

NATIONAL COMPETITION AUTHORITIES' INVESTIGATIONS IN HUB-AND-SPOKE ARRANGEMENTS: A CRITICAL REVIEW

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EU competition law rests on two principles. The first principle is that every undertaking must independently determine the policy it intends to adopt on the market.¹ This requirement of independence prohibits a company from having any direct or indirect contact that: (i) influences an actual/potential competitor's conduct on the market or (ii) involves disclosing to an actual/potential competitor the course of conduct that the company has decided to adopt or contemplates adopting on the market.² The second principle is that undertakings will come up with any number of creative solutions to circumvent the first principle.

One of these solutions is what is commonly referred to as an "A-B-C" or "hub-and-spoke" exchange. These types of illicit information exchanges, when done effectively, are both difficult to detect and prove. Possibly as a result of this, competition authorities have only recently begun using their ever improving investigative tools to address this type of anticompetitive conduct. This article will look at: (i) what is and is not a hub-and-spoke exchange; (ii) why hub-and-spoke exchanges can be difficult to prove; and (iii) why it is unlikely that there will be a sudden spike in the number of hub-and-spoke exchange cases.

I. The great and elusive Hub-and-Spoke exchange

A hub-and-spoke exchange is a specific type of illicit information exchange. It involves an *indirect* exchange of confidential information between

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¹ Joined Cases 40-48, 50, 54-56, 111, 113 and 114/73, *Coöperatieve Vereniging "Suiker Unie" UA and others v. Commission* [1974] ECR 1663, para. 173.

² *Ibid.* at para. 174.

competitors. The exchange normally occurs between competing distributors via a common supplier and typically concerns prices. However, it can also work with competing suppliers exchanging information via a common distributor. The essence of the hub-and-spoke exchange lies in the fact that there is no direct contact between competitors. In sum, it is a horizontal collusive behaviour with a vertical component.

A hub-and-spoke exchange can be an independent anticompetitive agreement or concerted practice or it can be part of a broader anticompetitive scheme. Where the main economic function of the agreement or concerted practice lays in the hub-and-spoke exchange itself, the hub-and-spoke exchange is an independent conduct. If, however, the main objective of a given conduct is to fix prices directly in the more traditional sense and the hub-and-spoke mechanism is used as a tool to facilitate or monitor it, then it is simply part of a wider anticompetitive conduct.

The concepts of agreement and concerted practice are often used in combination or interchangeably by regulators to capture different forms of harmful coordination and collusive activities between independent economic operators. Thus, where the investigative authority cannot prove that the investigated undertakings have entered into an anticompetitive agreement, it may nevertheless hold them liable under EU competition law on the basis that they have engaged in an anticompetitive concert.³ The UK Court of Appeal, one of the most often cited authorities on hub-and-spoke exchanges, does not appear to get too bogged down by having to distinguish between an agreement and concerted practice in its review of two hub-and-spoke exchanges in *Toys and Replica Kits*, although it finally holds that a concerted practice took place in *Replica Kits*.⁴ The UK Competition Appeal Tribunal ("CAT"), in *Cheese*, however, speaks specifically and consistently of concerted practices.

In the most widely cited cases on hub-and-spoke exchanges, the relevant tribunal or authorities have looked at the conduct as a concerted practice. Therefore, in the following section we look at how EU competition law defines concerted practice.

³ Case C-49/92, *Anic Participazione v. Commission* [1999] ECR I-4125, para. 112.

⁴ Court of Appeal [2006] EWCA Civ 1318, *Argos Limited and Littlewoods Limited v. OFT and JJB Sports Plc v. OFT* ("Toys and Kits"), para. 106.

A. Concerted Practice

A concerted practice is a form of coordination whereby a company eliminates or, at the very least, substantially reduces uncertainty as to the type of conduct its competitors can expect from it on the market.⁵ This can be contrasted with an anticompetitive agreement; the collusive behaviour of a concerted practice does not require the participants to adhere to a common plan that defines their actions in the market. Rather, it is enough if the participants “knowingly *adopt or adhere to collusive devices which facilitate the coordination of their commercial behavior*” (emphasis added).⁶

Under well-established case-law, an illegal concerted practice exists when the following three conditions are cumulatively met:

- The undertakings are taking part in a concerted practice;
- The participating undertakings’ subsequent market behaviour is different from what it would have done in the absence of the concertation; and
- There is a causal link between the concert and the conduct on the market.⁷

At first glance, the fact that three conditions must be met is quite daunting. However, as we look at each one in turn, we discover that the proverbial deck may not be stacked against competition authorities.

