

**HUB AND SPOKE AS AN ANTI-
COMPETITIVE PRACTICE IN THE
DIFFERENT JURISDICTIONS: ARE
THEY COMPATIBLE?**

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RESUMO:

“A existência de contactos sobre estratégia comercial entre parceiros comerciais não concorrentes – fornecedor e distribuidor – por si só nada tem de ilegal. É, de facto, inerente a esse tipo de parceria. Assim, discussões sobre formas apelativas de dispor produtos em loja, conceção de produtos distintos mais inovadores que respondam às necessidades dos consumidores, atividade promocional, negociação de condições comerciais, meras recomendações de preços de venda ao público, bem como outras formas de tornar o fornecimento mais eficiente, são em geral práticas lícitas e aceitáveis no âmbito de tal relação comercial.”¹ A presente dissertação tem, por objetivo o estudo de um tipo de prática que excede os limites legais da negociação fornecedor/distribuidor, os cartéis "Hub and Spoke" enquanto práticas anti-concorrenciais, evidenciando as suas nuances mais particulares, características diferenciadoras, implicações na jurisdição portuguesa e internacional e a sua harmonia com as normas jurídicas.

Em Portugal, a Autoridade da Concorrência (AdC) desempenha um papel crucial na regulação da concorrência e no combate a estas práticas anti-concorrenciais. Este estudo visa analisar o quadro jurídico português e compara-o com o de outras jurisdições, nomeadamente na União Europeia e a nível mundial, para avaliar a eficácia e a compatibilidade desta regulamentação.

Pretendo concluir a dissertação com a apresentação de um rol de recomendações para reforçar a harmonização dos quadros legais, com o objetivo de melhorar a aplicação global do direito da concorrência. Estas recomendações sublinham a necessidade de cooperação internacional e de normas jurídicas mais robustas para enfrentar os desafios complexos colocados pelos acordos Hub and Spoke, promovendo assim um ambiente de mercado justo e competitivo, tanto em Portugal como a nível internacional.

PALAVRAS-CHAVE: HUB AND SPOKE, CONLUIO, CONCORRÊNCIA, COMPLIANCE

¹ Autoridade da Concorrência, *Perguntas e Respostas sobre casos de “hub-and-spoke” na Grande Distribuição*, 2022, p.2

ABSTRACT:

"The existence of contacts on commercial strategy between non-competing commercial partners - supplier and distributor - in itself has nothing illegal about it. It is, in fact, inherent in this type of partnership. Thus, discussions about appealing ways of arranging products in the store, designing different, more innovative products that meet consumer needs, promotional activity, negotiating commercial conditions, mere recommendations on retail prices, as well as other ways of making supply more efficient, are generally lawful and acceptable practices within the scope of such a commercial relationship."² The aim of this dissertation is to study a type of practice that exceeds the legal limits of supplier/distributor negotiation, the "Hub and Spoke" cartels as anti-competitive practices, highlighting their more particular nuances, differentiating characteristics, implications in Portuguese and international jurisdiction and their harmony with legal norms.

In Portugal, the Competition Authority (AdC) plays a crucial role in regulating competition and combating these anti-competitive practices. This study aims to analyze the Portuguese legal framework and compare it with that of other jurisdictions, namely in the European Union and worldwide, in order to assess the effectiveness and compatibility of this regulation.

I intend to conclude the dissertation by presenting a list of recommendations to strengthen the harmonization of legal frameworks, with the aim of improving the overall application of competition law. These recommendations emphasize the need for international cooperation and more robust legal standards to face the complex challenges posed by Hub and Spoke agreements, thus promoting a fair and competitive market environment, both in Portugal and internationally.

KEYWORDS: HUB AND SPOKE, COLLUSION, COMPETITION, COMPLIANCE

² *Autoridade da Concorrência, Perguntas e Respostas sobre casos de "hub-and-spoke" na Grande Distribuição, 2022, p.2 (our translation)*

*A vida é feita de desafios e tenho, felizmente, podido contar com várias pessoas
significativamente importantes para superar os meus.*

*A todos a quem nunca faltou uma palavra de força e encorajamento, por terem
acreditado mesmo quando eu não acreditei.*

*Ao meu orientador, Exmo. Senhor Professor Nuno Cunha Rodrigues, pela
paciência e ajuda inestimável.*

*Aos meus pais, a quem tudo devo, esta, como todas as metas que cruzar, é
graças a vocês e por vocês. À minha mãe, neste mês tão especial, por seres a minha
maior inspiração. Ao meu pai, por seres o meu maior exemplo de força e determinação.*

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ABBREVIATIONS

CAT: Competition Appeal Tribunal

CEC: Commission of the European Communities

COA: Court of Appeal

EC: European Commission

EU: European Union

FTC: Federal Trade Commission

OFT: Office of Fair Trading

RPM: Resale Price Maintenance

SC: Supreme Court

TFEU: Treaty on the Functioning of the European Union

UK: United Kingdom

USA: United States of America

I. INTRODUCTION

The phenomenon of Hub and Spoke has increased significantly the attention and scrutiny within competition law. It differs from other anti-competitive practices because of its singular characteristics, in particular for combining elements of vertical and horizontal practices - it therefore does not fit on either side of that traditional divide. This blend of vertical and horizontal elements of Hub and Spoke agreements increases the complexity of their detection, prosecution and regulation by the regulatory authorities of the different jurisdictions.

