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Hub-and-spoke arrangements – Note by BIAC

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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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1. Introduction

1. *Business at OECD* appreciates the opportunity to contribute to the Competition Committee's roundtable on hub and spoke arrangements. Business strongly supports robust and effective enforcement of competition laws to detect and sanction hardcore cartels among competitors. Hardcore cartel behaviour harms other businesses as well as consumers and the markets concerned and is generally categorised and prosecuted as criminal or quasi-criminal conduct. Business would be most concerned, however, if the scope of allegedly hardcore cartel behaviour subjected to such serious sanctions were to be expanded so as to include, or risk including, less clearly harmful activities or less clearly articulated scenarios. This would undermine the fundamental right of defendants to know the scope of legal prohibitions and to avoid violations, as well as risk undermining efficient, pro-competitive initiatives.

2. Hub and spoke theory and enforcement against such arrangements should, in *Business at OECD's* respectful submission, be examined in this light. To the extent hub and spoke theory is used to make clear that horizontal collusion will be treated as such even when it is achieved without direct contact between competitors but is shown to be implemented via a common (vertically-related) hub, the theory is unobjectionable. Grave concerns would arise, in contrast, were hub and spoke theory to be applied to prosecute as a cartel vertical communications or restrictions, even in a network with some indirect horizontal impact, without clear and compelling evidence that proves horizontal collusion. Such proof should be subject to appropriately exacting standards and be evidence-based. Absent clear and compelling evidence of horizontal collusion, vertical agreements are generally efficiency-enhancing and should be prosecuted only on the basis of a full rule of reason-type review of their actual effects.[1]

3. This contribution will examine key concepts and concerns in relation to hub and spoke cartels (section II) and then identify the factors emerging from the developing application of the theory in various jurisdictions (section III). In section IV, we examine whether e-commerce developments may drive the need for enhanced enforcement or a new approach and conclude they should not. The challenges for both a business wishing to implement effective compliance in the face of hub and spoke concerns, as well as those of enforcers in terms of prosecuting hub and spoke violations, are examined in section V.

2. Key Concepts and Concerns

4. Cartels involve coordination amongst competitors, generally achieved by participants directly and expressly communicating with each other. However, competitors may, instead of communicating directly, coordinate their behaviour through a third party which has a vertical relationship with each of them. Such arrangements, referred to as hub-and-spoke cartels can, broadly speaking, take two forms.

[1] Whilst we accept that certain vertical restraints, such as resale price maintenance, are still treated as hardcore violations.

1. *Hub and spoke (Supplier Hub)*: Under this scenario, the supplier acts as the hub whereas resellers play the role of spokes. The supplier acts as a conduit between its various resellers for collusion involving, most often, resale prices that the latter intend to implement. Via the supplier, resellers can coordinate their behaviour without being in direct contact with each other.

   This appears to be the most common type of hub and spoke arrangement, at least outside the U.S. The incentives of the spokes are aligned in the sense that they may seek to avoid competition from each other. The supplier may choose to act as a hub following pressure from a reseller with market power or theoretically because stabilised higher resale prices mean resellers have less of an incentive to bargain on wholesale prices. The conduct involves resale of the supplier's products and so intra-brand competition, sharply distinguishing it from typical cartel behaviour.

2. *Reverse hub and spoke (Reseller Hub)*: Under this scenario, a reseller acts as the hub whereas multiple suppliers play the role of spokes. The suppliers pass information about their own future competitive behaviour to their competitors through a reseller who passes on or coordinates the exchange without the suppliers being in direct contact with each other.

   The incentives for the parties to participate in these reverse hub and spoke scenarios are less commonly analysed. Generally, resellers will pass through information and go back and forth between suppliers in order to secure the best possible price and terms. Only exceptionally may a reseller have the incentive to act as a hub where it is seeking to encourage its suppliers to jointly discipline or boycott a downstream rival. The incentives for suppliers to participate in this type of arrangement are obscure, unless the reseller hub has considerable leverage over the suppliers although the potential impact, affecting inter-brand competition is more capable of resembling a classic horizontal cartel.

5. This paper emphasises the need for clear and compelling evidence if companies are to be accused of horizontal collusion in the context of vertical relationships. That is vital because there are many legitimate, pro-competitive, efficiency-enhancing reasons for suppliers and resellers to exchange sensitive information—on costs, promotional activities and investment plans, for example—the benefits of which in general far outweigh the risk that restrictive arrangements can be reached.

