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Hub-and-spoke cartel – how to assess horizontal collusion in disguise?

Abstract

The increased effectiveness of competition law enforcement has contributed to the appearance of an atypical type of cartel, which engages not only competitors, but also their common supplier (or retailer). The so called hub-and-spoke cartel consists in the exchange of strategic information between two or more horizontal competitors (spokes) via a common contractual partner active at a different level of the production/distribution chain (the hub), who often also contributes to stabilizing a cartel. Due to the existence of the vertical element of this indirect information exchange, the question arises whether it should be assessed in the same way as its direct equivalent, i.e. as a "by-object" restriction of competition, thus, not requiring an analysis of its actual effects. Although the EU institutions have not adjudicated a hub-and-spoke collusion case yet, the jurisprudence of the national courts may provide useful guidance on what the constituent elements of the hub-and-spoke collusion are and how to assess this practice under the EU competition law. The analysis of both national and EU case law allows to contend that the hub-and-spoke cartels should amount to *de facto* horizontal information exchange and be assessed in accordance with the "by-object" standard. However, the hub-and-spoke collusion may equally constitute a part of a normal negotiation process (e.g. bargaining) with trading partners, as well as give rise to several efficiency gains, which should be taken into account in examining the practice concerned under the EU competition law.

Keywords: Hub-and-spoke cartels, atypical cartels, Article 101 TFEU, restriction of competition by object, information exchange between competitors, efficiency gains

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Kartel typu hub-and-spoke – ukryta zmowa horyzontalna?

Streszczenie

Zwiększona skuteczność w zakresie egzekwowania prawa konkurencji przyczyniła się do pojawienia się nietypowego rodzaju kartelu, który angażuje nie tylko konkurentów, lecz również ich wspólnego dostawcę (lub detalistę). Ten tzw. kartel typu hub-and-spoke polega na wymianie informacji strategicznych między dwoma lub większą liczbą konkurentów (tzw. *spoke*) za pośrednictwem wspólnego kontrahenta działającego na innym poziomie łańcucha produkcji/dystrybucji (tzw. *hub*), który zwykle przyczynia się do stabilizacji kartelu. Ze względu na obecność wertykalnego elementu tej praktyki, pojawia się pytanie, czy taką pośrednią wymianę informacji między konkurentami należy oceniać w taki sam sposób jak jej bezpośredni odpowiednik, tj. jako ograniczenie konkurencji ze względu na cel, niewymagające analizy jej rzeczywistych skutków. Pomimo że instytucje UE nie rozstrzygały jeszcze o legalności takich praktyk, orzecznictwo sądów krajowych może stanowić przydatną wskazówkę na temat elementów składających się na kartel typu hub-and-spoke oraz sposobu oceny tej praktyki w ramach prawa konkurencji UE. Analiza unijnego oraz krajowego orzecznictwa pozwala stwierdzić, że kartele typu hub-and-spoke stanowią *de facto* horyzontalną wymianę informacji i powinny być oceniane jak pozostałe ograniczenia konkurencji ze względu na cel. Należy mieć jednak na względzie, że kartele typu hub-and-spoke mogą również stanowić element normalnych negocjacji z partnerami handlowymi, a także, pod pewnymi warunkami, mogą prowadzić do przyrostu wydajności. Oba te elementy powinny być uwzględnione w badaniu zgodności danej praktyki z prawem konkurencji UE.

Słowa kluczowe: Kartele typu hub-and-spoke, nietypowe formy kartelu, Artykuł 101 TFUE, ograniczenie konkurencji ze względu na cel, wymiana informacji między konkurentami, przyrost wydajności

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Introduction

The European Commission has always attached high priority to the detection of cartels.[2] Article 101(1) TFEU[3], which together with Article 102 TFEU constitutes the core of the EU competition law, explicitly prohibits agreements, decisions by associations of undertakings and concerted practices that may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the internal market. Throughout the years the EU courts have established in their case law that anti-competitiveness of some types of agreements and concerted practices, both of horizontal and vertical nature[4], may be derived directly from their object.[5] Thus, in case of agreements that have the object of restricting competition (e.g. price fixing, market sharing, agreements restricting output or exchange of information between competitors that reduces uncertainty about future behavior[6]), it is not necessary to prove their anti-competitive effects.[7] In turn, when an agreement does not restrict competition

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2 R. Whish, D. Bailey, *Competition law*, Oxford 2012, p. 517. Also: Report on Competition Policy 2014, European Commission 2015, COM(2015) 247, pp. 13–14, available at: http://ec.europa.eu/competition/publications/annual_report/2014/part1_en.pdf.