The concept of Hub and Spoke involves a central entity, the “hub”, coordinating activities among several independent entities, the “spokes”, often leading to collusive outcomes that distort competitive processes - price-fixing, market allocation, or other restrictive practices without explicit agreements among the spokes themselves. This coordination can take place through various means, usually through the exchange of strategic information, as intermediaries in the supply chain, thus blurring the boundaries between legitimate business practices and illegal collusion.

As global markets become increasingly interconnected every day, it is crucial to understand how different jurisdictions approach Hub and Spoke practices. Different jurisdictions around the world adopt varying legal frameworks, enforcement strategies, and judicial approaches when it comes to addressing anti-competitive behavior. For instance, the European Union stands out with its robust antitrust regulations, characterized by stringent laws and proactive enforcement carried out by the European Commission. This contrasts with the United States, where both government agencies such as the Federal Trade Commission (FTC) and the Department of Justice (DOJ) play central roles in enforcement, but private parties also contribute significantly through litigation. These differences have a direct influence on how competition laws are applied and enforced.

The aim of this thesis is to explore the intricacies of Hub and Spoke collusion as an anti-competitive practice across various jurisdictions. I propose to analyze the

compatibility of these practices with the existing legal frameworks and assess the effectiveness of current enforcement mechanisms. By examining case studies, regulatory responses and judicial outcomes, I aim to provide a comprehensive understanding of this practice and its characteristics, on how different legal jurisdictions face the challenges posed by Hub and Spoke agreements, to understand which sectors are most frequently involved in this type of conduct, which red flags may be associated and, ultimately, to propose compliance solutions that reduce the risk of this behavior occurring. The future of business and industry depends on growth and, closely linked to it, innovation - with the ultimate aim of adding value to the market and the consumer. Ensuring fair competition is a dynamic and essential objective for the pursuit of this goal.

II. HUB AND SPOKE

a. Definition

“Hub-and-Spoke arrangements are triangular schemes that involve economic players operating at different levels of the supply chain, thus containing both horizontal and vertical elements.”³

Hub and Spoke involves a relationship between at least three companies, one of which acts as an intermediary in the sharing of sensitive competitive information between competitors.

Therefore, the producer or supplier acts as a vehicle - the “Hub” - for transmitting commercially sensitive information to competitors - the “Spokes”. There are not direct communications between competing companies, but rather indirect communications that take place through an intermediary, their commercial partner.

“A common manufacturer or supplier may act as a hub in order to relay information to multiple distributors or retailers, or a distributor or retailer may act as a hub to relay information to multiple manufacturers or suppliers. An online platform can also act as a hub where it facilitates, coordinates or enforces information exchanges between business users of the platform, for example, to secure certain margins or price

³ OECD, “Hub-and-spoke arrangements – Note by the European Union”, 2019, p.2

levels. Platforms may also be used to impose technical measures which prevent platform users from offering lower prices or other advantages to final customers. Information may also be exchanged indirectly via a shared optimisation algorithm which takes commercial decisions based on commercially sensitive data feeds from competitors. Whilst using publicly available data to feed algorithmic software is legal, the aggregation of commercially sensitive information into a pricing tool offered by a single IT company to which various competitors have access could amount to horizontal collusion.”⁴

To better understand the Hub and Spoke scheme, we visualize the figure of a pyramid, through which two companies that are at the same level of the production chain - both retailers or suppliers - exchange commercially strategic information through a third company that is at another level of production - retailer or supplier.

Anti-competitive practices tended to be classically divided into vertical and horizontal agreements, distinguished by the relationship between the parties, i.e: horizontal agreements occur between competitors operating at the same level of the supply chain, whereas vertical agreements happen between parties who belong to a common chain but in different levels, manufacturers, distributors and retailers. While horizontal agreements are directly anti-competitive and subject to strict enforcement, vertical agreements are evaluated based on their potential to both harm and benefit the market. Hub and Spoke cases, however, are not included in either of these two large groups - they are rather a combination of vertical and horizontal elements - they can be explained as a “direct exchange of information at a vertical level, which has consequences at a horizontal level (allowing coordination of behavior between competing distribution companies). Thus, the existence of a Hub as an identifying factor is not enough; a horizontal link must be established between the Spokes, namely through the intention and knowledge of the practice, otherwise we are dealing with mere vertical commercial relationships that are independent of each other.”⁵

⁴ European Commission, “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements”, paragraph 402

⁵ MIRANDA POÇAS, “O Enquadramento da figura hub-and-spoke na jurisprudência do Tribunal de Justiça da União Europeia e dos Tribunais Britânicos”, p.85

Hub and Spoke arrangements often relate to prices, supply intentions or business strategies. As with other types of horizontal collusion, the main competition concern is that the exchange of strategic information may reduce the uncertainty about the action of competitors and thus lead to a collusive outcome on the market. In Hub and Spoke arrangements, however, collusion is achieved through the hub, who acts as a facilitator and sometimes also as the enforcer of anticompetitive horizontal conduct.

In *Amore*, Hub and Spoke arrangements are defined as practices where the interaction between a supplier or manufacturer and its distributors or retailers, or vice versa, may facilitate collusion, reduce competition in retail prices or quantities, and ultimately harm consumers.⁶ This definition distinguishes between two types of arrangements: the first, where the supplier or manufacturer functions as the “hub” at the upstream level, and the distributors or retailers act as the “spokes” downstream; and the second, where the roles are reversed, with the distributor or retailer acting as the hub and the suppliers or manufacturers as the spokes.