First, the concept of a concerted practice requires the existence of a concertation between undertakings. This concertation can be direct or indirect – EU competition law is more concerned with function than form.⁸ Usually, concertation is evidenced from a number of coincidences and indicia, which taken as a whole, and in the absence of alternative plausible explanations, point to the existence of an illicit collusive behaviour among competitors. Of course, in order to amount to a harmful conduct, the key issue is whether the concert is capable of removing uncertainty

⁵ Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, *Cimenteries CBR and others v. Commission* [2000] ECR II-491, para. 1852; see also *Imperial Chemical Industries Ltd (“ICI”) v. Commission* [1972] ECR 619, para. 64.

⁶ *Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements*, para. 60; Case 40/73, *Suiker Unie and others v. Commission*, para. 26; Case 48/69, *ICI v. Commission*, para. 64.

⁷ Case C-199/92 P, *Hüls AG v. Commission* [1999] ECR I-4287, para. 161.

⁸ Joined Cases C-89/85, C-104/85, C-114/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö and others v. Commission*, Opinion of AG Darmon [1992] ECR O-1449, para. 170.

among competitors. In this regard, the subject matter of the concert must be such as to influence the conduct that the concerting parties will adopt. Accordingly, to fall within the scope of Article 101(1) of the Treaty on the Functioning of the European Union (“TFEU”), the practice must affect an *important parameter* of competition capable of removing uncertainty among participants. This point shows up again when we look at the third condition.

Finally, in order to fall under the prohibition, the case-law requires “reciprocity” among the concerting undertakings, since Article 101 TFEU does not apply to undertakings’ unilateral actions.⁹ This notion of reciprocity is somewhat misleading. One undertaking merely has to share strategic information with another undertaking, and that receiving undertaking must accept it. In *Cimenteries*, the General Court (“GC”) found that Lafarge had taken part in a meeting where its competitor Buzzi communicated strategic information regarding its position in the market. Since Lafarge had not objected when Buzzi gave this information, the GC ruled that the condition of reciprocity was met.¹⁰ However, more recently, in *Eturas*, the Court of Justice (“CoJ”) clarified that participation in a concerted practice arising in the virtual world may not be presumed from the mere dispatch of an e-communication by the administrator of an online platform to its user community. A consistent and objective body of evidence that the recipients: (a) were aware or ought to have been aware of the illicit content of the e-communication and (b) did not object to it, is necessary in order to implicate them in the conspiracy.¹¹

The second condition requires subsequent conduct on the market.¹² However, this condition does not mean that the conduct should necessarily produce anticompetitive effects. Rather, for this condition to be satisfied, the undertakings only have to remain on the market after concerting.

The third and final condition is that there is a causal link between the concertation and the subsequent behaviour on the market. On this point, in *Anic*, the CoJ ruled:

⁹ *Ibid.* at paras 170-175.

¹⁰ *Cimenteries CBR SA v. Commission*, para. 1849; see also Joined Cases T-202/98, T-204/98 and T-207/98, *Tate & Lyle* [2001] ECR II-2035, paras 57-58. In *Tate & Lyle*, British Sugar had informed its competitors, Tate & Lyle and Napier Brown, of the conduct that it intended to adopt on the sugar market in Great Britain. The European Commission, upheld by the GC, found that Napier Brown, by merely receiving such information, had participated in a concerted practice.

¹¹ Case C-74/14, *Eturas UAB and others v. Lietuvos Respublikos konkurencijos taryba* [2016] not yet published, para. 39.

¹² *Commission v. Anic Partecipazione*, para. 118.

*“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.”*¹³

The *Anic* presumption is based on the notion that a participating undertaking cannot help but adapt its behaviour on the market in light of the strategic business information it received from or exchanged with its competitors. This presumption maybe rebutted. However, the evidential burden appears so high that the presumption is arguably quasi-irreversible,¹⁴ unless the undertaking brings convincing evidence of public distancing.¹⁵ In *Westfalen Gassen Netherlands*, the fact that an undertaking merely left a meeting was deemed insufficient because it was not accompanied by an affirmative distancing statement.¹⁶

In light of the foregoing, proving a concerted practice would at first sight appear to take little effort: (i) competitors facilitate some type of coordinated commercial behaviour; (ii) the same competitors alter their behaviour on the market; and (iii) criteria (i) and (ii) are related – and there is even a presumption that they are.¹⁷ However, all is not as it seems, particularly, where the horizontal collusive conduct is achieved indirectly through the assistance of a common trading partner (*i.e.* a supplier, service provider, or customer). Proving a hub-and-spoke concerted practice is difficult as the first condition – *i.e.*, requiring participation in a concert –, mandates that the competition authorities, and the reviewing courts, get into the intent of the competitors in question to look for some type of “meeting of the minds”.