3 Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.

4 An agreement is horizontal if it is entered into between actual or potential competitors. In turn, vertical agreements are agreements which are entered into between companies operating at different levels of the production or distribution chain. See: Guidelines on Vertical Restraints, OJ C 130, 19.05.2010, pp. 1–46, and Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.01.2011, pp. 1–72.

5 R. Whish, D. Bailey, op. cit., p. 118, also: Judgment in T-Mobile Netherlands and Others, C-8/08, EU:C:2009:343, paragraphs 28–30.

6 R. Whish, D. Bailey, op. cit., pp. 122–124. Also: European Commission, Guidance on restrictions of competition „by object" for the purpose of defining which agreements may benefit from the De Minimis Notice, available at: http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf.

7 R. Whish, D. Bailey, op. cit., p. 120. Also: Judgment in T-Mobile Netherlands and Others, C-8/08, EU:C:2009:343, paragraph 47. However, the parties to such an agreement may still defend themselves by proving that it satisfies the criteria of Article 101(3) TFEU (the burden of proving that rests on them). In order to satisfy Article 101(3) TFEU an agreement: (1) must contribute to improving the production or distribution of goods or to promoting technical or economic progress (2) while allowing consumers a fair share of the resulting benefit; (3) must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these

by object, it is necessary to demonstrate that it would have an anticompetitive effect.[8] The European Commission and the EU courts have examined and ruled in many cartel cases involving both types of restrictions, which most commonly took form of direct horizontal agreements or concerted practices between competitors, and imposed a considerable number of fines on undertakings participating in them.[9] Nevertheless, although the level of imposed fines is substantial[10], and bearing in mind that it is easier for private parties to claim compensation for the harm caused by antitrust violations[11], illegal agreements between competitors are still being detected.[12]

However, the era of these "traditional" cartels seems to be coming to an end. Undertakings are getting smarter in colluding and hence a growing number of horizontal arrangements engage not only competitors, but also their common supplier (or retailer).[13] The so called hub-and-spoke cartel, also known as A-B-C information exchange[14], consists in the exchange of strategic information between two or more horizontal competitors (A and C; spokes) via common contractual partner active at a different level of the production/distribution chain (B; the hub)[15], who often also contributes to stabilizing a cartel.[16] The hub-and-spoke collusion may

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objectives nor (4) afford such undertakings the possibility of eliminating competition in a substantial part of the products in question.

8 R. Whish, D. Bailey, op. cit., p. 120.

9 See: Cartel statistics available at: http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

10 See: Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.09.2006, pp. 2–5.

11 European Commission, The Damages Directive – Towards more effective enforcement of the EU competition rules, 2015, Competition policy brief, http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf. See also: Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, pp. 1–19.

12 See: Cartel statistics available at: http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

13 N. Sahuguet, A. Walckiers, *Selling to a cartel of retailers: a model of hub-and-spoke collusion*, "CEPR Discussion Paper" 2013, 9385, p. 1.

14 O. Odudu, *Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion*, "European Competition Journal" 2011, 7(2), p. 207.

15 E. Prewitt, G. Fails, *Indirect information exchanges to hub-and-spoke cartels: enforcement and litigation trends in the United States and Europe*, "Competition Law & Policy Debate" 2015, 1(2), p. 63.

