Hub and Spoke Cartels in EU Competition Law

LLM Paper

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AUTHOR’S PREFACE

This master’s dissertation was written as an essential requirement of the University of Ghent’s LLM programme in international business law.

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I. INTRODUCTION

A. DEFINING THE CONCEPT AND ISSUES

1. NO DEFINITION UNDER EUROPEAN LAW- European law does not contain a definition of a hub and spoke cartel.¹ But notwithstanding the fact that European law does not define this phenomenon, a lot of ink has been spent over this topic. Generally, a hub and spoke cartel involves (retail) competitors and one (or more) of their common suppliers.² For the purpose of this paper I will define a hub and spoke cartel as the exchange of sensitive information between competitors through a third party that facilitates the cartelistic behaviour of the competitors involved.

2. ‘A’ INITIATES THE CARTEL- In a simplified example B (the hub) will be used by A (a spoke) to implement a price increase, if C (A’s competitor and a potential spoke) will do the same. B will inform C of A’s intention to increase its prices. C will confirm to B that it will be ‘spontaneously’ following A’s increase of price. And finally B will pass on C’s confirmation to A.³ B’s function is merely that of a hatch between the parties to the cartel.

3. THE HORIZONTAL GUIDELINES- At first sight the Horizontal Guidelines seem to bring an answer on how to deal with such type of a competition infringement. The European Commission stated in paragraph 55 of the Horizontal Guidelines that the exchange of information can take numerous 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 organization or

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through the companies’ suppliers or retailers.” In paragraph 61 of the guidelines the Commission stated that an information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion.5

4. OBLIGATION OF INDEPENDENT BEHAVIOUR- So according to Horizontal Guidelines the indirect exchange of information through a common agency or a third party may infringe competition law as it can be seen to breach the obligation of independent behaviour, as set out by the Court of Justice in its “Suiker Unie” judgement.6 As the Court stresses in paragraph 174 of the “Suiker Unie” judgement: “this obligation of independence precludes any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market”.

5. INFORMATION EXCHANGE AS AN INSTRUMENT TO ACHIEVE A COORDINATED MARKET RESPONSE- Like in all forms of collusion, competing undertakings set up a hub and spoke cartel in order to achieve a coordinated market response. The main ingredients of setting up a durable coordinated response are (1) a mutually beneficial strategy; (2) a mechanism that is able to detect deviations from that mutually beneficial strategy; and (3) the possibility of pressuring parties to prevent them from deviating from the mutually beneficial strategy.7 The disclosure of information is an effective instrument in achieving the first element of a coordinated market response, as it allows the competing undertakings to remove the uncertainties in the market.8 The disclosure of information also enables the

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5 Horizontal Guidelines, para 61.


competing undertakings to detect deviation from their mutually beneficially strategy.\textsuperscript{9} With regard to hub and spoke collusion this is not different. The only distinctive feature of hub and spoke collusion is that the exchange of information happens through a third party to the cartel agreement. A party that is operating at a different level of the production/distribution chain or even on a completely different market. Therefore, in a hub and spoke scenario we are dealing with an indirect information exchange in a vertical context that has consequences on a horizontal level.

6. **RESEARCH QUESTIONS IN THIS PAPER**- Consequently one of the main issues with regard to hub and spoke cartels is, whether such an arrangement should be qualified as a horizontal agreement, a vertical agreement (with horizontal effects) or a sui generis type of agreement. An additional key aspect is distinguishing the situations in which undertakings may or must share information with trading partners, from the situations in which competing undertakings use this common trading partner as a channel that facilitates anti-competitive behaviour.\textsuperscript{10} The circumstances under which the indirect information exchange between competitors via a common contractual partner will amount to a cartel agreement or a concerted practice for the purpose of Article 101 (1) TFEU were considered by the UK competition authorities in the *Replica Kit* and *Hasbro* decisions.\textsuperscript{11}

7. **PURPOSE OF THIS PAPER**- This paper aims to provide an answer on how a hub and spoke cartel should be qualified in the view of European competition law and which approach would be best adopted by the competition authorities in the European Union. This will be done on the basis of examining the approach adopted by the UK competition authorities in the *Replica Kit*, *Hasbro* and *Dairy* investigations on the one hand, and the approach adopted by the European Union in the *E-book*, *AC Treuhand I* and *AC Treuhand II* cases


\textsuperscript{10} O Odudu, ‘Hub and Spoke Collusion’ in I Lianos and D Gerardin (eds), *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar, Cheltenham 2013) 244.

on the other hand. To conclude this paper, an attempt will be made to construct a legal test that a particular practice must meet in order to be qualified as a hub and spoke cartel.

B. WHY WOULD UNDERTAKINGS SET UP A HUB AND SPOKE CARTEL?

8. THE RATIONALE OF UNDERTAKINGS TO JOIN A HUB AND SPOKE CARTEL- There are some logical questions that arise when discussing hub and spoke cartels. For instance, why would a hub be interested in joining the spokes in their cartelistic practices? Vice versa the same question arises, why would A and C approach B instead of opting for direct contact?

9. MORE SUBTLE AND MORE EFFECTIVE- The second question can be answered quite simply. A and/or C will approach B in order to camouflage there inherently illegal conduct. By opting for indirect contact via a hub, the spokes, who mainly are direct competitors, reduce the risk of being caught with their hands in the proverbial cookie jar by having direct contact. A hub and spoke cartel is often more subtle and effective than a regular price cartel.\(^\text{12}\) Therefore it is the perfect solution for cartelist that want to increase their prices, but do not want to get their hands dirty.

10. REDUCING INTERBRAND AND INTRA-BRAND COMPETITION- The main reasons why a common upstream supplier would want to facilitate a downstream cartel are rather unexplored. Nonetheless the possibility to use vertical restraints to reduce interbrand competition was already explored in 1998 by Frank Mathewson and Ralph Winter.\(^\text{13}\) Despite the fact that the above mentioned article focused on interbrand competition, it found that there could be possible negative effects on intra-brand competition as well.\(^\text{14}\)

11. A FACILITATING ROLE- The hub mainly fulfils the role as a serving hatch.\(^\text{15}\) The hub facilitates the collusion set up by and between the retailers. Its role remains rather passive.


\(^\text{15}\) Case 1022/1/1/03 JJB Sports plc v Office of Fair Trading [2004] CAT 17, para 141.
However, the hub can also play a more active role by (whether or not on the request of A) urging or encouraging C to increase its retail prices, or even more subtle by stimulating C to follow the (higher) recommended prices.

12. **EXAMPLE**- For instance, a supplier can set up a hub and spoke cartel in order to increase the efficiency of its distribution system. This cartel agreement will mainly be enforced and sustained by the supplier itself by threatening its retailers to issue an embargo if they do not comply with the cartel agreement. As suppliers prefer to deal with retailers who have market power on the downstream market, they might opt to enter into cartel agreement with his downstream retailers to help them stabilise an agreement that would be unsustainable without his interference.\(^{16}\) In this way the supplier can avoid a price war that would undermine the recommended prices.

13. **IMPROBABLE ECONOMIC THEORIES**- Although these economic theories are very plausible, it is not likely that a supplier would be able to set up a hub and spoke cartel on the retail market, let alone enforce it by embargo. Suppliers, how much market power they might have on their own relevant product market, simply do not have enough market power on the retail market to enforce a hub and spoke cartel between retailers.