¹³ *Ibid.* at para. 121; see also Case C-8/08, *T-Mobile Netherlands BV* [2009] ECR I-4529, para. 61.

¹⁴ See Case C-449/11 P, *Solvay Solexis* [2013] ECLI:EU:C:2013:802, para. 39, where the CoJ found that Solvay could not rely on the fact that its prices significantly decreased during the infringement period to reverse the presumption that it had taken account and used the information received from its competitors during the collusive meetings.

¹⁵ Joined Cases T-147/09 and T-148/09, *Trelleborg Industrie SAS and Trelleborg AB v. Commission* [2013] ECLI:EU:T:2013:259, para. 68. In *Trelleborg*, the GC noted that, where an undertaking merely attended an anticompetitive meeting without actively participating to the discussion (see Section 2), it may prove that it did not adhere to the collusion by “distanc[ing] itself openly and without equivocation from the cartel, so that the other participants are aware that it no longer supports the general objectives of the cartel”. The public distancing defense requires proof of a “firm and unambiguous disagreement.”

¹⁶ Case T-303/02, *Westfalen Gassen Nederland BV v. Commission* [2006] ECR II-4567, para. 126.

¹⁷ We should point out here that underlying idea of ‘concerted practice’ is equally applicable to the vertical relationship between a supplier and a distributor/dealer. For example, pricing intentions are highly confidential matters that would not be disclosed in advance between parties in normal circumstances. See *Toys and Kits*, para. 127 citing Cases 1014 & 1015/1/03, *Argos Ltd and Littlewoods Ltd v. OFT* [2004] CAT 24 (“*Toys and Games*”) para. 703.

B. Proving an Illicit Hub-and-Spoke Exchange

To our knowledge, there are no EU cases dealing specifically with a concerted practice by virtue of indirect contacts between two or more undertakings via a common supplier or retailer.¹⁸ To date, only the National Competition Authorities (“NCAs”) have been willing to tackle hub-and-spoke exchanges. While the United Kingdom, German, Austrian and Belgian authorities have been particularly active in recent times, the most widely cited cases on hub-and-spokes exchanges are cases initiated by the UK’s Office of Fair Trading (“OFT”) (now the Competition & Markets Authority or “CMA”), although for the concerted practice analysis they relied on EU jurisprudence.

The CAT, with some assistance from the UK Court of Appeal, has provided guidance as to how a concerted practice via a potential hub-and-spoke exchange should be analysed. While the European Commission (EC) has yet to take on a true hub-and-spoke exchange, we view the below five-pronged test as a good means to evaluate whether specific conduct may be caught by Article 101(1) TFEU.

While the necessary state of mind is still being debated – as discussed in the next section –, the constitutive elements of a hub-and-spoke are as follows:

1. Competitor A discloses to Supplier/Retailer B its future (pricing) intentions.
2. Competitor A may be taken to intend or foresee that Supplier/Retailer B will make use of that information to influence market conditions by passing on the information to other companies that may compete with A.
3. Supplier/Retailer B does, in fact, pass that information on to Competitor C. It is not necessary for B to pass on all or even the most salient of the confidential (retail pricing) information in its possession.¹⁹
4. Competitor C may be taken to know the circumstances in which the information was disclosed by Competitor A to Supplier/Retailer B.

¹⁸ The Apple *e-books* case closed with a commitment decision rather than an infringement decision. While the EC makes references to direct and indirect contacts among the five publishers and Apple, it focuses more on what the parties were communicating amongst themselves (e.g., most-favour-nation (“MFN”) clauses and wholesale model vs. agency model) rather than how they were communicating amongst themselves.

¹⁹ Case 1188/1/11, *Tesco Stores Ltd, Tesco Holdings Ltd and Tesco Plc v. OFT* [2012] CAT 31 (“Cheese”), para. 248.

(C must be shown to have appreciated the basis on which Competitor A provided the information to Supplier/Retailer B.)²⁰

5. Competitor C does, in fact, use the information in determining its own future pricing intentions.²¹

On this final prong, there is, however, a presumption – the *Anic* presumption, mentioned above – that when a company receives information about a competitor, it uses that information when determining its own conduct on that market. In order to rebut the *Anic* presumption in the context of a potential hub-and-spoke exchange, Competitor C would presumably have to get up in the middle of a meeting or during an exchange with its supplier/retailer B and write a note to the file and state to B that it did not want this type of information.²² Alternatively, although the burden is set very high (as often this may not be considered enough to escape liability), Competitor C would have to show that it consistently departed from the Competitor A's minimum prices communicated by B by charging systematically lower prices and discounts to its customers.