16 P. Van Cayseele, *Hub-and-spoke Collusion: Some Nagging Questions Raised by Economists*, "Journal of European Competition Law & Practice" 2014, 5(3), pp. 2–4. The Prisoners' Dilemma game reveals that cartels are by nature unstable; while firms have an incentive to collude and coordinate their behavior so as to charge higher price, there is also a huge incentive for the colluding firm to cheat by charging lower price and thus earn more profits. Therefore, both reaching and sustaining

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have different forms[17], but typically a common supplier acts as a hub facilitating the flow of information (e.g. relating to future pricing) between competing retailers.[18]

It has already been settled that the vertical element of this practice reinforces horizontal coordination[19], but at the same time the question arises whether due to the presence of this vertical component an indirect horizontal information exchange should be assessed in the same way as its direct equivalent[20], i.e. as "by-object" restriction of competition.[21] This essay will attempt to find an answer to this question by, firstly, providing a concise analysis of the characteristics of hub-and-spoke collusion, and secondly, considering how it determines its competition assessment.

Constituent elements of the hub-and-spoke collusion

In order to properly address this question it is indispensable to identify the constituent elements of a hub-and-spoke cartel, which also help to distinguish it from the situations in which retailers can legitimately share information with suppliers as a part of a normal negotiation process (e.g. bargaining) with trading partners.[22] The latter should not be underestimated, since uncertainty over the legal treatment

a collusive equilibrium is very difficult. See: S. Bishop, M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, London 2010, pp. 167–168.

17 In particular, the hub-and-spoke collusion may also occur where a retailer acts as a hub for unlawful information exchange between two suppliers/manufacturers, e.g. Toys'R'Us case in US (Toys'R'Us, Inc., 126 FTC 415 (1998)). However, the retailer-supplier-competing retailer cases are more common. See: P. Whelan, *Trading negotiations between Retailers and Suppliers: A Fertile Ground for Anti-Competitive Horizontal Information Exchange?*, "European Competition Journal" 2009, 5(3), p. 825.

18 P. Van Cayseele, op. cit., p. 1. It is the fact that information exchange is facilitated by a common supplier (or retailer) that distinguishes the hub-and-spoke collusion from other types of the indirect information exchanges (e.g. through trade association or third party not related to the competitors).

19 N. Sahuguet, A. Walckiers, op. cit., pp. 1–3.

20 P. Whelan, op. cit., pp. 826, 844.

21 „An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings" (Judgment in T-Mobile Netherlands and Others, C-8/08, EU:C:2009:343, paragraph 43). Also Judgment in Cimenteries CBR SA and Others *vs* Commission, T-25/95, EU:T:2000:77, as well as Judgment in Aalborg Portland A/S and Others *vs* Commission, C-204/00 P, EU:C:2004:6.

22 P. Whelan, op. cit., p. 823.

of information exchanges on the part of undertakings may have negative impact on their functioning and thus also on competition itself.[23]

Although the European Commission (the "EC")[24] has expressed the concern about indirect information exchange[25], until now it has not issued any guidelines[26], neither has there been any cases at the EU level, which would provide a full legal assessment by the EC and EU courts of hub-and-spoke collusion.[27] However, there have been several cases against hub-and-spoke cartels at the national level in some European countries such as the UK, Belgium, Germany[28] and Poland[29], which provide useful guidance in analyzing this practice and identifying its essentials.

Two-phase phenomenon

The hub-and-spoke collusion is described in the UK jurisprudence as a "two-phase phenomenon", each phase consisting of two elements.[30] The first phase (A-B phase) involves (1) a direct exchange of commercially sensitive information between A and B and (2) the intention to disclose this information to one or more of A's competitors. In the second phase (B-C phase) (3) B passes that information to C and (4) C, confident that the information is credible, relies on it in determining its own future

23 European Competition Lawyers Forum, *Comments on the Draft Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements*, 2010, p. 7. Also: O. Odudu, *Indirect...*, op. cit., p. 214.

24 „Information exchange can take various forms. Firstly, data can be directly shared between competitors. Secondly, data can be shared indirectly through a common agency (for example, a trade association) or a third party such as a market research organisation or **through the companies' suppliers or retailers**" (Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1, 14.01.2011, paragraph 55, hereinafter referred to as: **Guidelines on horizontal co-operation agreement**).

25 O. Odudu, *Indirect...*, op. cit., p. 205.

26 O. Odudu, *Hub and Spoke Collusion*, [in:] I. Lianos, D. Geradin (eds.), *Handbook on European Competition Law*, Cheltenham 2013, p. 245.