14. **COERCION**- In practice a supplier joins a hub and spoke cartel because he is more or less coerced by its retailers. A common situation on how a supplier ends up in a hub and spoke cartel is when a retailer wants to increase its prices, on the condition that its competitors do the same. A will therefore pressure B to pass on this information to C, who, at its turn, might get pressured by B to implement the same price increase.

**II. THE APPROACHES ADOPTED BY COMPETITION AUTHORITIES WITHIN THE EUROPEAN UNION**

15. **NO EU CASE LAW (YET)**- On a European level there is a lack of case law on hub and spoke cartels. Therefore a lot of the competition authorities of the Member States can take guidance from the case law of the UK competitions authorities. The UK authorities issued

a number of decisions in hub and spoke cases which may serve as a source of inspiration for the competition authorities of other Member States.

A. THE UK APPROACH

16. **Replica Kit, The First Decision on Hub and Spoke Cartels**- A number of retail investigations in the United Kingdom brought hub and spoke collusion to the surface. In its Replica Kit decision -the first decision on this topic- the Office of Fair Trading concluded that when information concerning prices is passed between two or more competing undertakings (A and C, the spokes) via a common contractual partner operating at a different level of the production or distribution chain (B, the hub), there can be said to exist a cartelistic price-fixing agreement between the retailers.\(^\text{17}\)

17. **FACTS OF THE REPLICA KIT CASE**- In the Replica Kit decision the Office of Fair Trading found that a number of sportswear retailers and suppliers had entered into price fixing agreements with regard to replica football kits. These retailers and suppliers were involved in various agreements or concerted practices which fixed the prices of the top-selling adult and junior replica football shirts manufactured by Umbro Holdings Ltd. The replica football shirts concerned were those of the England team and Manchester United, Chelsea, Glasgow Celtic and Nottingham Forest football clubs. Some of the parties were involved with the shirts of only one or some of the teams and some for longer periods than others. The hub and spoke cartel took effect after the launch of the new replica football kit and during the Euro 2000 tournament. As the OFT considers that price fixing agreements are among the most serious competition infringements, all involved parties were fined.\(^\text{18}\) JJB Sports plc and Allsports Ltd appealed against the fines imposed by this decision.

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18. **FACTS OF THE HASBRO CASE** - Hasbro was concerned that the reduced margin for its retailers might lead them to lowering their prices. In order to prevent this, Hasbro established a recommended retail price policy. To ensure the effectiveness of this policy, the cooperation of Argos, Hasbro’s main retailer, and Littlewoods, Argos’ main competitor of Argos, was essential. For those reasons Hasbro held individual conversations reassuring both retailers that the other one would follow the recommended retail price. The overall hub and spoke cartel was composed by two bilateral vertical agreements between each of the parties and a trilateral agreement.\(^{19}\)

19. **COMPETITION APPEAL TRIBUNAL GOES TOO FAR** - The decision was however upheld by the UK Competition Appeal Tribunal. The CAT held that the obligation of independent behaviour, as set out by the European Court of Justice in the *Suiker Unie* case, was infringed, and an anticompetitive horizontal agreement 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’.”\(^{20}\) This test requires the competitor providing the information to have reasonably foreseen that the information would be passed on to a competitor. This test could have grave consequences as it could put every retailer should have foreseen that their information could have been passed.

20. **REASONING GETS EXTENDED TO COMPLAINTS** - JJB Sports appealed the OFT’s decision in the *Replica Kit* case, and this led the *JJB Sports* case before the UK Competition Appeal Tribunal. The UK Competition Appeal Tribunal considered in paragraph 664 of the judgement on the liability in the *JJB Sports* case, that an anti-competitive concerted practice can be said to exist arises when “a competitor (A) complains to a supplier (B) about the market activities of another competitor (C), and the supplier B acts on A’s complaint in a way which limits the competitive activity of C.”\(^{21}\) This reasoning was already applied by the European Commission in its *Hasselblad* decision where it held that: “If an undertaking acts on the complaints made to it by another undertaking in connection


with the competition from the former’s products, this constitutes or is evidence of a concerted practice.”

21. **APPLICATION OF THE JJB SPORTS CASE LAW IN THE NETHERLANDS** - This JJB Sports test was recently used by the Dutch Hoge Raad in the Batavus case. In this Dutch case bicycle retailers complained and practically forced the bicycle producer Batavus to end its distribution agreement with an internet retailer. This internet retailer was offering the same bikes at a much lower consumer price than the other retailers were willing to offer. The Dutch Hoge Raad held that the termination of the distribution agreement could be incompatible with the Dutch Competition Act, if the termination could be found to restrict competition appreciably. The Dutch Hoge Raad referred the case back to the Arnhem Court, which held that the termination of the distribution agreement indeed appreciably restricted competition.

22. **THE UK COURT OF APPEAL FORMULATED A MORE NUANCED TEST** - JJB Sports also appealed the decision of the UK Competition Appeal Tribunal. JJB Sports argued before the UK Court of Appeal that the reasonable foreseeability test formulated by the Competition Appeal Tribunal was too general and too extensive. The Court of Appeal was of the opinion that the test should be narrowed down to a test where a requirement of intent is essential. Therefore the Court of Appeal formulated a more nuanced test to determine the existence of a hub and spoke cartel. It stated that hub and spoke collusion exists: “if (I) 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), (II) 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 (III) C does, in fact, use the information in determining its own future pricing intentions.”

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23. Arrest van de Hoge Raad van 16 September 2011, LJN BQ2213, point 3.7.
in the *Dairy* investigation.\(^{27}\) This was very important since vertical information exchange is not per se prohibited. There cannot be a presumption on A or C’s state of mind, and they shouldn’t be held liable for the actions of B, over whom they have no or little control.\(^{28}\)

**23. THE DAIRY INVESTIGATION** - The JJB Sports case law of the UK Court of Appeal was subsequently applied by the UK Competition Appeal Tribunal in Tesco’s appeal against the Office of Fair Trading’s decision in the ‘*Dairy*’ investigation.\(^{29}\) Tesco was of nine parties involved in the exchange of sensitive pricing information with the view to fix the retail prices for certain dairy products in 2002 and 2003. The OFT found that the supermarkets did not exchange the pricing information directly, but did so through intermediaries working for the dairy processors who supplied the supermarkets. Therefore it decided that the exchange of sensitive information constituted a hub and spoke cartel.

**24. PROBLEMS OF PROOF** - While most supermarkets and dairy processors settled with the OFT in order to receive reduced fines, Tesco kept denying that it passed information to the dairy processors with the required intent. Further Tesco emphasized that in order to qualify its conduct as a competition infringement, the OFT is required to prove that Tesco was aware that the information provided to the supplier would have been passed on to competing retailers. This resulted in Tesco’s removal by the OFT in the related milk and butter investigation, but the OFT proceeded with its investigation in the cheese case where a fine was imposed on Tesco in the amount of £ 10.4 million. Tesco appealed against the OFT’s decision. The Competition Appeal Tribunal held that there was not enough evidence to support several of the OFT’s conclusions concerning Tesco’s involvement in concerted practices to manipulate cheese prices in 2002.\(^{30}\) Therefore the CAT reduced Tesco’s fine to £ 6.5 million.

