio, 2016).

22. The previous cases had a common hub responsible for influencing pricing policies of horizontally located players. The hub in both cases was an association. In both cases, an Association exercised a behavior similar to that of the suppliers in the RPM cases previously analyzed. In addition, the competition authority proved that the Association promoted to associates and non-associates the adoption of common pricing policies. As shown in Figure 6, the role of the Association was key (central) to reach a common understanding of the associates and non-associates. Only through the Association, they managed to fix the percentage of the commission in the auctions.

Figure 6.



23. The analysis of the SIC as to the behavior of the horizontal players differs from the one applicable to the RPM cases in two aspects: first, the common hub was an association and not a traditional hub; second, the competition authority took under consideration the role of the spokes in advancing the anticompetitive conduct. Both liability and evidentiary considerations in these cases present a wider approach to vertical restrictions with horizontal effects.

24. In respect to the nature of the hub and its role in the identification of a situation as a Hub-and-Spoke scheme, Veerecken noted:

“(…) there still remain a lot of uncertainties when differentiating situations in which undertakings may, or must necessarily, exchange information with trading partners, from situations in which competitors use a common trading partner as a hub through which to facilitate cartelistic behavior. This common trading partner is not necessarily a common supplier; it can also be a common customer, a common association of undertakings, or even a common third party that operates on a different market.” (Veerecken, pp. 27)

25. To Veerecken defining the underlying relationship between the parties engaged is key to determine the legal approach of the conduct of the parties. In this scenario, associations have to convince the competitors to stick to a certain price level, or increase the prices. The association is not a party to the cartel agreement as such, but it plays an essential facilitating role in the cartel. However, the SIC analyses separately the conduct of the agents. On the one hand, the SIC proves that the associates and non-associates fix or discipline the prices. On the other hand, examines the liability of the association. Despite this fact, there still remain the Hub & Spoke scheme in which the competitors use a common partner as a hub through which to facilitate cartelistic behavior.

2.3. Cartels: concerted practices

26. This section aims to identify the probatory standard, in which spokes, as active subjects, belong to a scheme where the hub also participate actively as a third party who acts as facilitator of the conduct. Having examined how hub & spoke operates and after reviewing relevant cases in which the SIC have established criteria for the finding of coordination among competitors through a third party, the analysis will therefore focus on the questions of joint liability and the correct approach to hub & spoke. To the standard of proof and liability for the collective infringement, we propose apply the rules applicable to concerted practices for detect and prosecute the hub & spoke arrangements under Colombian competition law.

27. In Colombia, the Law 155 of 1959 and the Decree 2153 of 1992 established a well-defined antitrust system and prohibits anticompetitive practices as well as concerted practices in the following terms:

*(...) agreements or treaties that have as their object the limitation of production, supply, distribution, or consumption of primary resources, products, merchandise, or domestic or foreign services, and, in general, **all types of practices**, procedures or systems **tending to limit open competition** and to maintain or determine unfair prices.” (article 1 of the Law 155 of 1959)*

*(...) 1. Agreement: Any contract, covenant, concertation, **concerted practice** or consciously parallel between two or more undertakings. (article 45 of the Decree 2153 of 1992)*

28. It is most likely that the concept of concerted practice in the Colombian law, has been extracted from the European competition Law, in which the conduct is understood as “a way of coordination between companies that, without having signed an agreement itself, it consciously replaces the risks of competition for a practical cooperation between them”⁵. As Brockelman suggests, the notion of “concerted practice” has made it easier for the European competition authorities “the job of having to qualify individually and in detail if the coordination has reached a high enough level to be qualified as an «agreement» or if is just a concerted practice.” (Brockelmann, pp. 89).

29. Even though in Colombia it hasn’t been set a standard of legality and proof in terms of a concerted practice, it is considered that this normative category can be useful in a context where competitors have reached a horizontal coordination in the modality “Hub & Spoke”. To do so, there would be at least the following analysis resources.⁶ On the first place, there would be proof that the interaction between a hub (B) and a spoke (A) is being used for the traffic of sensitive information that belongs to A⁷.

30. On this phase, the reasons of information transferred between the agents, must be analyzed and differentiated. In this regard, it is necessary to comprehend: (i) the nature of the hub. If it is about a supplier or retailer, an association, or an agent from another market (for example, an audit or consulting company). (ii) the content of the information and the commercial purposes that could be pursued with it. It could be about private or public, future and historic information⁸. Because the classification of the information modifies the probatory standard, it is important that this phase concludes that the information is sensitive and confidential, and that exists a high risk of reduction of uncertainty in the market at the moment of transferring it to a third party. As in the case of the *SIC v. Concreto and other* (Superintendencia de Industria y Comercio, 2018), the SIC can apply markers that

⁵ Commission of the European Communities. As. C-89, 104, 114, 116, 117, 125 y 129/85, Ahlström y otros/Comisión, Rec. 1993, p. I-1307, apdo. 63.