6. Business therefore needs clear rules based on sound principles which ensure the flexibility to have procompetitive discussions is not constrained. To enable this, *Business at OECD* submits that it is important to differentiate between situations where there is (i) a network of bilaterally agreed vertical restrictions and (ii) true coordination where there is evidence of a "rim" of collusion. While both situations may generate some horizontal effect on the market (for example, reduced intrabrand competition due to RPM), *Business at OECD* submits that it is only in the second situation that a horizontal restraint has arisen, which it may be appropriate to treat as a cartel.

7. This is a valid and important distinction which must not be blurred. We identify below aspects of the developing case law which enable the distinction to be drawn.

3. Factors Which Lead to a Finding of Horizontal Collusion

3.1. The Importance of a "Rim"

8. In each type of hub and spoke activity, the spokes are the allegedly colluding competitors and the hub is an upstream supplier or a downstream customer facilitating the collusion between the spokes. The resulting horizontal arrangement among the spokes is referred to in certain jurisdictions as the rim, because it connects the spokes and is crucial if the wheel is to turn. Without the rim, an alleged hub and spoke cartel is merely a set of vertical relationships and alleged restraints that may result in parallel conduct but which do not involve or establish horizontal collusion.

9. Although there is no EU case law directly concerned with hub and spoke cases (as defined above), the EU notion of "cartel facilitation" is consistent with the idea of the need for a rim. That is because cartel facilitation is concerned with whether a third party participated in an identified horizontal infringement. The horizontal element or rim of coordination is already present.[2]

10. The U.S. cases on hub and spoke cartels, stretching back to 1939, show the importance of identifying a "rim" in order for there to be an unlawful horizontal agreement.

11. In *Interstate Circuit Inc. v. United States*, collusion was initiated by a downstream exhibitor of films, Interstate, in response to aggressive competition from rivals who were showing films for a lower cost.[3] Interstate required upstream film distributors to force their customers (Interstate's rivals) to raise their prices as a condition of being able to show the distributors' films. Interstate sent a letter with the collusive plan to all upstream firms and supplemented it with bilateral verbal communications to achieve enough confidence among upstream firms that the others were likely to comply. The Supreme Court viewed the letter as instrumental in achieving mutual understanding among the film distributors.[4] There was an unlawful agreement despite the lack of direct communication among them. The Court

[2] *See, e.g.*, Case C-194/14P, AC-Treuhand AG v. Comm'n, (Oct. 22, 2015), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CJ0194 (considered the circumstances in which a third party could be held liable for its part in a cartel); Case C- 74/14 Eturas and Others (Jan. 21, 2016), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CJ0074 (discussed in paragraph 35 below) (assessed under information exchange/facilitation theory as opposed to hub and spoke); and C-542/14, VM Remonts and Others (July 21, 2016), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CJ0542 (arguably increases the scope for a third party to be held liable for a cartel (in which it had no involvement or knowledge), presupposes some other cartel in existence).

[3] Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

[4] *Id*. at 222 ("The . . . letter named on its face as addressees the eight local representatives of the distributors, and so from the beginning each of the distributors knew that the proposals were under consideration by the others. Each was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of the subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits. There was, therefore, strong motive for concerted action, full advantage of which was taken by Interstate and Consolidated in presenting their demands to all in a single document.").

noted that "knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."[5]

12. In another U.S. case, *Toys "R" Us v. FTC*, the reseller Toys "R" Us (TRU) sought to defend itself from price competition from warehouse clubs by informing toy manufacturers that they would not carry an item if it were also sold to a warehouse club.[6] Manufacturers sought assurances from TRU that their competitors were subject to the same rule and TRU had bilateral communications with each and made them aware of its bilateral communications with rival toy manufacturers. The FTC found there was a "conscious commitment to a common scheme" and this was affirmed on appeal. The Seventh Circuit Court noted that the "TRU case if anything presents a more compelling case for inferring horizontal agreement than did *Interstate Circuit*, because not only was the manufacturers' decision to stop dealing with the warehouse clubs an abrupt shift from the past, and not only is it suspicious for a manufacturer to deprive itself of a profitable sales outlet, but the record here included the direct evidence of communications that was missing in *Interstate Circuit*."[7]

13. In *United States v. Apple, Inc.* (*e-Books)*, Apple sought to encourage publishers to move away from selling e-books via other outlets through a wholesale model.[8] Apple offered an agency model which would take away retail pricing authority from the resellers and used an MFN clause to ensure that if a publisher offered a lower price for an e-book on another outlet, it would also need to lower its price on Apple's platform. Apple assured each defendant that it would only move forward if a critical mass of the major publishing houses agreed to its agency terms. It promised each publisher that it was getting identical terms and kept each publisher apprised of how many others had agreed with the new model. There were also direct communications among the publishers.