**25. A TWO PHASE PHENOMENON** - As professor Odudu points out in his chapter on hub and spoke collusion in Lianos’s and Gerardin’s Handbook on European Competition Law: Substantive Aspects, in an indirect information exchange, and this includes hub and spoke

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\(^{28}\) B Graham, ‘Hub and spoke cartels: the key lessons from recent enforcement action in Europe’, (2013) mLex AB extra 1, 2.


collusion, there are two phases.\textsuperscript{31} The first phase, The A-B phase, there firstly is a direct exchange of strategic and sensitive information between A and B, and this information is intended to be disclosed to one or more of A’s competitors (e.g. C). In the second phase, B discloses the strategically sensitive information to C, and C relies on this information and uses it.

26. **ILLUSTRATION-** An illustration can be found below on how this collusive behaviour would look. The full lines stand for the information provided to the hub, while the dotted lines stand for the information received from the hub. The red dotted line indicates the horizontal effect of the vertical agreements.

Both spokes are aware of each other’s future pricing intentions, and use the information.

1. THE A-B PHASE

1.1. COLLUSION

27. COLLUSION FOR THE PURPOSE OF HUB AND SPOKE CARTELS- Article 101 TFEU only applies to agreements between undertakings, decisions of associations of undertakings and concerted practices.\(^32\) Therefore in order for Article 101 TFEU to apply, collusion has to be present. For the purpose of hub and spoke cartels, the UK Court of Appeal stated that collusion existed as ‘retailer A disclosed 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 on to other retailers.'\(^33\) Collusion is therefore established from the direct provision of strategically sensitive information by A to B, if A can be taken to intend that B would pass on this information to other retailers in order to influence the market conditions.\(^34\)

28. NECESSARY INFORMATION EXCHANGE- However, reality is more complicated than that. The exchange of sensitive information between undertakings operating at a different level of the production/distribution chain is a necessity in commercial relations. It is precisely because of the necessity of the exchange of certain sensitive information in vertical commercial relations, that UK Court of Appeal adopted a more nuanced and appropriate approach. The UK Court of Appeal found it legitimate “for a manufacturer to ask its distributors, as a matter of routine, to inform it of the prices at which and the terms on which they sell its products, which it may wish or need to be aware of for its own commercial purposes and in the context of the ongoing relationship with each distributor separately.”\(^35\) This view was later accepted by the UK Competition Appeal Tribunal.\(^36\)

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29. **ACTORI INCUMBIT PROBATIO**- In other words, the anti-competitive purpose has to be established more explicitly than in case of direct information exchange between competitors.\(^37\) And in addition it is for the competition authority to prove the absence of a legitimate justification for the information exchange.\(^38\)

1.2. **Restriction**

30. **A’S INTENTIONS NEED TO BE OBVIOUS**- In addition to the presence of collusion, Article 101 TFEU cannot be applied unless, either the object of the collusion is to prevent, restrict or distort competition or the effects of the collusion is to prevent, restrict or distort competition.\(^39\) In order to be qualified as an infringement of the competition rules via the object approach the competent competition authority has to prove that the directly exchanged strategically sensitive information between A and B is intended to be revealed to one or more of A’s competitors. The Court of Appeal expressed this both in the *Replica Kit* and *Hasbro* cases as ‘A may be taken to intend that B will make use of that information to influence market conditions’.\(^40\) In short, the knowledge of A that its pricing intentions would be passed on by B to C needs to be evident in order to qualify the exchange as hub and spoke collusion.\(^41\)

31. **SOFTENING THE PRESUMPTION OF ANTI-COMPETITIVE INTENT**- As it is, however, rather difficult and farfetched to infer an anti-competitive intent of A if there would be no alternative means to achieve a legitimate transaction with B that does not involve the disclosure of sensitive information. This presumption of anti-competitive intent shall,

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\(^38\) Cases 1021/1/1/03 and 1022/1/1/03 *JJB Sports plc v Office of Fair Trading; Allsports Limited v Office of Fair Trading* [2004] CAT 17, paras 200 and 660.

\(^39\) Horizontal Guidelines, paras 64-71.


therefore, not be applied if the disclosed information does not relate to the supplied goods or services in the A-B transaction.\footnote{Case 1188/1/1/11, \textit{Tesco v Office of Fair Trading} [2012] CAT 31, paras 300 and 368.} According to the US Federal Trade Commission an anti-competitive intent can also be ruled out if A takes measures to ensure that B does not disclose the exchanged information.\footnote{US Federal Trade Commission and the US Department of Justice, Antitrust Guidelines for Collaborations among Competitors, April 2010, para 3.34(e), available from \url{https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf} (accessed on 7 April 2015).} However, the presumption of anti-competitive intent is all the stronger where there is reciprocity: when A not only provides strategically sensitive information to B, but also receives strategically sensitive information from B that originated from C.\footnote{Cases 2005/1071, 1074 and 1623, \textit{Argos Limited and Littlewoods Limited v Office of Fair Trading and JBB Sports plc v Office of Fair Trading} [2006] EWCA Civ 1318, paras 141 and 144; Case 1188/1/1/11, \textit{Tesco v Office of Fair Trading} [2012] CAT 31, paras 302-303.} This is defined as a bi-directional flow of information.\footnote{O Odudu, ‘Hub and Spoke Collusion’ in I Lianos and D Gerardin (eds), \textit{Handbook on European Competition Law: Substantive Aspects} (Edward Elgar, Cheltenham 2013) 250; Cases 2005/1071, 1074 and 1623, \textit{Argos Limited and Littlewoods Limited v Office of Fair Trading and JBB Sports plc v Office of Fair Trading} [2006] EWCA Civ 1318, paras 118-123.}

**32. Complaining Remains a Risky Business-** Due to statements made by the Office of Fair Trading in the \textit{JBB Sports} and \textit{Allsports} cases, the concern arose that anti-competitive intent would be inferred from complaints from a competitor to supplier about the market activities of another competitor.\footnote{Cases 1021/1/1/03 and 1022/1/1/03 \textit{JJB Sports plc v Office of Fair Trading; Allsports Limited v Office of Fair Trading} [2004] CAT 17, para 664.} And despite the fact that the intention to disclose information to C is not attributable to A when A complains to B in its attempts to obtain better terms and conditions from B for itself, complaining remains risky.\footnote{Cases 2005/1071, 1074 and 1623, \textit{Argos Limited and Littlewoods Limited v Office of Fair Trading and JBB Sports plc v Office of Fair Trading} [2006] EWCA Civ 1318, paras 84-86.} Especially because the UK Competition Appeal Tribunal explicitly held that a competitor who complains to a supplier about the activities of another competitor should not be absolved of
responsibility under the UK Competition Act of 1998 if the supplier chooses to act on the complaint.  

33. **COMMENT**- I submit that the line between complaining to obtain better terms and conditions for itself and complaining about the activities of a third undertaking is very thin and easily crossed. This has been illustrated by the *Batavus* judgement of the Dutch Hoge Raad and the Arnhem Court.  

2. **THE B-C PHASE**

2.1. **COLLUSION**

34. **THE ANIC PRESUMPTION**- As well as in the A-B phase, the B-C phase requires collusion and restriction in order to fall within the scope of Article 101 TFEU. The UK Court of Appeal described the B-C phase collusion requirement as satisfied when ‘B does, in fact, pass that information to C’. Following the case law of the Court of Justice in the *Anic Partezipazioni* case, C will be presumed to have accepted the information and adapted its market conduct accordingly, unless it responds with a clear statement that it does not wish to receive such data.  