27 The only hub and spoke case dealt by the EC so far has been the e-Books case. However, as the case was settled it did not provide a full legal analysis of the hub-and-spoke practice. See: Case COMP/AT.39847 – E-Books.

28 N. Sahuguet, A. Walckiers, op. cit., pp. 2–4.

29 A. Bolecki, *Polish Antitrust Experience with Hub-and-Spoke Conspiracies*, "Yearbook of Antitrust and Regulatory Studies" 2011, 4(5), pp. 26–46.

30 Case 1188/1/1/11, Tesco *vs* Office of Fair Trading [2012] CAT 31, citing: O. Odudu, *Hub...*, op. cit., p. 246.

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market behavior (e.g. future pricing intentions).[31] Although it is a test developed on the national level, it is likely that the EU institutions (i.e. the European Commission and the EU courts) will use it as well while assessing such arrangements in the future.[32] As the test includes several concepts that can be interpreted ambiguously, I will discuss some of them below on the basis of the case law and the opinions of the jurisprudence in that respect.

Information exchanged and possible pro-competitive effects

Firstly, it should be indicated that not all forms of information exchange are prohibited under competition law. The EC explicitly refers only to the exchange of *strategic* information[33], and UK jurisprudence – to *commercially sensitive* information.[34] Specifically, it is apparent from the case law that the EC tends to prohibit the exchange of individual information[35] which occurs on a regular basis and involves data such as future pricing intentions, investment strategies, capacity increases or individual sales data.[36]

In turn, the Commission recognizes that exchange of aggregated, statistical and/or present and historical data, may bring about several pro-competitive effects.[37] In particular, the exchange of such information may reduce information asymmetry, and thus contribute to more efficient operations of markets.[38] Furthermore, knowledge about the rivals' costs may enhance these companies' internal

31 Idem, *Indirect*..., op. cit., p. 218. Also: Case 1021/1/1/03 and 1022/1/1/03, JJB Sports Plc *vs* Office of Fair Trading; Allsports Limited *vs* Office of Fair Trading [2004] CAT 17, paragraph 141, citing: O. Odudu, *Hub*..., op. cit., p. 251.

32 Idem, *Hub*..., op. cit., p. 246.

33 The concept of strategic information is defined as data that reduces strategic uncertainty in the market. In practice, it involves information related to prices, customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes and their results. See: Guidelines on horizontal co-operation agreements, paragraphs 61 and 86.

34 O. Odudu, *Indirect*..., op. cit., p. 230.

35 P. Whelan, op. cit., p. 830.

36 Ibidem, p. 831, and the case law cited therein.

37 Guidelines on horizontal co-operation agreements, paragraphs 57, 89–91, 100. Also: P. Whelan, op. cit., p. 830.

38 Guidelines on horizontal co-operation agreements, paragraph 57. The information exchange may enable better forecasting of oversupply and undersupply and thereby reduce probability of unsatisfied consumer demand.

efficiency if they benchmark each other's best practices and adapt their incentive structures correspondingly.[39] The sharing of information may also contribute to significant cost savings by allowing companies to reduce their inventories, enabling faster delivery of perishable goods to consumers, or solving the problems arising from unstable demand.[40] Moreover, it is also indicated that under certain circumstances, exchanging information about future intentions may generate efficiency gains.[41] Nonetheless, it would be rather difficult to find a pro-competitive justification for an information exchange, whose subject is fixing such parameters of competition as price or quantities.[42]

Moreover, also the manner of information exchange may influence the assessment of its lawfulness. Whereas the exchange of information in a private setting may lead to the violation of Article 101 TFEU, public communications are less likely to result in an anticompetitive outcome.[43]

In light of the above considerations, in practice, a proper assessment of the information exchanged can be difficult. The data are often ambiguous[44] and, as mentioned before, at this stage it may also be difficult to distinguish the information exchange facilitating anticompetitive conduct from one constituting an element of the trading negotiations[45], or an instance of healthy competition generating efficiency gains.