In the first group, that the author calls Type 1, the supplier acts as the hub, setting the collusive prices, monitoring retailers to ensure compliance, and punishing those who fail to adhere to the agreed pricing. This may involve the imposition of fixed or minimum resale price maintenance (RPM) agreements. The European Commission defines RPM agreements as those that directly or indirectly restrict the buyer's ability to set their sale prices, including agreements that establish a fixed or minimum sale price to be followed by the buyer. The Commission also notes that RPM can be linked to other anti-competitive practices, such as horizontal collusion through Hub and Spoke arrangements.⁷ *Amore* also notes that the UK cases, such as *Toys*, *Replica Kit*, *Tobacco* and *Dairy*, that he calls “A-B-C cases” are a good example of this dynamic.⁸

⁶ AMORE, “Three (or more) is a magic number: Hub & spoke collusion as a way to reduce downstream competition”. *European Competition Journal* 12, 1 (2016): 28-53 – p. 28

⁷ European Commission, “Guidelines on vertical restraints”, paragraph 185, pp. 54 and 55

⁸ AMORE “Three (or more) is a magic number: Hub & spoke collusion as a way to reduce downstream competition”. *European Competition Journal* 12, 1 (2016): 28-53 – p. 31

The second group, Type 2, involves a scenario where a number of suppliers, operating upstream in the supply chain as the spokes, impose identical vertical restraints, usually at the request of a common retailer, the hub, who seeks to prevent new entrants into the market. This arrangement may involve the suppliers setting final prices and requiring that these prices not be undercut by any other retailer outside the agreement. In this scenario, both the supplier and the retailer agree on a price that benefits both parties, limiting competition. In this category Amore includes *Toys R Us* case.⁹

Both groups of Hub and Spoke collusion cases share common features, particularly in the way suppliers set fixed or minimum retail prices, creating a horizontal agreement that limits competition at the retail level. A further shared characteristic is the pressure applied by retailers on suppliers to engage in these anti-competitive practices. The key difference between the two groups lies in the sequence of events: in the first group, the collusion at the horizontal level (the suppliers' coordination) forms the basis of the Hub and Spoke arrangement, leading to the establishment of RPM. In contrast, in the second group, the collusion begins at the retail level, with the retailer's pressure prompting suppliers to align their conduct.

In both cases, the effect is the same: competition at the retail level is reduced, consumers are harmed, and the competitive process is distorted. However, the dynamics of how the collusion is structured—whether initiated by suppliers or retailers—provide key insights into the functioning of Hub and Spoke arrangements and the mechanisms through which they restrict competition.

Another important distinction to consider is between exclusive and selective distribution agreements. In an exclusive distribution agreement, the supplier agrees to sell its products to only one distributor, refusing to supply any other operator outside the arrangement. On the other hand, a selective distribution agreement involves the supplier choosing which products or types of products to sell to all operators, while reserving certain products for exclusive sale to those within the agreement.

⁹ AMORE, “Three (or more) is a magic number: Hub & spoke collusion as a way to reduce downstream competition”. *European Competition Journal* 12, 1 (2016): 28-53 – p. 32

The European Commission Guidelines address exclusive supply agreements, emphasizing that the main competition concern with exclusive supply is the anti-competitive foreclosure of other buyers. This risk is particularly relevant if the exclusive distributor becomes the sole buyer for a whole market. The Commission highlights that the market share of the buyer on the upstream purchase market is crucial for assessing the ability of the buyer to impose exclusive supply, potentially excluding other buyers. However, the buyer's position in the downstream market is a more significant factor when determining if anti-competitive effects could arise. If the buyer does not hold market power downstream, then no significant harm to competition is expected. Conversely, negative effects may arise if the buyer's market share exceeds 30% in either the downstream or upstream markets. In situations where the buyer is dominant downstream, any obligation for suppliers to supply products mainly to that dominant buyer could have substantial anti-competitive effects.¹⁰

Amore presents three conditions, whether in Types 1 or 2, in order for being at stake a Hub and Spoke case and to avoid confusions between other infringements.

1. The retailer must have market power and, in top of that, “a significant degree of bargaining power vis-a-vis their suppliers”;
2. The retailer must use their “bargaining power to reach horizontal collusion at some level (either downstream, in Type 1, or upstream, in Type 2), through a network of identical vertical restraints, with the ultimate goal of (further) reducing competition at the retail level or eliminating it completely”;
3. A rent must be created (i.e. extra profits) “to share between the supplier(s) and the retailers relies entirely on the fact that a sufficient number of retailers (in Type 1) or suppliers (in Type 2) abide by the prescribed vertical restraint”.¹¹

¹⁰ European Commission, “Guidelines on vertical restraints”, paragraph 125, p.39

¹¹ AMORE, “Three (or more) is a magic number: Hub & spoke collusion as a way to reduce downstream competition”. European Competition Journal 12, 1 (2016): 28-53 – pp. 42 and 43

b. Relationship between the Hub and the Spokes

Relationships are established between the hub and the spokes. Regarding the relationship between the hub and the spokes, these are easily recognized as independent vertical relationships and, in this line of thought, it would be expected to classify the relationship between the various spokes as a purely horizontal relationship, but this is not necessarily the case.