35. **REDUCING THE UNCERTAINTY ON THE MARKET**- The Court of Justice suggested in 1972 that a concerted practice between undertakings exists when certain behaviour “can only be

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**Footnotes:**

48 Cases 1021/1/1/03 and 1022/1/1/03 *JJB Sports plc v Office of Fair Trading; Allsports Limited v Office of Fair Trading* [2004] CAT 17, para 664.

49 Arrest van de Hoge Raad van 16 September 2011, LJN BQ221, point 3.7; Arrest van het Gerechtshof Arnhem-Leeuwarden van 22 Maart 2013, LNJ BZ5188, point 3.3.


explained by a common intention on the part of those undertakings.”\textsuperscript{52} So if a common intention is required, collusion cannot be established on the mere basis that B provides information to C. In order to meet the necessary conditions of collusion, it must be proven that C relied on the disclosed information.\textsuperscript{53} However, the horizontal guidelines consider that the unilateral disclosure of strategic information by one undertaking to its competitor(s) who accept(s) it, satisfies the legal element of collusion since it reduces the uncertainty on the market.\textsuperscript{54} The European Commission finds it irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all the participating undertakings informed each other of the respective deliberations and intentions.\textsuperscript{55} This because the uncertainty on the market will be reduced for all the competitors involved, even if only one undertaking reveals its future commercial policy.\textsuperscript{56}

36. **CREDIBILITY OF THE RECEIVED INFORMATION-** According to Advocate General Vesterdorf the disclosure of strategically sensitive information leads to a situation where C is in a position to assess the market situation with considerably more certainty and to act accordingly.\textsuperscript{57} However, the UK Competition Appeal Tribunal required an additional condition. Namely, C “must be taken to know the circumstances in which the information was disclosed by A to B.”\textsuperscript{58} This concerns the credibility of the information exchanged.\textsuperscript{59}


\textsuperscript{55} Horizontal Guidelines, para 62.


\textsuperscript{58} Cases 1021/1/1/03 and 1022/1/1/03 *JJJB Sports plc v Office of Fair Trading; Allsports Limited v Office of Fair Trading* [2004] CAT 17, para 141.

2.2. Restriction

37. The need for restrictive consequences- While the reduction of uncertainty may lead to collusion in the context of competition law, the reduction of uncertainty is not intrinsically prohibited. In order to be prohibited by competition law, the reduction of uncertainty must have restrictive consequences for competition. The UK Court of Appeal described this last requirement as ‘C does, in fact, use the information in determining its own future pricing intentions.’

38. Tacit approval of the information- In the Anic case the Court of Justice answered the fundamental question whether the fact of reliance has to be presumed due to the mere disclosure. The Court stated that: “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.”

39. Distancing is key- As stated above, the Court of Justice requires the recipient company to explicitly reject the received disclosed information if it wants to avoid to be a party to the infringement. If that undertaking does not explicitly rejects the disclosed information it would be considered having approved of the communication of the information. This Anic presumption of restriction has also been accepted by the UK Competition Appeal Tribunal with regard to hub and spoke cartels.


63 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland A/S; Irish Cement Ltd; Ciments français SA; Italcementi - Fabbriche Riunite Cemento SpA; Buzzi Unicem SpA; and Cementir – Cementerie del Tirreno SpA v Commission [2004] ECR I-123, para 84.

64 Case 1188/1/1/11, Tesco v Office of Fair Trading [2012] CAT 31, para 86.
2.3. **Rebutting the Presumption of Restriction**

40. **How to Distance Oneself, the Basics** - Although C cannot undo the fact that B has disclosed A’s sensitive information to it, C can rebut the presumption of restriction. As in result of the disclosure of information the burden of proof shifts towards C, and it is up to C to prove that it did not rely on the disclosed information. In order to do so, C must take proactive steps to remove the effects the information disclosure has on its continuing operations.\(^{65}\) The Court of Justice elaborated in the *Adriatica di Navigazione* case on how an undertaking should prove its good faith when it has received sensitive information. The Court decided that in order to successfully prove its good faith it is insufficient for the undertaking to give instructions within its own organization that clarify its wish not to align itself with competitors participating in a cartel. This constitutes a measure of internal organisation which must be viewed positively. However the European Commission could not, in the absence of any evidence that such internal instructions had been externalized, conclude that the undertaking has distanced itself from the cartel.\(^{66}\) The Court stated that: “in order to avoid liability by distancing itself, an undertaking which has attended meetings with an anti-competitive purpose need do no more than inform the other companies represented, with sufficient clarity, that, despite appearances, it disagrees with the unlawful steps which they have taken.”\(^{67}\)

41. **How to Distance Oneself from a Hub and Spoke Cartel** - In the context of hub and spoke collusion, C should be able to successfully rebut the presumption of restriction via the following steps. Firstly, when C receives unrequested information, it has to reply immediately to B stating the information was not requested and is very unwelcome.\(^{68}\) This is crucial and has to be done in writing and very promptly. Internal documents or an oral rejection registering C’s reluctance to participate in the collusion will be insufficient.\(^{69}\) Professor David Bailey suggests that the repudiation should take place at the level of the

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senior management. Further, C must be able to establish that its subsequent commercial policy was determined independently. Alternatively C can rebut the presumption of restriction if it can demonstrate that the information has legitimately entered the public knowledge before it could have been acted on by C. This has been accepted by the UK Competition Appeal Tribunal in the Dairy case.

B. THE EUROPEAN UNION’S APPROACH

42. WAITING FOR A MILESTONE JUDGEMENT- At the European level a milestone judgement or decision is yet to be issued. But there have been three cases that may shed some light on how the European institutions may approach hub and spoke cases. These cases are the AC Treuhand I and AC Treuhand II cases, as well as the e-Books case. These cases will likely play a crucial role in the analysis under EU competition law of hub and spoke cases.

1. THE AC TREUHAND CASES

43. FACTS- AC Treuhand is a Swiss consultancy firm that was found to have contributed to the implementation of a cartel and got fined for complicity. In the AC Treuhand I case the European Commission adopted a decision finding that three producers of organic peroxides had implemented a cartel on the European market for those products. The aim of the cartel was to preserve the market shares of those producers and to coordinate their price increases. AC Treuhand was entrusted, on the basis of an agency agreement with the three producers, with storing certain secret documents relating to the cartel on their premises, collecting and treating certain information concerning the commercial activity of the three organic peroxide producers, and completing and logistical and administrative tasks associated with the organisation of meetings between those producers, such as the

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reservation of the rooms. After a leniency application of one of the producers, the European Commission found that AC Treuhand had played an essential role in the cartel by organising the meetings and covering up the evidence of the infringement. The Commission therefore concluded that AC Treuhand had also infringed the competition rules and imposed a fine of € 1000. The fine was of a limited amount due to the novelty of the policy followed in that area, but the European Commission wanted to give a clear message: those who organise or facilitate a cartel must be aware that they are infringing competition law, and that heavy sanctions can be imposed on them.