Intention of the participants

Secondly, with regard to the requirement of intention, so far two approaches have been identified in the national courts' case law. According to the first one, adopted by the UK Competition Appeal Tribunal, the *constructive* knowledge is sufficient

39 Ibidem, paragraph 95.

40 Ibidem, paragraphs 57, 96.

41 By knowing upfront that certain company won the R&D race, the competitors may avoid duplication R&D expenditures and waste of unrecoverable resources. See: ibidem, paragraph 100.

42 Ibidem, paragraphs 59, 74.

43 Ibidem, paragraph 94. Also: P. Whelan, op. cit., p. 832.

44 For example, sending a till receipt indicating a price increase of A to competing retailers may be indicative of unlawful information exchange in view of competition authorities. However, supplier may defend himself stating that such information was already made public. See: CRA, Effects Analysis in Hub and Spoke Cartels, 2010, p. 2.

45 O. Odudu, *Indirect...*, op. cit., p. 209.

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in order to establish a concerted practice.[46] However, this approach was criticized by the UK Court of Appeal in the case Argos and Littlewoods *vs* Office of Fair Trading and JJB Sports *vs* Office of Fair Trading[47], which stated that *actual* knowledge and intent of the parties involved is required.[48] It should be understood that both the retailer and its competitor should have an *actual* knowledge of the role played by the supplier (as opposed to a *constructive* knowledge).[49]

It has been indicated that the approach of the Court of Appeal is more likely to be adopted at the EU level[50], since it corresponds to the EU jurisprudence concerning the concept of a "concerted practice", which "refers to a form of coordination between undertakings by which (...) practical cooperation between them is **knowingly** substituted for the risks of competition".[51] In this respect, it should also be emphasized that in the first phase (A-B) there is a strong presumption of legality and the burden to prove the opposite is on the complainant (most likely a competition authority).[52] A good example of the existence of the intention or actual knowledge on the part of the participants can be a bidirectional flow of information.[53]

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46 In case JJB Sports plc *vs* Office of Fair Trading, the CAT held that an anti-competitive concerted practice exists „if one retailer 'A' privately discloses to a supplier 'B' its future pricing intentions in circumstances where it is **reasonably foreseeable** that B might make use of that information to influence market conditions, and B then passes that pricing information on to a competing retailer 'C'". See: Case 1022/1/1/03 JJB Sports plc *vs* Office of Fair Trading [2004] CAT 17, paragraph 659.

47 Case 2005/1071, 1074 and 1623 Argos and Littlewoods *vs* Office of Fair Trading and JJB Sports *vs* Office of Fair Trading [2006] EWCA Civ 1318, citing: P. Whelan, op. cit., pp. 837, 844.

48 The UK Court of Appeal emphasized requirement of intent on part of all participants to hub-and-spoke collusion, which takes place when: "(1) retailer 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 retailers (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". See: Case 2005/1071, 1074 and 1623 Argos Limited and Littlewoods Limited *vs* Office of Fair Trading and JJB Sports Plc *vs* Office of Fair Trading [2006] EWCA Civ 1318, paragraph 141.

49 In turn, the US Courts require to show that there is a horizontal agreement between spokes/competitors. As a rule, this so called "rim requirement" is indispensable in establishing the existence of a hub-and-spoke cartel. See: B. Orbach, *Hub-and-Spoke Conspiracies*, "Arizona Legal Studies Discussion Paper" 2016, 16(11), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2765476, pp. 3–4.

50 P. Whelan, op. cit., pp. 837, 844.

51 Judgment in T-Mobile Netherlands and Others, C-8/08, EU:C:2009:343, paragraph 26.

52 O. Odudu, *Hub*..., op. cit., p. 249.

53 It refers to a situation where A discloses commercially sensitive information to B, and also obtains commercially sensitive information from B coming from C. See: ibidem, p. 250.

The approach requiring actual knowledge on the part of undertakings in order to identify a concerted practice seems to ensure more legal certainty than the notion of constructive knowledge and the reasonable foreseeability test. It would presumably help to avoid excessive condemnation of a conduct that is inherent in operating most businesses, and seems also to better correspond to the prevailing market conditions, where such an information exchange is undertaken on a daily basis without having any anticompetitive intention.