⁶ What elements do competition agencies need to prove?

⁷ Is the existing case law on (indirect) information exchanges between competitors, or on cartel facilitators, relevant in hub-and-spoke cases?

⁸ What is the legal standard that you (would) apply to prove a hub-and-spoke type of collusion, and what kind of evidence would prove/has proven to be helpful? Is there established case law in your jurisdiction, or any other kind of guidance? Please highlight in particular the treatment of indirect information exchanges in your case practice and jurisprudence.

allow to value the level of sensibility of the information and its tendency to create illicit coordination:

Figure 7.

Time	Past	Present	Future
Aggregation	Aggregates	The propose of	Disaggregated
Regularly	Insufficient	The propose of	Enough
Access	Public	Restricted	Private
Vehicle	Third party	Third parties relating to	Direct

Source: Superintendencia de Industria y Comercio, Resolución No. 56979 de 2018⁹

31. On the second place, there would be proof of the relationship between hub (B) and another competitor (C, etc.). At that point, two aspects must be verified. First, that B revealed or communicated to the competitors, confidential information about A. Second, that C didn't show rejection for the information that B provided. Rather, C had the chance to communicate -in any way- its implicit or explicit approbation, for the delivery of this information. The assurance that C received the information and that implicitly accepted it, can be reached by observing C's behavior after receiving it. If it adjusts to the content of the information, its implicit consent to create an agreement, exists.

32. We could ask ourselves if the probatory standard should be similar to the one required for tacit collusion in the modality of conscious parallelism. If that's the case, the objective element should be proven (parallel behavior in prices or another variable) and the subjective element (conscious and interactive behavior to reduce competitive pressures in the market). It is also relevant to question if it is enough with the revelation of the information done by the hub (B) to determine the restraint of the conduct. Nevertheless, it must be allowed for C to prove that despite the revealing of the information, it was not used or was immediately rejected.

33. Overall, if the evidence shows that the spokes, implicitly or explicitly concerted to coordinate through a third party, the responsibility is shared between the cartel members and the one who helped creating it. In contrast, we find the RPM cases, previously shown, in which the hub -as active subject and instigator of the conduct- fulfills the initiative of influencing and suggesting other agents the politics that must be implemented by the competitors (Harrington, 2018)¹⁰.

⁹ The didactic tool in question is found in the presentation that LUIS BERENGUER FUSTER, former president of the then National Commission of Spanish Competition, held at the Third International Congress of Free Economic Competition, called "The exchanges of information between competitors."

¹⁰ What is the treatment reserved to the "hub" and to the "spokes" respectively?

3. Conclusions

34. This contribution has examined three relevant aspects about the hub & spoke figure. In the first place, a general description of the scheme was made on the basis of its essential elements even in the absence of explicit classification by the Colombian regulation. In the second place, there have been some situations, where the SIC has approached the characteristic elements of the scheme through the unilateral conduct of “acts of influence”. From the relevant cases, the following aspects were studied: the interpretation of the SIC about acts of influence done by suppliers for the resale prices (RPM) and those situations in which the associations influenced the prices of their members and not members. The analyzed cases showed that, for the restrictions caused by the influence of resale prices (RPM), the only responsible is the supplier, which does acts of influence as an active subject of the conduct. Instead, the cases where the associations promote the prices setting of the members and not members, the SIC has reproached, on one side, the conduct of the association as influencer agent (hub) and on the other, the conduct of those who did the restriction on the horizontal side.

35. Finally, this contribution had set the challenges that the SIC faces to interpret the hub & spoke as a single scheme, and therefore, as a unique behavior. With this purpose, the contribution considered that a correct way to interpret the scheme would be to analyze it as a concerted practice. This conduct, which can be applied in the Colombian competition regulation since the Law 155 of 1959 and the Decree 2153 of 1992, would allow applying some criteria of shared responsibility. Besides, it would adjust correctly to the cases which have enough evidence that the hub (who can be a supplier, retailer, associated and any third person) helped in the exchange of information between competitors (spokes) with the purpose that these last will do horizontal behaviors that go against the Colombian regulation of free competition.

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