“Through an initial analysis of the relationship established between A - B - C, it seems clear to us that there is no direct link (i.e. from a formal point of view) between A and C, which would allow us to state, without a doubt, that the relationships established, through B, are only horizontal in nature, to the exclusion of vertical aspects. This aspect is particularly important, since its characterization will depend, to a large extent, on the application of competition rules to the subjects involved, namely, by the application of a greater or lesser number of restrictions by object, the possibility of applying the exemption regulation provided for certain categories of vertical agreements and concerted practices and the limits provided for in the De Minimis Notice, which vary according to the type of relationship in question.”¹² Thus, we can already point out that there are two currents in this regard: supporters of the characterization of the Hub and Spoke figure as always being horizontal in nature, and, on the other hand, those who prioritize the characterization of this figure by the specificities of the vertical relationships established A - B and B - C and the subjective elements that exist (i.e. the intention of the parties involved).

It can be understood that the legal assessment of whether a Hub and Spoke cartel is lawful or not hinges on classifying the agreement as either vertical or horizontal. In European competition law, this classification is particularly important, first and foremost, for two reasons: leniency programs and the application of the object/effect approach.

Leniency programs offer immunity or a reduction in fines to companies involved in cartels that self-report and provide evidence to the competition authorities. These programs are a crucial tool for uncovering cartels, including Hub and Spoke

¹² MIRANDA POÇAS, “O Enquadramento da figura hub-and-spoke na jurisprudência do Tribunal de Justiça da União Europeia e dos Tribunais Britânicos”, p.86

arrangements, as they allow authorities to gain insider information from cartel participants. However, most leniency programs are designed to apply primarily to horizontal cartels, meaning that for competition authorities to take advantage of these programs, Hub and Spoke cartels would benefit from being classified as horizontal agreements.

Horizontal agreements are generally assessed under the "object" approach, which means that there is no need to prove that the agreement has actual anti-competitive effects. This is not the case for vertical agreements, where the mere object of the agreement is often insufficient to establish a competition law violation. The doctrine, namely Lemley and Leslie¹³, understands that this distinction arises because horizontal agreements are typically seen as more harmful to competition than vertical agreements, due to their higher potential to distort market competition. As a result, for horizontal agreements, it is sufficient to demonstrate that the agreement's object itself restricts competition. On the other hand, if a Hub and Spoke arrangement is classified as a vertical agreement, competition authorities would need to prove both that the object and the effects of the agreement are anti-competitive.

Therefore, the classification of a Hub and Spoke cartel as either a vertical or horizontal agreement has significant implications for enforcement. If the cartel is viewed as horizontal, authorities only need to show that the object of the agreement is harmful to competition, making it easier to establish a violation. However, if the arrangement is treated as vertical, a more detailed analysis is required, with authorities needing to prove that both the object and the effect of the agreement harm competition in the market.

The key elements of a Hub and Spoke agreement typically include a hub as the dominant purchaser, the spokes, which are competing manufacturers or distributors entering into vertical agreements with the hub, and the horizontal agreements among the spokes are "the rim of the wheel"¹⁴, and then a fourth element can be identified that is the relation that exists between the hub and the spokes that end in exclusivity clauses, RPM clauses, loyalty discounts, among others.

¹³ LEMLEY/LESLIE, "Categorical Analysis in Antitrust Jurisprudence", 2007, p. 15

¹⁴ OECD, "Hub-and-spoke arrangements – Note by the United States", p. 2

c. The specificities in the exchange of information

The exchange of information between competitors can significantly influence market dynamics, often blurring the line between legitimate business conduct and anti-competitive behavior. In the context of Hub and Spoke agreements, the role of information exchange is particularly nuanced.

In Hub and Spoke collusion, information exchange typically occurs through the central hub, which acts as an intermediary among the spokes. The hub collects, processes, and redistributes strategic information such as pricing, production plans, and market strategies. – but it is the intervention of the spoke that distances these behaviors from strictly vertical relationships.

This information flow can occur through various channels: **a) direct communication**, when the hub facilitates direct meetings or communications among the spokes, creating an environment where sensitive information is openly shared; **b) indirect communication**, information can also be exchanged indirectly through shared third-party agents, industry associations, or even through public announcements strategically designed to signal intentions to competitors; and **c) digital platforms**, With the advent of technology, digital platforms and online marketplaces have become new arenas for information exchange. As previously mentioned, these platforms can be used to monitor competitors' activities and disseminate information efficiently.

Legal frameworks governing information exchange vary significantly across jurisdictions, with different thresholds for what constitutes anti-competitive behavior. Key considerations include the (i) nature of the information, (ii) the market context, and the (iii) intent and effect of the exchange.

- (i) The nature of information exchanged plays a crucial role; for instance, while sharing historical data might be permissible, exchanging future pricing information is often deemed anti-competitive.
- (ii) Additionally, the market context in which information is shared is critical, as in highly concentrated markets, even seemingly benign exchanges can have anti-competitive effects.

- (iii) Legal frameworks also assess both the intent behind and the actual impact of information exchanges, with jurisdictions differing in their emphasis on intent versus effect, which influences how cases are prosecuted.

One of the most important characteristics of the Hub and Spoke collusion is the indirect exchange of information method. There are two phases in this method: in the first one the strategic/sensitive information goes from A to B; and then, in the second phase, B discloses the same information to C, who may use it when deciding its business strategy. “Information exchange can only be addressed under Article 101 if it establishes or is part of an agreement, a concerted practice or a decision by an association of undertakings”¹⁵ and “the object or effect of which is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question”.¹⁶ Therefore, it is imperative to prove that there is not just the exchange of information between A and B and B and C, it is necessary to prove that there is a collusive practice in place.

The Court of Appeal (COA) stated that in the first phase when “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).¹⁷ This means that if A shares strategic information with B knowing that B with great certainty will transmit the information to C (other retailers) and they can influence market conditions the collusion is established.