3.2. The Importance of Evidence of the "Rim"

14. Hub and spoke cartels were identified in the UK cases, *Toys*[9] and *Replica Kit.*[10] The two cases involved evidence of horizontal coordination impacting intra-brand competition in the form of repeated bilateral discussions and the giving of assurances:

- In *Toys,* there was evidence that the supplier had regular conversations with resellers in which each reseller would indicate its future pricing intentions, and the supplier would inform that reseller of other resellers' future pricing intentions. These conversations took place in a context in which the supplier had informed

[5] *Id*. at 226.

[6] Toys "R" Us v. FTC, 221 F.3d 928, 935 (7th Cir. 2000).

[7] *Id*. at 935.

[8] United States v. Apple Inc., 791 F. 3d 290 (2d Cir. 2015), *aff'd* 952 F. Supp. 2d 638 (2013), *cert. denied*, 136 S. Ct. 1376 (2016).

[9] Decision of the Office of Fair Trading, No. CA98/8/2003, Agreements between Hasbro U.K. Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games (Nov. 21, 2003), *available at* https://assets.publishing.service.gov.uk/media/555de4d340f0b666a2000168/hasbro3.pdf [hereinafter OFT Toys].

[10] Decision of the Office of Fair Trading, No. CA98/06/2003, Price-fixing of Replica Football Kit (Aug. 2, 2003), *available at* https://assets.publishing.service.gov.uk/media/555de4c5e5274a74ca00014b/replicakits.pdf.

resellers that it was making a coordinated effort to persuade all resellers to price at its recommended retail prices (RRP). It was "clear that there was an informal agreement, understanding or tacit arrangement whereby Argos and Littlewoods co-operated with Hasbro by indicating that they would or might price the particular products in question at or near RRP on the understanding that the other reseller would also do so, at the same time making it clear again and again that if the other reneged, the former would immediately respond."[11]

- In *Replica Kit*, there was evidence that the resellers required assurances from the supplier that other retailers would not lower their resale prices.[12]

15. These fact patterns ultimately led to the Court of Appeal setting out the following test of hub and spoke where if:

1. reseller A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other resellers (of whom C is or may be one),
2. B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and
3. C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition.[13]

16. This was actually a narrower test than that which had been put forward by the lower court. The Court of Appeal had been concerned that the lower court had gone too far by only requiring it to have been reasonably foreseeable that the hub (supplier B) might make use of information provided to it by reseller A to influence market conditions. However, it is submitted that, even the requirements as formulated by the Court of Appeal may set a lower threshold than was strictly necessary given the strength of evidence in those cases—i.e., the actual evidence in those cases (in particular the extensive bilateral discussions and assurances) went beyond the requirements in the test that was formulated.

17. Competition authorities in other countries also appear to have gone to some lengths to insist upon evidence of a rim in these cases. The Peruvian competition authority found a hub and spoke arrangement which involved price fixing by pharmacies through their suppliers. The decision refers to numerous emails which revealed that the suppliers acted as intermediaries between the pharmacies, either assuring them of compliance with the coordination by the rest or, at a minimum, informing them of the negotiations they had with the competing chains. The emails were detailed, setting out the prices at which products were to be marketed and the relevant date. The authority also pointed out that many of the terms used in emails suggested coordination: "reconciled," "settle," "regulate," "regularize." Emails also referred to the existence of "agreements between all chains." The constant repetition of communications led the authority to conclude that the pharmacies accepted the coordination proposed by their suppliers, knowing that their competitors would do the same. Evidence showed that there were complaints by the chains to their suppliers if the indicated price was not the one agreed upon, and threats to adjust price if

[11] OFT Toys, *supra* note 9, ¶ 103.