44. **Appeal before the Court of First Instance**- AC Treuhand brought an action for annulment of the European Commission’s decision before the Court of First Instance claiming that it could not be held liable since it was not a contracting party to the cartel. However, the Court noted that any restriction of competition within the common market may be qualified as an agreement between undertakings where the restriction results from the manifestation of a concurrence of wills between the undertakings involved. The Court of First Instance held that the fact that the consultancy firm was not active on the market on which the restriction of competition occurred, does not exclude liability for the infringement as a whole. Indeed the Court found that the mere fact that an undertaking has participated in a cartel only in a subsidiary, accessory or passive way is not sufficient for it to escape liability for the entire infringement. Further, AC Treuhand argued that the European Commission infringed the principle of *nullum crimen, nulla poena sine lege* by imposing a fine for a behaviour that had never been considered antitrust breach before. However, the Court of First Instance stated that settled case law with regard to undertakings that shared liability for the anti-competitive conduct of another economic actor because they were co-perpetrators in the whole infringement already existed. Therefore it was not unforeseeable that such a reasoning would be applied to AC Treuhand in the case at hand. Finally, the Court agreed with the Commission that by organising

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meetings and covering up traces of the infringement, AC Treuhand actively contributed to the implementation of the cartel and there was a sufficiently definite and decisive causal link between its activity and the restriction of competition on the organic peroxides market.  

As a result, the Court confirmed AC Treuhand’s fine.

45. **Recidivism by AC Treuhand in the AC Treuhand II Case** - In February 2014 the General Court issued its decision in the *AC Treuhand II* case. The *AC Treuhand I* case and the *AC Treuhand II* case are not related on a factual basis. The Swiss consultancy firm was among several undertakings that were fined by the European Commission in its decision in Heat Stabilisers. In that decision the European Commission found that a number of undertakings had infringed Article 101(1) TFEU and Article 53 of the EEA Agreement by participating in two sets of anti-competitive agreements and concerted practices. The first set relating to the tin stabiliser sector, and the second one relating to the epoxidised soybean oil and esters sector. Both kinds of stabilizers are added to PVC products in order to improve their thermal resistance. Each of the infringements consisted of price fixing, the allocation of markets through sale quotas, the allocation of customers and the exchange of commercially sensitive information. AC Treuhand, although it was not party to the cartel agreement as such, had played a very similar role to the one it played in the first AC Treuhand case.

46. **Essential Role as a Facilitator** - Like in the first case, AC Treuhand was not a party to the cartel agreement as such, but it played an essential facilitating role in the cartel. Therefore the European Commission decided to impose a fine on it on the ground that it had played an essential role in the organisation and facilitation of the cartel. For instance, AC Treuhand made its premises available to the cartel and encouraged the parties to compromise in order to reach an anti-competitive agreement. For those reasons the European Commission imposed a total fine of € 348,000 on AC Treuhand. AC Treuhand appealed the Commission’s decision before the General Court, but all of its arguments got

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81 Case COMP/38.589 - Heat Stabilisers.


83 Case COMP/38.589 - Heat Stabilisers, para 356.
rejected. AC Treuhand then appealed the case and now the Court of Justice will have the final say. 84

2. THE E-BOOKS CASE

47. INSTRUCTIVE EXERCISE- The e-Books case is the only hub and spoke case that the European Commission dealt with so far, and as the case was settled it does not include a full legal analysis of the practices involved. Despite the case having being settled this was an interesting exercise for the European Commission on deciding which approach has to be taken in regard to hub and spoke situations.

48. UNDERLYING REASONS- In April 2010 Apple planned to launch its iPad. This new iPad contained an application containing e-Book content. 85 Via this “iBookstore” Apple wanted to compete with Amazon and its Kindle. Since the introduction of Kindle in 2007 all major publishing houses had begun to sell e-books on Amazon’s platform through a classic wholesale distribution model where Amazon acts as a reseller, setting its own consumer prices. In order to make its e-reader more popular, Amazon had set the price of each e-book at $ 9.99. This was often lower than the wholesale price Amazon had to pay to the publishing houses. As a result of the increase of Amazon’s market share, the e-book market had begun to cause concern among publishers who feared a possible negative fallout on sales volumes of the far more profitable paper books. As the average selling price of a physical book was $ 26, Amazon’s $ 9.99 pricing policy presented a potential cannibalization risk for the publishing houses. 86

49. PUBLISHERS TAKING BACK CONTROL- In 2010, when Apple introduced the iPad, publishing houses started to sign with Apple, each one a few days after the other. The distribution contracts with Apple were based on an agency pricing model where Apple acted as an agent for the publishers, meaning that the consumer prices were set by the publishers. 87 Threatening to withdraw their products from Amazon, publishers were able to successfully

84 Case C-194/14P, AC-Treuhand v Commission.


convert Amazon’s wholesale distribution model to an agency pricing model as well. This new model, although resulting in lower revenues for the sale of e-books, gave publishers control of the sale price and reduced the risk of cannibalization of paper book prices. It also resulted in a higher consumer price for the e-books. In short, the concerted practice in the case at hand consisted of Apple and the five publishers jointly converting the wholesale model to an agency model with the same key terms.

50. APPLICABLE RULES- When assessing whether a concerted practice is anti-competitive, the European Commission had to pay attention to the objectives the concerted practice is intended to attain and to its economic and legal context. And while the intentions of the parties may be an essential factor in determining whether a concerted practice is restrictive, the Commission remains free to take it into account. In addition, when the Commission has to decide whether a concerted practice is prohibited by Article 101(1) TFEU, there is no obligation for the commission to take the actual or potential effects into account once it has been established that it is the concerted practice object to prevent, restrict or distort competition.

51. THE COMMISSION’S REASONING- The Commission was of the opinion that the objective of the concerted practice between Apple and the five publishers was to raise the retail prices of e-books in the European Economic Area, or to prevent the emergence of lower retail prices for e-books in the European Economic Area. Such a concerted practice has, by its very nature, the potential to restrict competition. As a result, the Commission found that the concerted practice between Apple and the five publishers had the objective of preventing, restricting or distorting competition in the e-book market. Furthermore the

Commission held that the combination of the importance of undertakings involved, the nature of the products and the fact that the conversion to the agency model formed part of a global strategy, the concerted practice had an appreciable effect on the trade between Member States.  

52. **THE COMMISSION’S INVESTIGATION** - For the foregoing reasons the European Commission found that the five publishers indirectly disclosed information among themselves concerning their intentions to switch to an agency agreement through Apple. According to the established case law of the Court of Justice this constituted an anti-competitive concerted practice. But since one of the publishers proposed commitments in order to meet the Commission’s concerns, the Commission decided that there were no longer grounds for action on its part.

53. **PARTICIPANTS IN A CONCERTED PRACTICE DUE TO THEIR JOINT INTENTION** - The European Commission did not use the UK Competition Appeal Tribunal’s test despite the fact that the conduct aspects of the case where similar to the ones in the Dairy case. With the AC Treuhand I case fresh on its mind, the Commission was of the opinion that due to the intentional elements of the case the parties could be considered participants in a concerted practice as a “joint intention” between them to conduct themselves on the market in a specific way was present.

54. **NO DETAILED EXPLANATION** - Due to the scarcity of hub and spoke case law at a EU level and the fact that a settlement was reached, the European Commission was reluctant to give a detailed explanation on how this test should be applied. This allows it to have more flexibility in any future assessment.