This may obviously arise a problem – distinguish the information that is transmitted with this intention from the harmless communications, because there are legitimate communications regarding “the prices (...) and the terms on which they sell its

¹⁵ European Commission, “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements”, paragraph 375

¹⁶ European Commission, “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements”, paragraph 374

¹⁷ Argos Limited, Littlewoods limited and JJB Sports PLC v OFT, Case No 2005/1071, 1074 and 1623, paragraph 141

products (...) for its own commercial purposes and in the context of the ongoing relationship with each distributor separately”.¹⁸

As stated by the Competition Appeal Tribunal (CAT) “a simple disclosure of retail pricing information by a retailer to a supplier cannot be treated, without more, as an agreement to fix the retail price”.¹⁹ In direct exchanges of information it is, naturally, much easier to ascertain the intention of the parties than it is in cases where a third party intermediates the exchange of information – however, it was strictly defined the necessity to evidence that A had an intention in order to define a Hub and Spoke arrangement.

The second phase is entered when B does, actually, transmit the information to C and this is a structural moment – when the uncertainty is indeed reduced. However, it is still necessary a third moment: when C uses that information to determine its future strategy.

Regarding this topic, in the horizontal guidelines the EC states that “when a company receives strategic data from a competitor (...), it 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”²⁰ and “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 the market”.²¹

In the *Cement* cases the General Court said that there would be no infringement if the parties can prove the contrary. However, in *Hüls*, the Court of Justice held that “a concerted practice is caught by Article 101(1) TFEU, even in the absence of anti-competitive effects on the market”²² – In its words, the reason for this was in Article

¹⁸ Argos Limited, Littlewoods limited and JJB Sports PLC v OFT, Case No 2005/1071, 1074 and 1623, paragraph 99

¹⁹ Makers UK Limited v OFT, case 1061/1/1/06, paragraph 99

²⁰ European Commission, “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements”, paragraph 62

²¹ CEE v Anic Partecipazioni SpA, Case C-49/92 P, paragraph 121

²² Hüls AG v Commission, Case C-199/92 P, paragraph 163

101(1) requirement that each undertaking must determine its policy on the market independently.

The Court acknowledged that the concept of a concerted practice implies that there will be common conduct on the market, but added that there must be a presumption that, by making contact with one another, such conduct will follow. This is commonly referred to as the *Anic* presumption.”²³

In *T-Mobile* the Court of Justice held that the *Anic* presumption of a ‘causal connection’ between competitor contact and conduct on the market forms an integral part of EU law, in consequence of which a national court applying Article 101 would be bound to apply the same presumption; to put the point a different way, the national court is not permitted to apply stricter national rules of evidence than the EU presumption. The Court also held that the presumption in *T-Mobile* could apply even in the event of a single meeting between competitors.

In *Fresh Del Monte v Commission* Del Monte, the major producer and distributor of fresh products, failed to rebut the presumption of a ‘casual connection’ between its bilateral contacts with two competitors to fix quotation prices for bananas and its market conduct.

Okeoghene Odudu created a thesis stating that the *Anic* presumption can be justified on three separate grounds: First, the presumption is justified if reliance is what firms are trying to get through the exchange of information because, “undertakings colluding with the intention of restricting competition are more likely to restrict competition than if they had no such intention”²⁴. Secondly, it is justified if trust occurs more frequently than if information exchange had not taken place, even if companies do not request the information. Because when firms receive information they will necessarily and unavoidably take it into consideration when acting on the market. Lastly, as it is C’s role to prove that it did not use the information that it received, “the presumption is all

²³ WHISH/BAILEY, “Competition Law”, 2024, p. 445/446

²⁴ ODUDU, “Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion”, 2011, p. 224

the more justified, or separately justified, if it is easier for C to prove that it did not rely on the information than it would be for a complainant to prove reliance”²⁵. Odudu added that the last factor to take into consideration is how to determine the credibility of the information disclosed. The fact that information is shared indirectly makes it harder to imply credibility, as information becomes less reliable than if it were transmitted directly. In order to evaluate the credibility, the UK CAT requires that “C may be taken to know the circumstances in which the information was disclosed by A to B”²⁶. C must be informed about “the circumstances in which the information was disclosed by A to B”. C must also be able to distinguish credible information from market rumour or speculation, and B’s opinion on the matter. It is unclear if a single interaction is sufficient to imply credibility can be established or if repeated interaction is needed.

In Richard Whish words “The legal burden of proving the existence of a concerted practice is on the Commission (or the person alleging the infringement of Article 101(1)). The Court of Justice has said that in most cases the existence of a concerted practice must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement. The principle of effectiveness requires that an infringement may be proven either by direct evidence or through indicia, provided that they are objective and consistent.”²⁷

These principles highlight that while the Commission bears the burden of proving the existence of a concerted practice, it is also necessary for the parties involved to provide evidence capable of rebutting any presumption of coordination between competitors. If the parties can demonstrate, with sufficient evidence, that there was no causal link between competitor contact and subsequent conduct, the initial presumption of a concerted practice may be dispelled. However, the overall burden of proof remains with the Commission to demonstrate the infringement. This was made clear in previous

²⁵ ODUDU, “Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion”, 2011, p. 225

²⁶ ODUDU, “Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion”, 2011, p. 226

²⁷ WHISH/BAILEY, “Competition Law”, 2024, p. 446

cases, such as *Compagnie Royale Asturienne des Mines* and *Rheinzink v. Commission*, where the Court of Justice annulled the Commission's decision for failing to consider an alternative plausible explanation for the observed behavior.