C. A Hub-and-Spoke State of Mind

While “*mens rea*” or “subjective intent”²³ are relevant but not necessary elements to establish an infringement under EU competition rules, the notion of a mental consensus does exist in EU competition case-law.²⁴ The consensus does not have to be achieved verbally, and can come about by direct or indirect contact among the parties.²⁵ This state of mind is relatively easy to grasp when an undertaking is directly sharing competitively sensitive information with a competitor. But, this mental consensus whereby practical cooperation is “knowingly” substituted for competition is the crux of the problem in proving an illicit hub-and-spoke exchange. How do you show consensus when the contact is indirect, in particular, when the information is shared via a common supplier or retailer during what could otherwise be legitimate business discussions? The CAT clearly appreciates this point in *Cheese*:

²⁰ *Id.* at para. 85.

²¹ *Id.* at para. 57; *Toys and Kits*, para. 141.

²² See also *Eturas UAB and others v. Lietuvos Respublikos konkurencijos taryba*, para. 48.

²³ OJ 2004 C 101, “Guidelines on the application of Article 81(3) of the Treaty,” para. 22.

²⁴ *Suiker Unie and others v. Commission*, para. 26; *ICI v. Commission*, para. 64; see also *Competition Law*, 6th edition, by Professor WHISH, at page 105 and *Toys and Kits*, para. 22.

²⁵ *Toys and Kits*, para. 27.

*“It is important to consider why the retailer’s state of mind matters in a case of this kind. Where commercially sensitive information is disclosed directly by retailer A to retailer C, it is often unnecessary to go behind the fact of the disclosure in order to assess the parties’ states of mind. The mere fact of a direct communication of future retail pricing intentions between horizontal competitors is almost invariably sufficient to demonstrate that each acted with the requisite state of mind (although it is conceivable that there may be rare situations where this is not the case). Where supplier B is interposed between A and C, however, there can be no presumption as to A’s state of mind. The onward transmission of A’s pricing intentions to one of A’s competitors, C, is made by their common supplier, B. It is therefore incumbent on a competition authority to demonstrate that A acted with the relevant state of mind to avoid A being held strictly liable for the conduct of B, over whom it may have limited control.”*²⁶

The EU case-law on concerted practices and the UK Court of Appeal in its *Toys and Kits* judgment refer to Competitor A having *intent* or *actual foresight* that the information it gives to B will eventually be given to Competitor C. In the same judgment, the Court of Appeal uses the following language to describe Competitor A’s mind set: “must have realised,” “must have known” and “must have been aware.”²⁷ The UK Court of Appeal appears disinclined to allow for a lesser state of mind, for instance recklessness (although it has not ruled on this legal point).²⁸ The reason behind such disinclination is that, if it were to allow for a lesser state of mind, the CMA might not need to show that there was some type of consensus between competitors – something that EU case-law, however, requires.²⁹

²⁶ Cheese, para. 65.

²⁷ *Id.* at para. 69 citing *Toys and Kits* (paras 94, 97, 142 and 144).

²⁸ *Toys and Kits*, paras 91 and 140. “But it does seem to us that the Tribunal may have gone too far, [...], insofar as it suggests that if one retailer (A) privately discloses to 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) then A, B and C are all to be regarded as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition. The Tribunal may have gone too far if it intended that suggestion to extend to cases in which A did not, in fact, foresee that B would make use of the pricing information to influence market conditions or in which C did not, in fact, appreciate that the information was being passed to him with A’s concurrence.”

²⁹ See cases C-2/01 P and C-3/01 P, *Bundesverband der Arzneimittel-Importeure eV and Commission v. Bayer AG* [2004] ECR I-23, para. 102. “It is necessary that the manifestation of the wish of one of the contracting parties to achieve an anticompetitive goal constitute an invitation to the other part, whether express or implied, to fulfil that goal jointly.”