[12] Argos Ltd v Office of Fair Trading, JJB v Office of Fair Trading [2006] EWCA Civ 1318, [43].

[13] *Id*. ¶ 141.

the others would not comply with the agreement and modify their price. The competition authority observed that the indirect coordination between the pharmacies included the monitoring of the prices of competing chains in order to verify compliance.[14]

18. In Chile, while there is apparently no formal hub and spoke doctrine, the Chilean authority concluded that a case involving concertation between supermarkets and the suppliers of poultry had the elements of hub and spoke and could be categorised as such. The authority found vertical price agreements plus a "rule" applied among the main supermarket chains and the common suppliers of fresh chicken, requiring compliance by those involved so that although the supermarket chains did not make direct agreements with one another, they consciously adhered to a "common scheme that substituted the risks of competition" to "regulate the market" and "prevent a price war." According to the authority, resellers had colluded horizontally because they knew of the agreements with the suppliers and were willing to abide by the vertical agreements if their competitors did the same and the supermarkets also alerted suppliers when another retail chain had deviated from the agreement not to sell under the wholesale list price. The suppliers then acted as intermediaries between the resellers by notifying the supermarket when it was not in compliance with the agreed pricing guidelines.[15]

19. Other cases show that there may be insufficient evidence of the rim.

20. While the UK test described in paragraph 15 above fits the evidence that was found in *Toys* and *Replica Kit*, the third UK case—*Dairy Retail Price Initiatives*—underlines the need to consider allegations of a hub and spoke cartel very carefully. The CAT applied the hub and spoke test as formulated by the Court of Appeal in the *Toys* and *Replica Kit* judgment but noted that the assessment is fact-specific,[16] that disclosures of price information by a reseller to its supplier are often part of normal commercial dialogue, and that a reseller may have limited control over whether its supplier then discloses that information to another. As regards one meeting attended by farmers and cheese suppliers, although a reseller had made statements to the effect that price increases in milk need to be extended to other dairy products, the CAT found that there was no evidence that the retailer had stated its willingness to increase its retail prices if its competitors did likewise.[17]

[14] Press Release, Indecopi, El Indecopi multa a 5 cadenas de farmacias, en primera instancia, por concertar precios de medicamentos y les ordena cumplir un programa de prevención (Oct. 25, 2016); *see also* Henry Stockley, *Peru Fines Pharmacy Chains*, GLOBAL COMPETITION REV. (Nov. 1, 2016), *available at* http://globalcompetitionreview.com/article/1070740/peru-fines-pharmacy-chains.

[15] Press Release, Fiscalía Nacional Económica, FNE acusa a Cencosud, SMU y Walmart por colusión en el mercado de la carne de pollo fresca (Jan. 6, 2016), *available in Spanish at* https://www.fne.gob.cl/fne-acusa-a-cencosud-smu-y-walmart-por-colusion-en-el-mercado-de-la-carne-de-pollo-fresca/; *see also* Sonya Lalli, *FNE fines Walmart and others for alleged price-fixing scheme*, GLOBAL COMPETITION REV. (Jan. 8, 2016), *available at* https://globalcompetitionreview.com/article/1063795/fne-fines-walmart-and-others-for-alleged-price-fixing-scheme.

[16] Tesco v Office of Fair Trading [2012] CAT 31, ¶ 56.

[17] *Id*. ¶ 190.

21. A UK reverse hub and spoke case, *Tobacco*,[18] demonstrates the importance of proving the horizontal element to establish the existence of a hub and spoke cartel. The lack of evidence of horizontal collusion ultimately led, on appeal, to the collapse of the UK OFT's case against tobacco manufacturers and resellers, the allegation being that the manufacturers had indirectly exchanged future pricing information through bilateral agreements with ten resellers.[19]