In Richard Whish can also be read that “The evidential burden of demonstrating that competitor contact did not affect an undertaking’s subsequent conduct falls upon the undertaking making such assertion. (...) The EU Courts have annulled decisions where they were not convinced by the evidence on which the Commission relied. For example, in *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission* the Commission had concluded that the simultaneous cessation of deliveries to a Belgian customer, Schlitz, by CRAM and Rheinzink of Germany was attributable to a concerted practice to protect the German market. The Court of Justice held that there was a possible alternative explanation of the refusal to supply, which was that Schlitz had been failing to settle its accounts on the due date; as the Commission had not dealt with this possible explanation of the conduct in question, its decision should be quashed. Similarly, in *CISAC v Commission* the General Court annulled the Commission’s finding of a concerted practice because the fight against piracy of copyrighted music was an alternative plausible explanation for the parallel behavior of collecting societies.”²⁸

In order to demark themselves of that collusion, there is the need of a clear statement from the entity that receives the information that it does not want to receive such kind of informations. According to the jurisprudence it is open for C to seek to demonstrate that it determined independently the policies it pursued and did not act on the basis of A’s future pricing intentions.

Firms need to take proactive steps to prove that they did not act on the information they received, the company must make it clear that, despite appearances, it does not agree with the illegal actions they have taken.

In order to dissociate itself from the cartel, C has to reply immediately to B stating the information was not requested and is unwelcome. This must be done in writing and very promptly. Internal documents or oral rejection will be insufficient. Bailey adds that C

²⁸ WHISH/BAILEY, “Competition Law”, 2024, p. 446/447

must also be able to prove that its subsequent strategy was determined without taking into consideration the information it received from B.

By way of conclusions, Richard Whish draws the following propositions from the various law cases:

- “a concerted practice involves a knowing substitution of practical cooperation for the risks of competition (*ICI v Commission*)
- a concerted practice does not require an actual plan; it strictly precludes contact that could influence conduct on the market or disclose one’s future conduct on the market (*Suiker Unie v Commission*)
- there is a presumption that undertakings taking part in concerted action take into account information exchanged between them; and there is no need to prove that the concerted practice produces actual effects on the market (*Commission v Anic Partecipazioni*)
- a concerted practice implies reciprocity, but this is satisfied where one competitor discloses its intentions or conduct on the market to another when the other requests it or, at the very least, accepts it (*Cimenteries CBR SA v Commission*)
- the *Hüls* presumption is a substantive rule of law, and a concerted practice can arise from the exchange of information at a single meeting”²⁹

d. The legal framework in Portugal

In a note of the Portuguese Competition Authority (Autoridade da Concorrência – hereinafter “AdC”) can be read that “hub-and-spoke arrangements are usually compared in legal literature and jurisprudence to a cartel, being assessed, in most cases, through the lens of a concerted practice”³⁰. In the Portuguese legal framework there is no provision referring specifically to Hub and Spoke arrangements, Hub and Spoke cases may fall may fall within the scope of Article 9 of the Law no. 19/2012, of 8 of May (the Portuguese Competition Act), besides the scope of Article 101 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”).

²⁹ WHISH/BAILEY, “Competition Law”, 2024, p. 448

³⁰ OECD, “Hub-and-spoke arrangements – Note by Portugal”, 2019, p.2

“Similarly to any other type of collusion, in order to find that a hub-and-spoke arrangement constitutes an infringement under Article 9 of the Portuguese Competition Act, a number of conditions have to be met. In particular, there must be (i) an agreement or concerted practice between undertakings, or a decision by an association of undertakings; (ii) which has as its object or effect the prevention, restriction or distortion of competition; (iii) with an appreciable effect on competition; and (iv) the verification of that appreciable effect on the Portuguese market. Article 9 is based on Article 101 TFEU, thus, when assessing whether a practice falls under it, one may take into consideration the relevant case-law by the Courts of the European Union, as well as guidelines adopted by the European Commission.”³¹

In the words of Sofia Oliveira Pais “The Portuguese decisions benefit from the experience of the US and UK case-law and confirm that hub-and-spoke arrangements are a special kind of cartels that are not coordinated through direct communication or information exchange between horizontal competitors (the spokes) but through indirect communication”.³² The author underlines that Hub and Spoke arrangements are a form of cartel where communication between competitors is mediated by an intermediary (usually a supplier or retailer), facilitating anticompetitive practices like price-fixing. Despite the difficulty in proving anticompetitive intent, the Portuguese decisions, which led to fines of €304 million, demonstrate that these arrangements can have the same harmful effects as traditional price-fixing cartels.

III. ANALYSIS BY JURISDICTION

a. European Union

To date, the European Commission has not taken any specific enforcement action in what concerns to Hub and Spoke arrangements.

³¹ OECD, “Hub-and-spoke arrangements – Note by Portugal”, 2019, p. 2 and 3

³² OLIVEIRA PAIS, 2021: “Hub-and-Spoke Agreements and Tacit Collusion:Recent National Decisions and the Competition Market Authority Paper on Algorithms, Competition, and Consumer Harm” in Market and Competition Law Review / Volume V / No. 1 / April 2021, p. 177

As such, we can, and must, go through the Court of Justice's analysis and understanding of the concept of concerted practice.