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97 Case COMP/39.847- E-Books, para 129.
99 B Graham, ‘Hub and spoke cartels: the key lessons from recent enforcement action in Europe’ (2013) mLex AB extra 1, 2.
55. **United States v. Apple Inc.**—As mentioned earlier the conversion to the agency model formed part of a global strategy. The US District Court for the Southern District of New York found that the five major book publishers “conspired with each other to eliminate retail price competition and raise e-book prices, and that Apple played a central role in facilitating and executing that conspiracy.”100 The Court was of the opinion that Apple organised the concerted practice by actively convincing the publishing houses to move from Amazon’s wholesale model to an agency model. The agency agreement between Apple and the publishers contained a Most-Favoured-Nation clause, requiring the publishers to offer Apple lowest retail price being offered by competing retailers. How longer Amazon continued to sell at its low retail prices, how longer the publishers were required to offer the same prices to Apple, reducing their profit margin.101 For these reasons, the Court held that the MFN clause was a “severe financial penalty” which effectively forced the publishers to convert from the retail pricing competition to the agency model. Judge Cote concluded that the enforced switch to the agency model raised retail prices of e-books, thereby effectuating a *per se* unlawful conspiracy to fix prices in violation of the Sherman Antitrust Act, 15. U.S.C. § 1.102

**III. Key Legal Analysis of Hub and Spoke Cartels under European Competition Law**

56. **Legal Uncertainty Remains**—Despite the fact that the UK Court of Appeal elucidated the circumstances in which the exchange of information between competitors through a common contractual partner is regarded as a breach of Article 101 TFEU, there still remain a lot of uncertainties when differentiating situations in which undertakings may, or must necessarily, exchange information with trading partners, from situations in which competitors use a common trading partner as a hub through which to facilitate cartellistic

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101 Winston & Strawn LLP, ‘Federal Court Ruling Calls Most-Favored-Nation Clauses into Question by Deeming Apple’s Use of MFNs a *Per Se* Unlawful Violation of the Antitrust Laws’ (July 2013).

102 Winston & Strawn LLP, ‘Federal Court Ruling Calls Most-Favored-Nation Clauses into Question by Deeming Apple’s Use of MFNs a *Per Se* Unlawful Violation of the Antitrust Laws’ (July 2013).
behaviour.\textsuperscript{103} This common trading partner is not necessarily a common supplier; it can also be a common customer, a common association of undertakings, or even a common third party that operates on a different market.\textsuperscript{104}

57. ARE WE DEALING WITH A VERTICAL OR A HORIZONTAL AGREEMENT?- As was mentioned above, a hub and spoke cartel is sort of a hybrid competition infringement that usually consists of a form of retail price maintenance at a vertical level, and a classic cartel infringement at a horizontal level. The UK’s Office of Fair Trade heavily relied on the obligation of independent behaviour as set out in the ECJ’s \textit{Suiker Unie} judgement. This obligation of independent behaviour precludes any direct or indirect contact between competing undertakings, but it remains unclear how this obligation can be applied to a vertical relationship. Therefore defining the underlying relationship between the parties engaged is key, as the legal approach to determine the legality of the conduct of the parties will depend on it.\textsuperscript{105}

58. THE IMPLICATIONS OF QUALIFYING A HUB AND SPOKE CARTEL AS A HORIZONTAL AGREEMENT- Having the relationship defined as a horizontal relationship will have to substantive and procedural consequences. For instance, they are more often subject to the object approach than to the effect approach, especially when this is compared to vertical agreements. In terms of competition law, horizontal agreements have the connotation to be riskier than vertical agreements. Furthermore, horizontal agreements do not enjoy the high \textit{de minimis} threshold that vertical agreements enjoy, and they are not subject to the extensive block exemption regime of the European Commission. In addition, leniency is only possible for a cartel and not for retail price maintenance. Therefore courts and competition authorities have to be very attentive as the infringing parties may attempt to


\textsuperscript{105} M A Lemley and C R Leslie, ‘Categorical Analysis in Antitrust Jurisprudence’ (2008) 93 Iowa Law Review 1207, 1219-1220; Horizontal Guidelines, paras 75-76.
gain advantages by distorting the characteristics of their relationship. The question via which legal test it can be determined when the transition to a cartel takes place is therefore of paramount importance.

A. VIEWING A HUB AND SPOKE CARTEL AS A SINGLE HORIZONTAL AGREEMENT

59. THE IMPORTANCE OF LENIENCY- Economic reality establishes that in most hub and spoke cartels there are parties being coerced for various reasons to take part in a horizontal collusion. Due to the hybrid characteristics of a hub and spoke collusion, these coerced parties are at risk of losing their way out of the cartel by applying for leniency. In most Member States and also at a EU level, undertakings can only apply for leniency with regard to horizontal agreements. Therefore I submit that it is crucial that courts and competition authorities view hub and spoke cartels as one sole horizontal agreement. Furthermore the competition authorities, and the EU competition policy as a whole, would certainly benefit from qualifying a hub and spoke cartel as a horizontal agreement, since the leniency program proved to be a very effective weapon in combatting cartels.

60. THE DOMINANCE OF RETAILERS- In practice, in most of cases it is the supplier that is coerced to join a hub and spoke cartel by powerful retailers. A hypothetic situation where a supplier coerces his retailers to join a hub and spoke cartel is very unlikely to occur in practice and tends to lean more towards Article 102 TFEU. Suppliers have very limited market power on the wholesale market and therefore they have a rather vulnerable position in their negotiations with the retailers. This makes them an easy prey if several powerful retailers are seeking to set up a hub and spoke cartel.

61. JOINT INTENTION IS KEY- Qualifying a hub and spoke cartel as a classic cartel could therefore offer the coerced parties a way out, without limiting the powers of the European


Commission in case the hub is not coerced, and rather plays an active role in the hub and spoke collusion. For instance, in the *AC Treuhand I* case, the Court of First Instance found that AC Treuhand deliberately contributed to an anti-competitive agreement and that it could be held liable for that infringement of the EU competition rules even though it is not active on the market in which the restriction of competition occurred. In this *AC Treuhand I* judgement the Court of First Instance ruled that the crucial element in determining whether an undertaking has concluded an agreement that has infringed Article 101 TFEU is that of a joint intention.\(^{109}\) Furthermore in order to constitute an agreement within the meaning of Article 101 TFEU, it is sufficient that an act or conduct is the expression of the concurrence of wills of two or more parties.\(^{110}\) The form in which that concurrence is expressed is not decisive by itself.\(^{111}\)

62. **THE APPLICATION OF ARTICLE 101 IS NOT LIMITED TO A SINGLE RELEVANT MARKET**

Moreover the Court found that the application of Article 101 (1) TFEU is not limited to horizontal agreements between undertakings exercising a commercial activity on the same relevant product market. Article 101 (1) TFEU also applies to vertical agreements which entail the coordination of conduct between undertakings active at different levels of the production and/or distribution chain, and therefore operate on markets for different goods or services.\(^{112}\) As a result, The Court of First Instance ruled that there is no necessity for the market on which the infringing undertaking is active to be exactly the same as the one on which as the one on which the restriction in competition is deemed to take place.\(^{113}\)

63. **AC TREUHAND WAS (OR SHOULD HAVE BEEN) AWARE OF THE ANTI-COMPETITIVE EFFECTS OF ITS ACTIONS**

In addition, the Court of First Instance stated that just as any other undertaking, a consultancy firm should be in a position to reasonably foresee that the prohibition of Article 101 TFEU applies to it, notwithstanding the fact that it is not active

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in the cartelised market. In the *AC Treuhand I* judgement, the Court of First Instance was of the opinion that a consultancy firm, due to its economic activity and professional expertise, should have been aware that it would be held responsible under Article 101 TFEU, if it actively and knowingly contributed to an anti-competitive agreement among undertakings on a different market than the one on which it operates. For those reasons, AC Treuhand argument that a consultancy firm cannot be regarded as a co-perpetrator of an infringement because it is not economically active on the relevant market affected by the restriction of competition, cannot be upheld. This has been confirmed by the General Court in the *AC Treuhand II* judgement.