22. The Hungarian supermarkets case of *SCA/Vajda Papír* also illustrates the need for strong evidence of horizontal collusion given the fact that, in the context of distribution agreements and negotiations, there may be legitimate reasons for sensitive information to have been passed between a reseller and a supplier. The Hungarian Competition Authority (HCA) described a test for trilateral hub and spoke conduct which closely resembles that developed in the UK: an illegal concerted practice may arise where (i) a reseller A discloses competitively sensitive information to supplier B with the intention that supplier B shares this with reseller C and (ii) supplier B passes that information to reseller C who is aware of the circumstances in which supplier B shared the information. Even though the HCA became aware of two instances in which a supplier passed future sensitive commercial information (relating to two resellers) on to a competing reseller, it concluded that the criteria were not met since it could not establish that the two resellers (whose information was passed on) knew or could have expected that the supplier would share the information with a competing reseller. Nor could it be established that the reseller who received the information recognized or could have recognized the circumstances in which the other resellers had shared the information with the supplier. The parties had also provided an explanation as to why the supplier could have obtained the sensitive data lawfully. The HCA did observe a risk of an infringement here, noting that a competition risk may arise where a reseller informs a supplier in negotiations that it can only accept a cost increase if other retail prices increase. That is because it might be deemed to be a request from the reseller that the supplier should intervene to increase downstream market prices. However, on the facts, there was no evidence that resellers were using the supplier as a communication channel.[20]

23. The German investigation into concertation in the food sector may also be a case where there was insufficient evidence of a rim, and therefore the case was rightly pursued as vertical resale price maintenance (RPM). In that case, resellers were alleged to have coordinated their prices under the moderation of a manufacturer and to have urged the manufacturers to persuade other resellers to observe a standard retail price level. However, the case was sanctioned as vertical RPM. Notably, in the letter of the head of chamber (so-called Vorsitzendenschreiben)[21] also relating to the food sector, the head of chamber notes

[18] Decision of the Office of Fair Trading, No. CE/2586-03, Tobacco (Apr. 15, 2010), *available at* https://webarchive.nationalarchives.gov.uk/20140402225013/http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/tobacco.pdf.

[19] Imperial Tobacco Group plc and Imperial Tobacco Ltd v. OFT [2011] CAT 41.

[20] Press Release, Hungarian Competition Auth., Proceeding Initiated for Suspected Cartel (Apr. 21, 2015), *available at* http://www.gvh.hu/en/press_room/press_releases/press_releases_2015/proceeding_initiated_for_suspected_cartel_.html; Press Release, Hungarian Competition Auth., The GVH Terminated its Cartel Proceeding on the Market of Household Paper Products (May 28, 2018), *available at* http://www.gvh.hu/en/press_room/press_releases/press_releases_2018/the_gvh_terminated_its_cartel_proceeding_on_the_ma.html.

[21] 13 April 2010, B 11-13, 16 u. 19/09, 12/10, p.9 (fn. 9).

that a justification or exemption for the vertical restriction is unlikely precisely because of the horizontal coordinative effects it has.

24. In fact, there have not been any cases in Germany to date regarding classic hub and spoke cartels. This may be because we understand that the German Federal Cartel Office (FCO) takes the position that, in pure hub and spoke cartels, the hub itself is not part of the anti-competitive agreement whereas in vertical cases relating to RPM, the intermediary itself engages directly in the anti-competitive conduct and can therefore be fined (as was the case in the food sector investigations). However, in the press release of 2015 relating to the food sector investigation, the President of the German competition authority clarified that only "those practices which constitute a clear restraint of competition and an explicit violation of competition law" were punished.[22] Given that the investigations were sanctioned as vertical RPM, this might indicate the absence of clear evidence regarding horizontal coordination between the resellers.

25. Nonetheless, German jurisprudence[23] does distinguish between vertical restrictions and horizontal cartels (based on vertical restrictions or contacts), the latter only being established where the companies are aware that there are multiple vertical agreements that lead to a (horizontal) concerted practice and that they aim at such coordination.

26. Finally, there are cases which seems to involve both vertical arrangements and some indirect horizontal contacts but which, for some reason, were not formally characterised as hub and spoke or do not set out a formal test for hub and spoke.

27. The Austrian Supreme Court considered the concept of a hub and spoke cartel in the *Spar* decision but qualified the conduct as "vertical price coordination reinforced by pronounced horizontal elements of 'hedging' the vertical agreements with regard to the horizontal relationship."[24] There is, however, no strict "hub and spoke" concept or test under Austrian case law and no strict qualification of arrangements as either vertical or horizontal in many cases. In practice, the concepts are rather blurred and dealt with under the umbrella provision of Article 101 TFEU (or the corresponding provision of Section 1 Austrian Cartel Act).