Unilateral disclosure and Anic presumption of reliance

However, the EC and the Court of Justice of the European Union (the "CJEU") agree in that unilateral disclosure of information can also constitute a concerted practice[54], and thus no proof of reciprocity is needed in order to establish collusion.[55] In addition, the CJEU in the Anic case established the presumption that undertakings rely on the information disclosed[56] (i.e. the evidential burden to prove the opposite is on the undertakings), and doing nothing in relation to the information disclosure is considered as a tacit approval of the concerted practice.[57] The undertakings concerned should promptly repudiate that information without undue delay in order to rebut that presumption, in particular by demonstrating that following the disclosure they acted independently.[58]

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54 „When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour" (Guidelines on horizontal co-operation agreements, paragraph 62).

55 P. Whelan, op. cit., p. 828.

56 „Subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period" (Judgment in Commission *vs* Anic Partecipazioni SpA, C-49/92 P, EU:C:1999:356, paragraph 121).

57 „A party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable" (Judgment in Aalborg Portland A/S and Others *vs* Commission, C-204/00 P, EU:C:2004:6, paragraph 84).

58 There are certain requirements that a firm should fulfil in order to "publicly distance" itself from a cartel; however, it is not required that a firm "blow the whistle" to a competition authority. See: D. Bailey, *"Publicly Distancing" Oneself from a Cartel*, "World Competition" 2008, 31(2), pp. 177–203.

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Hub-and-spoke collusion as restriction by object within the EU law setting

As explained above, the presence of vertical element (the hub) introduces several peculiarities into the legal assessment of the hub-and-spoke collusion, which is not so evident as in the case of direct information exchange.[59] However, it should be stressed that the assistance of a hub, who acts as a conduit for communication between competitors[60], makes the cartel even more stable, efficient and difficult to detect by competition authorities, compared to regular cartels. Hence, it may be assumed that unlawful information exchange with the help of a hub is even more harmful to competition. Therefore, if the requirements of the above mentioned test are fulfilled and the practice has actually a horizontal effect, it should amount to a *de facto* horizontal information exchange.[61]

Consequently, it would seem justified for the EC and EU courts to apply the same standard as in the case of direct information exchange, i.e. assess the hub--and-spoke collusion as a restriction by object. In that regard, it should be noted that classifying such conduct as a restriction by object does not equate to its *per se* illegality. Thus, there should still be room for an undertaking to exempt itself on the basis of Art. 101(3) TFEU.[62] In particular, undertakings may raise several efficiency claims (such as cost savings, increase of their internal efficiency, better catering for unstable consumer demand, or reduction of transaction costs), which may be brought about by the conduct concerned and were touched upon above.

This conclusion could be confronted with the approach endorsed by US courts. In the recent E-book case, whereas Apple entered into several vertical agreements with publishers which facilitated horizontal price-fixing among them, it was held that a hub-and-spoke conspiracy having as its object price-fixing is illegal *per se*.[63] It confirmed the stance of US courts, according to which a hub-and-spoke collusion may be *per se* unlawful if the underlying horizontal agreement among the spokes is illegal *per se* (for example, price fixing or sharing customer markets).[64] This approach, although it does not seem to be at odds with the EU competition law

59 P. Whelan, op. cit., p. 833.

60 Ibidem, p. 834. Also: O. Odudu, *Indirect...*, op. cit., p. 215.

61 P. Whelan, op. cit., p. 834.

62 OECD, Information Exchanges Between Competitors under Competition Law, 2010, p. 287, available at: http://www.oecd.org/competition/cartels/48379006.pdf.

63 United States *vs* Apple, Inc., 791 F.3d (2nd Cir. 2015), at 325.

64 B. Orbach, op. cit., p. 1.

treatment of the so called hardcore restriction of competition[65], should be rather considered as controversial[66], and, as unduly rigid and formalistic, should not be pursued by the EU institutions in the assessment of hub-and-spoke collusion cases.

Moreover, the question may arise whether a hub-and-spoke cartel, due to its vertical constituents, may fall under the Block Exemption Regulation.[67] As indicated therein, the benefit of the block exemption is granted to certain categories of vertical agreements and concerted practices, for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) TFEU.[68] However, as proven in this paper, although hub-and-spoke cartels involve vertical elements, their role is limited to facilitating horizontal conspiracy, and they cannot be considered as separate vertical agreements. Thus, since a hub-and-spoke cartel constitutes, in fact, a horizontal agreement or concerted practice, it cannot enjoy the benefit of the block exemption.