Article 101 (1) of the TFEU sets out what is to be understood by concerted practice and provides as follows:

“The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- b) limit or control production, markets, technical development, or investment;
- c) share markets or sources of supply;
- d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

To better understand how the concept of concerted practice is defined, it is essential to examine Court of Justice' decisions. Several cases have contributed to shaping the judicial interpretation of concerted practices and application within the context of competition law.

Imperial Chemical Industries Ltd. v Commission of the European Communities (Case 48/69 EU:C:1972:70), also referred to as the *Dyestuffs case*, was the first impactful case to reach the Court of Justice. The Commission has fined numerous producers of dyestuffs for price fixing through concerted practices, having in consideration evidences such as the similarity of the rate or timing of price increases and the fact that informal contact between the competitors occurred. The Court of Justice upheld the Commission's decision.

In *Suiker Unie v Commission* (EU:C:1975:174), also known as the Sugar cartel case, the Commission sustained that several sugar producers had a concerted practice to protect the position of two Dutch producers on their domestic market.

In this case the Court of Justice ruled that each economic operator must determine its commercial policy independently and that it is not necessary to prove that there was an actual plan for considering that there was a concerted practice.

In *Fresh Del Monte v. Commission* (EU:C:2015:416), the General Court clarified that it is not necessary to demonstrate a formal meeting of minds or an explicit "common course of conduct" to prove the existence of a concerted practice.³³ Similarly, in *Cimenteries CBR SA v. Commission*, the General Court ruled that a concerted practice can be identified when one competitor discloses its future market intentions or actions to another competitor—either in response to a request or simply by the latter accepting the disclosure. There is no requirement to show that the competitor formally committed to a particular course of conduct or that both parties explicitly colluded over their future behavior. It is sufficient if the statement of intentions from one party reduces or removes uncertainty about how the other party is likely to act in the market.

These cases establish the legal criteria for determining what constitutes a "concerted practice" under Article 101 of the Treaty on the Functioning of the European Union (TFEU). A concerted practice arises when there is (i) a mutual understanding where (ii) practical cooperation is intentionally substituted for competition. It is important to note that this consensus does not need to be verbalized; it can develop through direct or indirect interactions between the parties involved and this is probably the most determinant characteristic of a concerted practice that allows to distinguish a concerted practice from an agreement between undertakings - concerted practices can emerge through informal exchanges of information that align the behavior of competitors, even without direct agreements or explicit collusion. The key factor is whether the conduct creates a shared understanding that affects competition. Regarding this aspect of reducing the "strategic uncertainty" in the market there is a very important case: *T-Mobile*, in which the Court of Justice stated that mere attendance at a meeting where an

³³ *Fresh Del Monte v. Commission* (EU:C:2015:416), paragraphs 156-161

undertaking discloses its confidential pricing plans to its competitors is likely to be caught by Article 101, even in the absence of an explicit agreement to fix prices.

In *Hüls* (1999) the Court of Justice stated that Article 101(1) requires that each undertaking must determine its policy on the market independently. The concept of a concerted practice implies that there will be common conduct on the market, but added that there must be a presumption that, by making contact with one another, such conduct will follow, commonly referred to as the Anic presumption.

“A concerted practice is a form of coordination that knowingly substitutes practical cooperation between undertakings for the risks inherent in competition. A concerted practice strictly precludes contact that could influence conduct on the market or disclose one’s future conduct on the market, for example disclosing one’s intended conduct to another when the other requests or, at the very least, accepts such information. In *Tesco v OFT* the CAT described a concerted practice as a ‘versatile concept’: it can capture many forms of cooperation that fall short of an agreement. In *Emergency Services OFCOM* considered the case-law and said that a concerted practice arises in particular where:

- a disclosure of competitively sensitive information is deliberate
- the discloser should have the knowledge and awareness that disclosure might affect the competitive conduct of the recipient
- the recipient requests or accepts competitively sensitive, unless they publicly distance themselves from the information.”³⁴

Besides this, there are four other notable cases - *AC-Treuhand I and II*, *Marine Hoses*, and *ICAP* - that provide insight into how Hub and Spoke agreements might be evaluated, for being at stake other agreements between companies. The key distinction between these cases and a traditional Hub and Spoke cartel lies in the market in which the hub operates. In a classic Hub and Spoke scenario, the hub operates within the same market as the other participating firms. However, in these cases, the hub does not share the same market presence as the other parties involved.

³⁴ WHISH/BAILEY, “Competition Law”, 2024, p.938

The AC-Treuhand case revolves around a Swiss consultancy firm that facilitated meetings between the cartel participants and later concealed evidence of the cartel's existence. AC-Treuhand played a significant role in organizing price-fixing, market-sharing, customer allocation, and the exchange of sensitive commercial information among the firms involved. In the Marine Hoses cartel, the hub was a consultancy firm that did not manufacture or market marine hoses but instead provided advisory services related to the supply, demand, and pricing of the hoses. Similarly, in the ICAP case, the hub was an interdealer broker that facilitated the manipulation of JPY LIBOR interest rates across several banks. In all three cases, the firms shared sensitive information with the hub, which would then process and redistribute this information to the participants.

The AC-Treuhand case outlines three key conditions for determining whether an entity facilitated an unlawful agreement, which would be relevant in a Hub and Spoke case where the hub's role is to facilitate coordination among competitors. First, it must be demonstrated that the entity intended, through its own actions, to contribute to the shared objectives of the cartel participants. Second, the entity must have been aware of the conduct planned or executed by the other firms to achieve these objectives, or it should have reasonably foreseen such conduct and accepted the associated risks. Lastly, the entity must have been ready to accept the risk of its involvement in the cartel's activities.