64. AC TREUHAND WAS A CO-PERPETRATOR OF THE CARTEL- In order to be able to attribute the whole of an infringement to an undertaking, that undertaking must have contributed, even in a subordinate manner, to the restriction of competition at issue, and the subjective condition relating to the manifestation of that undertaking’s intention in that regard must be met. With that regard the Court expressly held “that with regard to the determination of the individual liability of an undertaking whose participation in the cartel is not as extensive or intense as that of the other undertakings, it is apparent from the case-law that the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to rule out its liability for the entire infringement, including conduct put into effect by other participating undertakings but sharing the same anti-competitive object or effect.” In other words, participation in a cartel can take different forms. Accordingly, by storing and concealing the original cartel agreements within its premises, by calculating and communicating any deviation of the respective market shares from the agreed quotas, and by organising and attending the meetings, the Court decided that AC Treuhand shared liability for the infringement.

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65. **COMMENT—** I submit that this reasoning of the Court can be applied *mutatis mutandis* to any undertaking willingly and intentionally operating as a hub in a more classic example of a hub and spoke cartel. Both AC Treuhand judgements confirmed that it is not only the *stricto sensu* participants to the anti-competitive agreement or concerted practice that may be held liable for a cartel infringement. Undertakings that actively and knowingly aid or facilitate cartelistic behaviour can be sanctioned for their conduct, even if they are not involved in any economic activity on the cartelised market. Given the fact that the AC Treuhand cases share various characteristics with the hub and spoke cases in the retail sector, they can function as a starting point for hub and spoke analysis case under European competition law. The Court’s ruling can also function as a warning towards undertakings acting as a hub. This judgement was a clear signal that notwithstanding the unconventional character of the hub’s participation in such a cartel, the fines imposed on it may be significant.

**B. VIEWING A HUB AND SPOKE CARTEL AS A SINGLE COLLUSIVE AGREEMENT**

66. **REQUIREMENT OF A LINK BETWEEN BOTH PHASES—** The mere existence of parallel vertical agreements between A and B and B and C do not lead to a hub and spoke cartel because B is a common contractual partner.\(^{121}\) Whether the A-B phase and the B-C phase are infringements or not on themselves, the exchange of information of both phases needs to be linked in order to form a hub and spoke cartel.\(^{122}\) However, there has not been a full consideration by a competition authority on how this link is to be established.\(^{123}\) The UK Court of Appeal took the view that it made no important difference whether the correct analysis is that there was, in addition to the two or more bilateral agreements between the hub and the spokes, a tripartite agreement or concerted practice having the same object or

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According to Professor Okeoghene Odudu the Court seems to require both the vertical and horizontal agreement to have the same object, and to be interpreted cumulatively in order to qualify them as a hub and spoke cartel.\(^{125}\) In other words, the two agreements must be complementary in nature and interacting.\(^{126}\)

**67. PROFOUND IMPLICATIONS** - When a link can be established, the agreement becomes horizontal rather than vertical.\(^{127}\) And as stated before this has very profound implications with regard to the way the agreement is analysed under competition law. For instance, the high *de minimis* threshold is no longer applicable and the majority of measures is subject to the object approach.

**68. UNCERTAINTIES REMAIN** - However it is still not possible to give a definite answer on the question when a link is exactly established. In all the cases where certain agreements were condemned as hub and spoke collusion, the vertical agreements themselves were contrary to the EU competition rules. For instance in the *JBB Sports* case the vertical agreements imposed minimum retail prices on the retailers. Furthermore, according to the UK Court of Appeal, a hub and spoke cartel is considered to be constituted when the information obtained in the A-B phase is used by C subsequent to the B-C phase.\(^{128}\) But also with this regard a lot of uncertainties remain. For instance, it does not seem to be important whether B is acting in or against its own interest, or whether the disclosure of information by B to C constitutes a breach of a confidentiality agreement with A. Nor does it seem to be of any importance whether C uses the information to compete more fiercely or to avoid competition.\(^{129}\)

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C. Viewing a Hub and Spoke Cartel as an ‘Ordinary’ Vertical Agreement with Horizontal Effects

69. **Much Ado About Nothing?** Professor Nicolas Petit has taken the view that hub and spoke agreements are ordinary vertical agreements with horizontal anti-competitive effects. He argues that one should deal with them along the lines of multi-agency contracts, English clauses, etc. Viewing hub and spoke agreements as a novel kind of agreement is a purely formalistic reasoning.

70. **Comment:** While professor Odudu seems to make his reasoning too formalistic professor Petit might be taking it too far in (over)simplifying the phenomenon of hub and spoke cartels to a vertical agreement. I submit that competition authorities should consider hub and spoke cartels as a single horizontal, in parallel with the approach taken in the AC Treuhand cases. Further I consider it key to the cartel investigation to investigate the participants’ underlying (competitive) intentions.

IV. The Importance, in Terms of Legal Consequences, of the Classification of a Hub and Spoke Cartel

71. **The Consequences of Classification:** There is also a lot of uncertainty with regard to the legal consequences of a (mis)classification. For example applying for leniency, applying a block exemption, etc. But also with regard to the fine courts might find themselves in a difficult situation as the hub who acted in bad faith, might not be active on the same market where the infringements took place. For the purpose of this chapter, a hub and spoke cartel will be classified as a horizontal agreement.

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72. **Leniency** - Leniency is a lynchpin of the European Commission’s and the National Competition Authorities their enforcement policy.\(^{132}\) Close to 60% of all cartel infringements are discovered through a leniency application.\(^{133}\) The efficiency and effectiveness of the leniency program plays therefore a vital role in combatting cartel infringements. Most of these leniency programs, including the leniency program of the European Commission, are however limited to horizontal agreements.\(^{134}\) As cartels are difficult to uncover, classifying a hub and spoke cartel as a horizontal agreement would consequently be in the best interest of the competition authorities themselves. Especially because hub and spoke cartels are a more subtle, effective and ‘camouflaged’ method to cartelise a certain market. By bringing hub and spoke collusion under the scope of the leniency programs, the competition authorities would be able to combat hub and spoke cartels more effectively as it will allow them to obtain secret information by way of a leniency application.

73. **A more strict De Minimis threshold** - Furthermore, when classifying a hub and spoke cartel as a horizontal agreement, the parties involved will have to comply with the more strict rule for agreements between competitors.\(^{135}\) If a hub and spoke cartel is viewed as a horizontal agreement, it will only fall within the scope of the De Minimis Notice if the combined market share of the parties involved (including their wider corporate groups) does not exceed 10% on any of the markets affected by the agreement.\(^{136}\) This is significantly stricter than with regard to vertical agreements. In relation to vertical agreements, an agreement will fall within the scope of the De Minimis Notice if the market size

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\(^{133}\) T Carmeliet, ‘How lenient is the European leniency system? An overview of current (dis)incentives to blow the whistle’, (2012) 48 (3) Jura Falconis 463, 463.

\(^{134}\) However, the Belgian, Finnish, Polish and Romanian leniency programs are applicable to horizontal and vertical agreements; the UK program also applies to retail price maintenance.