The CAT has avoided ruling on the state of mind issue in the more recent *Cheese* judgment.³⁰ However, in its judgment it did not exclude the possibility that the CMA could try applying a lesser state of mind – like recklessness – in future cases. The CAT did warn the OFT/CMA, however, that where there is a legitimate commercial reason for Competitor A to convey future pricing information, the authority must do more than just fall back on “the context in which the disclosure was made” in order to establish the requisite state of mind.³¹

Competitor C must also have a certain state of mind. It must have known the circumstances in which Competitor A disclosed the confidential information to Supplier/Retailer B. If C does not believe that the information it has received is really confidential information that belongs to Competitor A (because, for example, it thinks that B is just engaging in market speculation), then C does not have the requisite state of mind.³² If, however, C knows that Competitor A and Supplier/Retailer B are in negotiations about costs and retail price increases and B subsequently tells C about Competitor A's upcoming price increase on a specific date, it would be extremely difficult for C to argue that it did not occur to it that the information came from Competitor A.³³ When determining Competitor C's state of mind, the competition authorities will look at: (i) whether there is a legitimate reason for B to have the information; and (ii) if there is a legitimate reason for it to pass it on to C.³⁴

The next question is how the above states of mind are established in practice. In this regard, it appears from the UK case-law that Competitors A's and C's states of mind are inferred from the specific circumstances of the case, in particular whether there is any legitimate commercial reason for disclosures. For example, the dialogue may be justified when it takes place in the context of a price reduction (seeking support from the supplier to protect margins). There is greater scepticism about these types of exchanges when they take place in order to raise prices.

This look into the potentially legitimate reasons for the flow of information can be seen not only with a hub and spoke exchange, which is in itself a concerted practice, but also with price signalling and other forms of parallel conduct, which are evidence of a concerted practice. In *Woodpulp II*,

³⁰ *Cheese*, paras 353-354.

³¹ *Id.* at para. 439.

³² *Id.* at paras 82-83 and *Toys and Kits*, para. 141.

³³ *Cheese*, para. 83.

³⁴ *Id.* at para. 253(d).

the CoJ focused on whether the EC had provided sufficient evidence to show that it is implausible that the parallel conduct arose from anything other than a concerted practice.³⁵

In *Cheese*, the CAT looked at the evidence in a similar manner when determining A's and C's states of mind. In the judgment, the CAT considered potential legitimate reasons for the information being passed from A to C by assessing the context in which the information flow took place:

Sainsbury's (A) → McLelland (B) → Tesco (C)

First, in considering Sainsbury's state of mind, the CAT evaluates the information that Sainsbury's passed on to its supplier, McLelland. It concludes, "[w]e do not accept that Sainsbury's conduct in disclosing to McLelland the information set out [...] is explained or justified by legitimate commercial reasons, given the prevailing circumstances on the market that were known to Sainsbury's at the time."³⁶ Subsequently, it looks at Tesco's state of mind and observes inter alia that Tesco "must have appreciated that there was no legitimate commercial reason for Sainsbury's or any other retailer, to have given McLelland all of the information [...] other than with a view to influencing the future pricing decisions of other competitors."³⁷ We also see this contextual element in the Belgian Competition Authority's household and body-care decision finding a hub-and-spoke exchange (Decision No. ABC-2015-1, § 36), which relies on the fact that the distributors at the initiation and receiving ends knew the context in which the information exchanges were taking place.

While all of this mind-reading and contextual analysis is going on to figure out what Competitors A and C were up to, Supplier/Retailer B seems to be along simply for the ride. The test only requires that it gives Competitor A's information to Competitor C – and not even the most important bits of that information – to be implicated in the illicit concerted practice. Supplier/Retailer B's state of mind appears to be inconsequential. This may be a

³⁵ Joined Cases C-89/85, C-104/85, C-114/85, C-117/85 and C-125/85 to C-129/85, *A. Ahlström Osakeyhtiö and others v. Commission* ("Woodpulp II") [1993] ECR I-1307, para. 71. "In determining the probative value of those different factors, it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article [101] of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors (see Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v. Commission* [1975] ECR1663, para. 174)".

³⁶ *Cheese*, para. 238.

³⁷ *Id.* at para. 274.

moot point since it appears that, in the successfully prosecuted cases, Supplier/Retailer B knew what it was getting itself into. Most savvy undertakings would appreciate that saying something along the lines of “come on, all of your competitors are doing it” may not sit squarely with competition law. Plus, we have the recently issued *AC-Treuhand*³⁸ judgment, which provides that when an undertaking associates with any type of anti-competitive behaviour it is assuming a significant amount of risk. It does not matter what the undertaking’s relationship is vis-à-vis the product or service that is the focus of the illicit behaviour; if it is “facilitating” the illicit behaviour, the EC can charge it with an infringement of Article 101 TFEU. The above overview indicates that when alleging that competing undertakings have participated in an illicit hub-and-spoke – a specific type of concerted practice – competition authorities and courts bind themselves to one of the more difficult ways of proving an Article 101 TFEU infringement arising in a vertical context.