28. In *Paints and Varnishes*, the Polish competition authority prosecuted vertical resale price maintenance agreements between manufacturers and resellers although the manufacturer had apparently played the role of a mediator who would "appease disputes," explain price differences, and inform resellers about how quickly prices of their competitors would return to the agreed level.[25]

29. In a Belgian case involving concertation between suppliers and resellers of drugstore, perfumery and hygiene (DPH) products, the Belgian authority found that

[22] Press Release, Bundeskartellamt, Vertical Resale Price Maintenance in the Food Retail Sector – Majority of Fine Proceedings Concluded (June 18, 2015), *available at* https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/18_06_2015_Vertikalfall.html.

[23] *See* Higher Regional Court of Dusseldorf, judgment of 12 June 1990, WUW/E 4691; and Higher Regional Court of Munich, Case on Whitelisting I, GRUR 2017, 1147, 1151 (paras. 130 et seq).

[24] Austrian Supreme Court, Oct. 8, 2015, No. 16Ok2/15b (16Ok8/15k), ¶ 5.8.1, *available in German at* https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20151008_OGH0002_0160OK00002_15B0000_000.

[25] UOKiK President's decision of 18 September 2006, DOK-107/06, Polifarb Cieszyn Wrocław.

resellers had indirectly coordinated end-consumer prices of branded DPH products by exchanging information through suppliers.[26] The authority described four phases to the coordination which included suppliers and resellers.[27] According to the authority, the "core" of the infringement was at the reseller level but suppliers also played an important role. The authority has described the case as involving both a horizontal and vertical infringement.

30. A number of important points can be made in relation to the cases above:

1. All the cases above involve indirect exchanges/discussions of future behaviour. The cases in the U.S., the UK, Hungary, Chile and Peru all seek to, and in many cases do, identify and evidence a rim.
2. All the cases are also related to pricing. Hub and spoke approaches do not lend themselves to non-price theories of harm.
3. The UK and Hungary have developed a legal test (albeit moulded to the facts at issue in their cases) for hub and spoke infringements. Both focus on the passing of future strategic information but, crucially, also acknowledge that communications in vertical relationships are legitimate and therefore introduce a "state of mind" parameter to the test, for both the party passing and the party receiving the information.[28]
4. Based on the above, the theory of hub and spoke may be most suited to the scenario where, in addition to indirect exchanges/discussions of future behaviour, there is clear and compelling evidence of broad and effective consensus-building, manifesting an intention to reach a horizontal arrangement. Some such evidence was present in all of the cases in 1 above, with the exception of certain allegations in *Dairy* and *Tobacco* in the UK and in the Hungarian supermarkets case, where the evidence was explored but was found to be lacking.
5. In other cases (such as Austria, Germany, Poland and possibly Belgium), there seems less consistency of approach (or clarity) as regards hub and spoke theory. This may stem from the fact that these cases appear to involve RPM reinforced by bilateral vertical discussions. In the absence of clear and compelling evidence of horizontal consensus, *Business at OECD* respectfully agrees with the authorities

[26] Décision No. ABC-2015-I/O-19-AUD, Affaire CONC-I/O-06/0038 –Hausses coordonnées des prix de vente de produits de parfumerie, d'hygiène et de droguerie (June 22, 2015), *available in French at* https://www.abc-bma.be/sites/default/files/content/download/files/2015IO19-AUD.pdf.

[27] The authority distinguished four phases: (i) At the initiative of either the retailer or the supplier, the latter would pass a desired price increase to the retailers concerned, each for their own products. (ii) During the second phase, the price increase and the date on which the price increase would be applied were negotiated through the suppliers. Once a final agreement was made, the suppliers would pass all relevant information regarding the increase. (iii) The next phase was implementation of the agreement by the retailers. (iv) During the last phase, the suppliers had a supervisory role, sometimes assisted by the retailers, who would warn the suppliers in case of a deviation by a competitor and would request intervention. *Id.* at 8-9.

[28] As does, interestingly, the AG Opinion in the *Eturas* case in the EU. Case C- 74/14 Eturas and Others, Opinion of Advocate General ¶ 65 (July 16, 2015), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CC0074 [hereinafter Eturas AG Opinion]. *See also infra* ¶ 35.

concerned that it is appropriate to challenge these cases as vertical restrictions, albeit serious ones.

4. Hub and Spoke in the Digital Economy

31. This contribution focuses on when contacts and information exchange in a vertical context take on a horizontal, collusive character, such that the overarching arrangement amounts to a cartel.