\(^{136}\) De Minimis Notice, para 8.
share of each of the parties involved (including their wider corporate groups) does not exceed 15% on any of the markets affected by the agreement.\textsuperscript{137}

74. **THE MAJORITY OF MEASURES WILL BE SUBJECT TO THE OBJECT APPROACH** - With regard to vertical agreements, there only are a limited amount of measures subject to the object approach, while the majority of measures is subject to the effect approach. With regard to horizontal agreements the opposite is true.\textsuperscript{138} This because generally speaking horizontal agreements are considered to be more harmful than vertical agreements. If an agreement has the object to harm competition, it will violate Article 101 of the Treaty, even if there are no negative effects on competition at all. Consequently an analysis of the effects on the market is not necessary.\textsuperscript{139} The guidelines on the application of Article 101(3) TFEU defined restrictions by object those restrictions that by their very nature have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 101(1) to demonstrate any actual effects on the market.\textsuperscript{140} For example, in the case of horizontal agreements restrictions of competition by object include price fixing, output limitation and sharing of markets and customers.\textsuperscript{141}

75. **THE EUROPEAN COMMISSION IS NOT LIMITED TO IMPOSING A SYMBOLIC FINE** - With regard to the fines the second AC Treuhand judgement clarified a few issues. Where the European Commission merely imposed a symbolic fine of €1000 in *AC Treuhand I*, it imposed the fine of €348.000 in *Treuhand II*. The General Court clarified in *AC Treuhand II* that the European Commission was not under the limitation to only impose a symbolic fine. This was solely an option available to the European Commission.\textsuperscript{142} The General Court also stated that the fact that the European Commission had imposed symbolic fines in earlier

\textsuperscript{137} De Minimis Notice, para 8.


\textsuperscript{139} Joined Cases 56 and 58/64, *Consten and Grundig v Commission* [1966] ECR 301, 342.


On the contrary, the General Court ruled that in order to effectively enforce the competition rules, the European Commission should be able to adjust the level of fines to the needs of the European competition policy.

76. **The European Commission was allowed to depart from its regular fine calculating methodology**—Further, AC Treuhand argued that the European Commission wrongfully calculated the imposed fine. AC Treuhand argued that its fine should have been calculated based on the fees it had received for its services from the cartel participants. According to points 9 to 13 of the Guidelines, the European Commission was supposed to determine the basic amount of the fine by reference to the value of the concerned undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area. However, in the case at hand, the fine imposed was defined as a lump sum instead by reference to the remuneration that AC Treuhand received for its services related to the infringement. The General Court considered that, in the case at hand, the Commission could and even should depart from the method normally used to calculate the fine. The General Court pointed out that, since AC Treuhand was not active on the market for heat stabilisers, the value of its sales on this market was therefore “not representative” of its participation in the cartel. The General Court started its reasoning with reiterating its case law that even though the Guidelines are merely a soft law instrument which the administration is always bound to observe, they nevertheless form rules of practice from which the European Commission may not deviate.

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from in an individual case without giving reasons. This does not mean that the European Commission has absolutely no margin of appreciation with regard to setting fines. Paragraph 37 of the Guidelines states that the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from the methodology set out in the Guidelines. And as mentioned above, The General Court was of the opinion that the particular circumstances of the present case justified a departure from such methodology.

V. FORMULATING A LEGAL TEST/STANDARD THAT A CERTAIN PRACTICE MUST MEET IN ORDER TO BE QUALIFIED AS A HUB AND SPOKE CARTEL

77. FACILITATOR LIABILITY- In order to determine a legal test that a certain practice must meet in order to be qualified as a hub and spoke cartel, I submit that the decision of the Court of First Instance in the AC Treuhand I case forms the perfect starting point. In its analysis the Court provided a statement that could serve as the legal basis for “facilitator liability”. The Court of First Instance stated that: “it is sufficient for the Commission to show that the undertaking concerned attended meetings at which anticompetitive agreements were concluded, without manifesting its opposition to such meetings, to prove to the requisite legal standard that that undertaking participated in the cartel ... Where an undertaking tacitly approves an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, the effect of its behaviour


is to encourage the continuation of the infringement and to compromise its discovery. It thereby engages in a passive form of participation in the infringement.”

This statement by the Court confirms that a facilitator of a cartel can be held liable as co-perpetrator of infringement as a whole, even if their participation was subsidiary, accessory or passive.

So the fact that the hub would not take part in all aspects of the anti-competitive conduct, or the fact that it only played a minor role in the aspects in which it did participate, is not material to the establishment of an infringement on its part. It is therefore clear that the Court of First instance recognises the joint liability of the undertakings which are co-perpetrators of an infringement of Article 101(1) TFEU.

78. INTENTIONAL ELEMENT- The attribution of the infringement as a whole to the participating undertaking depends on the manifestation of its own intention, which shows that it is in agreement, though only tacitly, with the objectives of the cartel. Further The Court stated that: “any undertaking which has adopted collusive conduct, including consultancy firms which are not active on the market affected by the restriction of competition, could reasonably have foreseen that the prohibition laid down in Article 101(1) TFEU was applicable to it in principle. Such an undertaking could not have been unaware, or was in a position to realise, that a sufficiently clear and precise basis was already to be found, in the former decision-making practice of the Commission and in the existing Community case-law, for expressly recognising that a consultancy firm is liable for an infringement of Article 101(1) of the Treaty where it contributes actively and intentionally to a cartel between producers which are active on a market other than that on which the consultancy firm itself operates.” As the Court expressly used the words “any undertaking” I submit that this reasoning can be applied mutatis mutandis on any third party that intentionally fulfils the function of a hub in a hub and spoke cartel.


SUMMARY OF THE LEGAL TEST- The Court of First Instance decided that any undertaking can be held liable for the infringement of Article 101(1) TFEU if it intentionally contributes to a cartel between competitors which are active on a market other than that on which the undertaking itself operates. The second step is determining the objective and subjective conditions for establishing that such an undertaking shares liability, in that the anti-competitive conduct of the other participating undertakings can be attributed to it, are satisfied.\textsuperscript{159} In order to be able to attribute the whole of an infringement to an undertaking, that undertaking must have contributed, even in a subordinate manner, to the restriction of competition at issue, and the subjective condition relating to the manifestation of that undertaking’s intention in that regard must be deemed to be met.\textsuperscript{160}


VI. CONCLUSION

80. LESS IS MORE- I started this paper with the following statement: “European law does not contain a definition of a hub and spoke cartel. But notwithstanding the fact that European law does not define this phenomenon, a lot of ink has been spent over this topic.” Nevertheless I have increased that portion of spent ink, I submit that there has been spent too much ink over this topic. Especially because in December 2003 the European Commission issued a decision that successfully handled a hub and spoke case.\textsuperscript{161} This decision ultimately led to the \textit{AC Treuhand I} case where the Court of First Instance confirmed the European Commission’s method.\textsuperscript{162} Admittedly, the \textit{AC Treuhand I} case was not a ‘classic retail hub and spoke cartel’, but it did provide a workable legal basis to sanction the parties involved in a cartel that consists of the exchange of sensitive information among competitors through a third party that facilitates the cartelistic behaviour of the competitors involved. I conclude that classifying the whole arrangement as a single horizontal agreement, appears to be the most efficient way of dealing with a hub and spoke cartel under European competition law.

\textsuperscript{161} Case COMP/E-2/37.857– Organic Peroxides.

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