II. Do Hub-and-Spoke exchanges affect competition? And does it really matter?

Economic theory suggests that an illicit hub-and-spoke exchange’s effect on competition may not be as negative as it first appears. In particular, the effect is rather ambiguous when a supplier enjoys strong bargaining power. In such a case, it may be able to reduce double-marginalisation problems.³⁹ The greater concern is when the retailers enjoy strong market power, which is what we see in a number of the investigations taken up by the NCAs. However, even then, economists are not entirely convinced that prices are radically affected to the consumers’ detriment. For better or worse, though, it does not appear to matter what the economists think. Information exchanges regarding future prices or volumes are almost always regarded as restrictions by object.⁴⁰

Landmark cases on concerted practices suggest that the standard of proof to establish a restriction of competition by object (as opposed to by effect)

³⁸ Case C-194/14P, *AC-Treuhand v. Commission* [2015] not yet published.

³⁹ See, N. SAHUGUET and A. WALCKIERS, “Selling to a cartel of retailers: a model of hub-and-spoke collusion”, March 2013, available at <http://ecares.ulb.ac.be/ecaresdocuments/seminars1213/walckiers.pdf> (accessed on 12 March 2016); see also, P.J.G. VAN CAYSEELE, “Hub-and-spoke Collusion: Some Nagging Questions Raised by Economists”, *Journal of European Competition Law & Practice* (2014) 5 (3): 164-168.

⁴⁰ *Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements*, para. 74.

due to an illicit exchange of information is rather low. The CoJ reminds us in *T-Mobile* that the exchanged information does not have to directly relate to consumer prices⁴¹ (and that they only have to share the information once to be caught by Article 101 TFEU).⁴² The *Bananas* saga confirms that when competitors exchange pre-pricing information (sales situations, supply and demand conditions, price trends, etc.) before setting their final prices, they, too, are restricting competition “by object.”⁴³ Furthermore, it may not even matter that the information is already on the market. In *Tate and Lyle*, British Sugar had informed its competitors of its pricing intentions – which it had already shared with its customers. The GC found that, even if British Sugar had notified its clients first, that fact did not imply that, at that time, those prices constituted “objective market data that were readily accessible.” By sharing this information, British Sugar allowed its competitors to have it “more simply, rapidly and directly than they would via the market.” Therefore, the GC confirmed the EC’s finding: this type of concerted practice qualifies as a restriction of competition by object.⁴⁴

One could argue that the above case-law is all well and good, but what about *Groupeement des Cartes Bancaires*? In this recent case, the CoJ held that the concept of restriction by object has to be interpreted narrowly: the essential legal criterion is the finding that the conduct reveals “in itself” a sufficient degree of harm to competition.⁴⁵ Hub-and-spoke exchange cases have only recently hit the competition scene. They arise in what appear to be otherwise legitimate vertical relationships. They may simply be part of tough negotiations, and actually generate competition. As a result, competition authorities should exercise restraint when using the “by object” route to establish that a hub-and-spoke exchange infringes Article 101 TFEU. In particular, to the extent that the object analysis is meant to save administrative resources and time, this route should only be used when there is little to no doubt that the concerted practice harmed competition.

An overview of the cases successfully litigated so far indicates that when:

- a) retailers had significant market power vis-à-vis their suppliers; and
- b) future pricing intentions were actually communicated between competing retailers through their common supplier;

⁴¹ *T-Mobile Netherlands*, paras 37-39.

⁴² *Id.* at paras 58-59, 62.

⁴³ Decision of the Commission, COMP/39188, *Bananas*, paras 263 and seq.

⁴⁴ *Tate & Lyle*, para. 60.

⁴⁵ Case C-67/13P, *Groupeement des cartes bancaires* [2014] not yet published.

The competition authority only needed to concentrate its efforts on establishing with consistent and objective indicia Competitors A's and C's states of mind. In looking at the evidence and putting it into context (e.g. was there any legitimate reason to be sharing the information?) it often became clear that the object of the exchange was to restrict competition.

By contrast, if the anti-competitive object of the contact(s) is not immediately apparent, the NCA would have to resort to proving a concerted practice by effect, which may be a sign that its hub-and-spoke analysis is struggling and that it is better off pursuing another theory of harm.