Participation and liability of a hub

Furthermore, in order to complement the presented picture of the hub-and-spoke collusion, the reasons for participation of a hub in the whole scheme and his liability should be presented.

Basically, from an economic point of view, the supplier should object to the collusion taking place at the retail level, since the price increase downstream resulting therefrom may lead to lower profits for him upstream. However, there are several rationales for B to facilitate the cartel.[69] Actually, the supplier may be content with the effective downstream collusion, which could be more profitable for him than price wars and fierce competition, as it may lead to higher profits for him

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65 See for example: Article 4 of the Commission Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102/1, 23.04.2010.

66 The dissenting judge rejected application of the *per se* prohibition rule to hub-and-spoke conspiracies. See: United States *vs* Apple, Inc., 791 F.3d (2nd Cir. 2015), at 345–346.

67 Commission Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102/1, 23.04.2010.

68 Recital 5 of the Commission Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102/1, 23.04.2010.

69 CRA, op. cit., pp. 2–3.

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upstream.[70] By orchestrating the collusion, and thus weakening the competition, he may also be able to prevent retailers from bargaining with him over wholesale price and consequently charge higher prices for his products, which in turn increases his financial gains.[71] In addition, it has also been proved that the supplier has an incentive to support the cartelists, since an inefficient cartel could prove even more costly for the supplier than the efficiently functioning one.[72] For these reasons, the hub may be interested in supporting a cartel and play an important role in stabilizing it, e.g. by punishing downstream deviator by refusing to supply.[73]

An interesting question within the hub-and-spoke collusion scheme concerns also the liability of a hub. The European case law does not clarify the issue whether a hub is considered to be a party to the anticompetitive agreement and, if so, on which basis he could be held liable. However, the recent judgment in AC-Treuhand, although not directly concerning the hub-and-spoke collusion, may provide useful guidance. The CJEU held that even an undertaking which is not active in the cartelized market but contributes actively and in full knowledge of the relevant facts to the operation of a cartel could be treated as a party to a horizontal agreement.[74] Therefore, it can be expected that a hub, acting obviously as a cartel facilitator, can be assessed accordingly.[75]

Conclusion

The hub-and-spoke collusion is a complex arrangement which requires closer attention on the part of the national and EU competition authorities. In the view of the existing case law and legal considerations it seems justified to classify a hub-and-spoke cartel as a "by-object" restriction of competition, and thus not requiring an analysis of its actual effects. This is of major importance also for a hub, who under recent case law is not likely to avoid liability for his participation in illegal arrangements of this kind.

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70 P. Van Cayseele, S. Miegielsen, *Hub-and-Spoke Collusion by Embargo*, "CES – Discussion Paper Series" 2013, 24, p. 4.

71 O. Odudu, *Indirect*..., op. cit., p. 217.

72 N. Sahuguet, A. Walckiers, op. cit., p. 14.

73 P. Van Cayseele, S. Miegielsen, op. cit., p. 2.

74 Judgement in AC-Treuhand AG *vs* Commission, C-194/14, EU:C:2015:717, paragraph 38.

75 G. De Stefano, *AC-Treuhand Judgment: A Broader Scope for EU Competition Law Infringements?*, "Journal of European Competition Law & Practice" 2015, 6(10), p. 689.

The analysis of the crucial elements of the hub-and-spoke collusion and the test presented above may serve as a useful tool in the examination and detection of such, in fact, horizontal concerted practices. Since the test derived from the UK jurisprudence seems to be in line with the hitherto prevailing EU competition case law, it may seem reasonable for the EU institutions to embrace it in the assessment of future hub-and-spoke cartel cases.

However, it should be also taken into account that the information exchange between suppliers and retailers may equally constitute a ubiquitous and widely acceptable part of business negotiations. Therefore, competition authorities should be both wary and careful while applying the standard of assessment presented above in pursuing hub-and-spoke cartels, so as not to deter firms from undertaking their normal business activities and thus not to create undesirable legal uncertainty.

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