32. While technology automates and enhances processes, this does not appear to have any substantive implications for when vertical contacts transform into evidence of horizontal agreement.

33. That is not to say that price matching software or contractual provisions such as MFN etc are irrelevant. However, a close analysis of market conditions and incentives will always be needed. Indeed, there may be multiple theories here which would militate against a generalised approach. For example, on the one hand, advanced price monitoring tools might lead to less fertile conditions for hub and spoke because increased transparency of retail prices reduces the need for resellers to use suppliers to help to maintain retail price levels. Alternatively, price matching software may result in price drops being replicated across the market at a much faster rate which could potentially translate into greater pressure (whether from supplier or reseller) to stabilise retail prices and more widespread effects. However, *Business at OECD* respectfully submits that these observations are not relevant for how those anticompetitive arrangements actually come into existence and how they should be prosecuted.

34. There may also be novel situations, but the traditional competition rules should continue to apply. For example, it is certainly possible that a third party provider of pricing algorithms could act, for some reason, as a hub for competitors who are seeking to outsource their pricing function. It is conceivable that a common industry-wide algorithm (using the same data and deploying the same algorithm, especially in a concentrated market), could reduce competition on price. However, *Business at OECD* submits that this is an economic outcome which may not, on the facts, involve intent, knowledge or coordination. Such a situation of parallel (but potentially independent vertical) agreements should be assessed but not using a per se or by object standard in the absence of evidence of horizontal collusion. The situation might be compared to where a supplier enters into numerous vertical but bilateral RPM agreements. There may be a horizontal impact on the market but, without horizontal coordination between resellers, that does not amount to and should not be treated as a per se horizontal violation.

35. Note that, in the *Eturas* case in the EU (involving, in broad terms, the sharing of pricing intentions between competitors facilitated by a joint platform), the Court did not find the hub and spoke theory to be relevant, instead assessing the conduct under EU information exchange and cartel facilitation case law. The AG had previously drawn a distinction between the facts of *Eturas* and hub and spoke, which "involves exchange of information between competitors via a common trading partner in vertical relations."[29] The AG emphasised that, unlike in the facts of *Eturas* (which concerned a message which was conveyed simultaneously to all undertakings concerned by their common trading partner), hub and spoke "calls for an additional consideration as to the state of mind of the parties

[29] Eturas AG Opinion, *supra* note 28, ¶ 65.

involved, since disclosure of sensitive market information between a distributor and its supplier may be considered as a legitimate commercial practice."[30]

36. A similar approach to the establishment of platforms was adopted by the German authority in the *XOM Metals* case. The authority was concerned that a platform where steel manufacturers and resellers could sell their products might increase market transparency and facilitate coordinated behaviour, but ultimately felt satisfied that there were appropriate mechanisms in place to prevent information exchanges as between competitors.[31]

37. One of the sectors that has been most scrutinised for potential price alignment through the use of platforms has been that of taxis. A class action launched against Uber and Kalanick in 2016 for allegedly conspiring with drivers to charge surge pricing during peak demand periods was not dismissed at first instance,[32] although it has been sent to arbitration on appeal (no outcome published).[33] The Competition Commission of India has also investigated Uber's business model, concluding that the use of the same algorithm by the drivers through the use of a common platform did not amount to cartel conduct in the absence of an agreement between the drivers to coordinate such prices between them.[34] In contrast, the Luxembourg competition authority decided in 2018 that Webtaxi, an application where individual taxi drivers sign up and charge customers prices calculated by a common algorithm, amounted to horizontal price fixing, although granted an individual exemption.[35]

38. If anything, these cases highlight the need for case by case analysis with careful assessment of market dynamics, business models and incentives.

5. Conclusion: The Challenges for Business and Competition Authorities

39. Business efficiency requires the law to allow suppliers the flexibility to disclose sensitive information (about current and future intentions) with resellers. This includes price, future promotions and investment plans, even comments and complaints about other market players. Both suppliers and resellers may provide this information—and a reseller might also pass information about a supplier's prices on to another supplier in order to secure the best possible deal.

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[30] *Id.*

[31] Press Release, Bundeskartellamt, Klöckner Allowed to Launch Digital Platform For Steel Products (Feb. 28, 2018), *available at* https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/28_02_2018_Kloeckner.html.