In light of the recent EU competition case-law, which has had to take into account Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the presumption of innocence tends to complicate matters further.⁴⁶ In *CISAC*, the GC describes the presumption in the following way:

*"[A]ny doubt of the Court must benefit the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine."*⁴⁷

The CAT more or less applies the same test – and even refers to Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms – although the language is slightly different since it is drawn from the judicial system's civil standard.

⁴⁶ Case T-442/08, *International Confederation of Societies of Authors and Composers ("CISAC") v. Commission* [2013] ECLI:EU:T:2013:188, para. 93, citing to that effect, *Hüls AG v. Commission*, paras 149 and 150, and Case C-235/92 P, *Montecatini v. Commission* [1999] ECR I-4539, paras 175 and 176; see also case T-11/06 *Romana Tabacchi v. Commission* [2011] ECR II-6681, para. 129.

⁴⁷ *CISAC*, para. 92, citing Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP, *Dresdner Bank v. Commission* [2006] ECR II-3567, para. 60, and *Romana Tabacchi v. Commission*, para. 129; *Cheese*, para. 88; *JJB Sports plc v. Office of Fair Trading* [2004] CAT 17, para. 204. The standard of proof is the civil standard of balance of probabilities. "It also follows that the reference by the Tribunal to "strong and compelling" evidence at [109] of *Napp* should not be interpreted as meaning that something akin to the criminal standard is applicable to these proceedings. The standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled." See also *Eturas UAB and others v. Lietuvos Respublikos konkurencijos taryba*, paras 38-40.

“Any doubt in the mind of the Tribunal as to whether a point is established on the balance of probabilities must operate to the advantage of the undertaking alleged to have infringed the competition rules (emphasis added).”⁴⁸

Competition authorities must assess each and every explanation investigated companies provide when determining the mindsets of A and C. Since hub-and-spoke exchanges occur during what would appear to be otherwise innocuous, everyday dealings between suppliers and their customers, the list of justifications for the questionable exchanges grows exponentially. It is even greater than if the competition authorities were investigating price signalling, since in a price signalling case the competition authorities are looking at direct communications. Therefore, they will focus on why the price signaler is making its intent known and if there are any justifications for it. In a hub and spoke exchange, the competition authorities must deal with the signaller (A), but it must also consider the recipient’s (C) ability to appreciate the information it has indirectly received. One could imagine any number of defenses a recipient could give competition authorities to show why it did not believe or appreciate the information it was given e.g., by a common supplier during negotiations.

III. Resale price maintenance (“RPM”): the non-Hub-and-Spoke exchange

Under EU competition law, RPM is presumed to be a hard-core restriction of competition. As explained in the 2010 EU Guidelines on Vertical Restraints (the “Guidelines”) the EC finds that RPM may restrict competition by: (i) facilitating cartel behaviour; (ii) softening competition through “interlocking” relationships; (iii) causing prices to go up; (iv) committing a supplier to follow a pricing path it would not otherwise follow; (v) foreclosing competing suppliers; and (vi) foreclosing innovative retailers.⁴⁹ RPM falls within an area of antitrust enforcement where, again, there is limited EU case-law but the NCAs have been quite active.⁵⁰ This fact may not be a coincidence.

⁴⁸ *Cheese*, para. 88.

⁴⁹ The Guidelines do provide that under specific circumstances RPM may lead to efficiencies and, on balance, enhance consumer welfare at para. 225.

⁵⁰ *E.g.* The OFT commissioned a 189-page tome on the matter, entitled “Anti-Competitive Effects of RPM (Resale Price Maintenance) Agreements in Fragmented Markets,” which was published in February 2013.

In at least three recent cases, NCAs have looked at potentially illicit hub-and-spoke exchanges and RPM. The practices involved: (i) suppliers acting as intermediaries and facilitators to ensure retailers adhered to coordinated retail price increases (e.g., assurances that other retailers would follow) and (ii) retailers taking active roles in urging or encouraging suppliers to persuade other retailers to join the initiative. In the BCA's household/body-care products case, the BCA considered both an illicit hub-and-spoke exchange and illicit RPM. The German Bundeskartellamt ("BkA") found illicit RPM in its food sector price fixing cases, but ultimately was unable to conclude that an illicit hub-and-spoke exchange existed. And similarly to the BkA, in its own food sector price-fixing cases, the Austrian Bundeswettbewerbsbehörde ("BWB") found an illicit RPM but was unable to ultimately conclude that an illicit hub-and-spoke exchange existed. The reason for this overlap is that the lines between the two can sometimes blur. The major stumbling blocks in the BkA's and BWB's cases were: (i) they could not conclusively prove the retailers' intention to achieve horizontal coordination via suppliers and (ii) some retailers were hesitant to share their future pricing intentions and only did so after being pressured by suppliers.

The UK Court of Appeal acknowledged that there may be circumstances where a retailer complains, but it does not expect the supplier to take any action – or at least any unlawful action – in response to its complaint. For example, the retailer may be trying to get better terms and conditions. In such a case, the retailer does not have the requisite mind set (intent or actual foresight).⁵¹ However:

*"Whe[n] the first undertaking, in effect, asks the second to do something in relation to a third which would be an anti-competitive agreement or concerted practice, and the second does do so, the first cannot rely on the fact that it may not have known whether the second and third did enter into such an agreement or concerted practice in order to assert that it was not involved as a participant in what they did."*⁵²

In this case, the UK Court of Appeal was looking at a hub-and-spoke exchange. But it does not require a massive mental leap to see how the above set of facts could be seen from an RPM perspective. A retailer asks its supplier to "do something" about another retailer. The "something" winds

⁵¹ *Toys and Kits*, paras 85-86.

⁵² *Id.* at para. 88.

up being the supplier asking the other retailer to respect a minimum price. From an NCA's perspective, this could easily look like an RPM (rather than the fact pattern from *Replica Kits*). There is an added bonus to labelling the conduct as an RPM: the NCA does not have to inquire deeply into the states of mind of the two retailers.

Admittedly, there tend to be some additional differences between hub-and-spoke exchanges and RPM:

- A hub-and-spoke exchange requires three parties. An RPM only requires two.
- In a hub-and-spoke exchange, the “hub” is normally (but does not have to be) the common supplier. In an RPM case, the supplier is the crucial player; it takes an active role in fixing the resale price (even if it is at the behest of a retailer).
- A hub-and-spoke has a horizontal dimension to it since it is indirect contact between two competitors. RPM, in contrast, arises only in a strictly vertical relationship.
- So far, successfully prosecuted hub-and-spoke exchanges have involved indirect sharing of future pricing intentions. RPM concerns the actual price being applied.

As discussed, in a situation involving retailers dealing with a common supplier and compared to RPM, proving a hub-and-spoke concerted practice is the most difficult way of going about proving a concerted practice. This coupled with the requisite standard of proof becomes a daunting task.

Advising and investigating potentially illicit hub-and-spoke exchanges is not for the faint hearted. Clients struggle to grasp how their “market research” or “tough negotiations” could land them in Article 101 TFEU investigations. The move from aggressive businessman to infringer may rest in how they tell a supplier to “do something.” To a certain degree, at least NCAs have foreseen this problem. They have, thus far, been very cautious in their prosecution of illicit hub-and-spoke exchanges. In at least two cases, the BkA and BWB had to abandon the hub-and-spoke aspect of the infringement all together. Riding on its wave of success with *Replica Kits* and *Toys*, the OFT may have been slightly overly exuberant in its prosecution in *Cheese*. In the latter case, the OFT was ultimately successful in proving that three of the 14 indirect exchanges Tesco had with its competitors were illicit hub-and-spoke exchanges: not a resounding success.

There may be easier ways to prosecute Article 101 TFEU infringements than to allege a hub-and-spoke concerted practice. As mentioned above,

one avenue available may be to allege (illicit) RPM. While this may not be entirely satisfying for the investigating competition authority since it points the finger most directly at the supplier who may have been bullied into it, it beats ignoring the whole thing. Courtesy of *T-Mobile*, it only takes one exchange of information to have a concerted practice. So, if the investigating competition authority can find just one direct exchange, then it can ignore any subsequent indirect exchanges and the whole hub-and-spoke analysis. DG Competition avoided a hub-and-spoke discussion in *E-Books*, which at first glance feels like a missed opportunity for it to give NCAs some guidance when looking into this type of conduct so that they could focus on the real issue. But, in hindsight, it may have been a good thing. The CAT and UK Court of Appeal have laid out a clear five-pronged test that both lawyers and NCAs can wrap their heads around. There is a logical thought process and it captures the relevant EU case-law. It is unlikely that DG Competition or the European courts would have spelled things out so succinctly. One could imagine lengthy paragraphs citing various cases on concerted practices with somewhat obscure references to “consensus” and how the involved undertakings knew or should have known what was going on. This may be one of those times where it is best to leave well enough alone. Instead of muddying the waters, the EC could sit back and let other NCAs (and hopefully their judicial systems) pick up the UK’s five-pronged test and make it their own.