[32] Meyer v. Kalanick, 174 F. Supp. 3d 817 (S.D.N.Y. 2016).

[33] Meyer v. Kalanick, 291 F. Supp. 3d 526 (S.D.N.Y. 2018).

[34] Competition Commission of India: Order under Sec. 26(2) Competition Act 2002 in *Samir Agrawal v ANI Technologies Pvt. Ltd.*, Case No. 37, *available at* https://www.cci.gov.in/sites/default/files/37of2018.pdf.

[35] Press Release, Conseil de la Concurrence Luxembourg, Le Conseil de la concurrence exempte l'accord mis en place par Webtaxi S.à.r.l. sur le marché de la réservation préalable de taxis (June 8, 2018), *available in French at* https://concurrence.public.lu/fr/decisions/ententes/2018/decision-2018-fo-01.html.

40. The law needs to provide for these legitimate exchanges. After all, vertical agreements are usually efficiency-enhancing, and these types of interactions are usually in the consumer interest, as suppliers seek to improve supply chain efficiency and resellers seek to secure the best possible terms. From a business compliance perspective, it is critical that businesses be allowed to have open, detailed and sensitive conversations with their supply chain partners without fear of accusations of horizontal collusion.

41. It is the view of *Business at OECD* that the hub and spoke theory is best deployed, if at all, when there is both an act (e.g. passing of sensitive future pricing information or plans) and an intention to reach a coordinated outcome and the assessment should cater for both these elements accordingly.[36] The violation should be demonstrated on the basis of clear and compelling evidence, e.g. broad consensus-building, taken as a whole. We are also of the view that the evidence of both action and state of mind should be assessed for each of the alleged participants to analyse their individual participation.

42. This approach to hub and spoke would, in the view of *Business at OECD*, continue to permit the flexibility to discuss legitimate (albeit sensitive) matters with supply chain partners. It would also be fair and provide predictability since this approach would not risk implicating a reseller who had passed on information in a legitimate context only for the hub to try to use it to interfere with the pricing of another reseller. It would also provide legal certainty by sending a clear and comprehensible message that acting as a go-between or receiving assurances from a competitor indirectly (or other acts of consensus-building) would risk creating a hub and spoke cartel.

43. Where only the vertical aspects of a case are clear and compelling, *Business at OECD* respectfully submits that the case should only be challenged as a vertical violation, bearing in mind that there is nothing to prevent enforcers from sanctioning both parties (supplier and reseller) in particularly serious vertical restraint cases where both are culpable of contributing to the violation. Appropriately limiting hub and spoke enforcement as suggested would therefore not lead to under enforcement.

44. An overly broad approach to hub and spoke, conversely, which seeks to challenge parallel bilateral vertical agreements (without clear and compelling evidence of horizontal collusion impacting inter-brand competition), would, in *Business at OECD's* opinion, be both unwarranted and counter-productive. It is not needed to challenge serious vertical violations and might, for example, put otherwise lawful networks of resellers with exclusive territories (who may occasionally complain of incursions by other resellers) at risk of being seen as part of a horizontal geographic market-sharing cartel.

45. Finally, a further reason for avoiding an overly broad test blurring the line between horizontal and vertical restraints is that clarity in terms of the rules and enforcement practice will also ensure that leniency programmes retain their value with appropriate benefits for business and competition authorities alike. In countries where there is no immunity available for vertical infringements and discounts for cooperation in a vertical case are uncertain, applicants might seek to characterise a vertical RPM case as a horizontal hub and spoke case in order to be eligible for immunity. Many RPM cases could be exaggerated by an applicant wishing to increase its chance of obtaining immunity. Granting

[36] As noted above, the need to assess intention was not only built into the hub and spoke tests developed in the UK and Hungary but was also emphasised by the AG in *Eturas* who noted that hub and spoke "calls for an additional consideration as to the state of mind of the parties involved, since disclosure of sensitive market information between a distributor and its supplier may be considered as a legitimate commercial practice." Eturas AG Opinion, *supra* note 28, ¶ 65.

leniency to these arrangements when they lack a clear horizontal collusive element is likely to encourage lower quality leniency applications and would certainly result in lack of certainty around the boundaries of a cartel. By increasing the scope of cartels to catch conduct which is less serious and different in nature, competition authorities would be at risk of stifling procompetitive initiatives.