A defense commonly raised by the facilitators in these cases is that they were not active participants in the cartelized market, and that their actions did not directly affect their own goods or services. They may also argue that the conduct of the other firms was so distinct from their own activities that they could not have contributed to the cartel's objectives. However, the European Court of Justice has made it clear that the terms "agreement" and "concerted practice" are broadly defined under EU competition law. This broad scope makes it easier to include the actions of entities like AC-Treuhand within those definitions, even if they were not directly active in the cartelized market.

While these cases are not classified as Hub and Spoke cartels, this does not imply that such behavior is beyond the reach of European competition law. The European Commission can still impose penalties on entities that facilitate anticompetitive behavior, even if they do not operate within the cartelized market itself. In this way, these cases illustrate the broader interpretation of cartel facilitation under EU law, showing that

entities involved in enabling or supporting anti-competitive conduct can still be held accountable.

However, having defined both concerted practices and agreements between companies, as explicit arrangements or contracts between at least three companies the Hub and Spoke agreements are mainly considered agreements between companies, although through indirect exchanges of information, as we previously had opportunity to cover, involve a clear and formalized arrangement between the parties.

b. UK

i. The British courts' approach

There are three relevant cases of Hub and Spoke in the UK: *Replica Kit*, *Hasbro* and *Dairy*.

The UK Courts have ruled on the issue for the first time in the *Replica Kit* case. The Office of Fair Trading (OFT), replaced in 2014 by the Competition and Markets Authority (CMA), launched an investigation involving Umbro Holdings Ltd, Manchester United, Allsports Ltd and JJB Sports PLC. In the course of this investigation, it found that there were various agreements and concerted practices between distributors and suppliers, culminating in the fixing of prices on replica soccer shirts produced by Umbro. The OFT concluded that the information was shared through the existence of the same contractual partner (the hub) who then passed the information on to the competing companies (the spokes) and all the companies involved were convicted of price fixing - in this case, Umbro, as supplier, coordinated price strategies with the retailers – Sports Soccer and JJB Sports – and manage to control the production of the equipments for the clubs in England.

Hasbro case was very similar with *Replica Kit*, in this case Hasbro, known for being the largest toy manufacturer in the UK, entered into an agreement with the retailers Argos and Littlewoods and also lead to price fixing strategy.

In the third case – *Dairy* case – the producers Dairy Crest, Glanbia and McLelland entered into an agreement with the leading supermarket chains – Asda, Safeway, Tesco and Sainsbury – and increased the prices of cheese.

The cases were all judged similarly and the Court went through the logic that we had have already opportunity to explain: “(a) if 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, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition (...) The case is all the stronger where there is reciprocity : in the sense that C discloses to supplier B its future pricing intentions in circumstances where C may be taken to intend that B will make use of that information to influence market conditions by passing that information to (amongst others) A, and B does so.”³⁵

The *private schools* case stands apart from the previously discussed cases. It centers on a group of 50 private schools that engaged in the exchange of confidential information regarding their future pricing intentions. This information was initially organized by the bursar of one of the schools involved and subsequently shared with all participating institutions. The OFT concluded that there was an agreement or concerted practice aimed at preventing, restricting, or distorting competition. However, could not classify it as a Hub and Spoke conspiracy. Unlike typical Hub and Spoke arrangements, where the hub operates at a different level of the supply chain than the spokes, the hub in this case functioned at the same level as the other participants in the scheme. For a Hub and Spoke conspiracy to be applicable, there must be an arrangement in which firms operate at distinct levels of the supply chain, with the hub acting as the intermediary between them.

ii. The English Court of Appeal’s Legal Test

After discussing the previously explained cases, *Replica Kit and Hasbro*, the A-B-C Test was established. According to this test sensitive market information is

³⁵ *Argos Ltd and Littlewoods Ltd v OFT and JJB Sports plc v OFT*, Case 2005/1071, paragraph 141

transmitted between two competitors, A and C, through a common contractual partner (B) acting at a different level of the production or distribution chain.

Sofia Oliveira Pais also explained that the UK Competition Appeal Tribunal (CAT) upheld the OFT understanding, that we already had opportunity to analyse, on the other hand the Court of Appeal “adopted a narrower concept of “consensus”, suggesting that “actual” knowledge of the role of the supplier was necessary, and decided that there is an infringement “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””³⁶.

c. USA

i. The American court’s approach

The concept of a Hub and Spoke conspiracy was for the first time explicitly used by the FTC in the case *Toys “R” Us v. FTC*.

Toys “R” Us (TRU) was the largest toy retailer in the U.S. and negotiated vertical agreements with toy manufacturers, pressuring them not to supply warehouse club retailers. While it is possible for a retailer to request that a manufacturer impose distribution restraints without an anticompetitive purpose—such as preventing free riding—this was unlikely in the case of TRU. As the FTC noted, the manufacturers directly compensated TRU for advertising their toys, storing toys that were made early in the year, and stocking a broad range of each manufacturer's products under one roof. This financial support suggests that TRU’s business arrangement did not fit the typical free-riding scenario. However, evidence indicated that the manufacturers were eager to expand

³⁶ OLIVEIRA PAIS, 2021: “Hub-and-Spoke Agreements and Tacit Collusion:Recent National Decisions and the Competition Market Authority Paper on Algorithms, Competition, and Consumer Harm” in *Market and Competition Law Review / Volume V / No. 1 / 2021*

their sales into this new distribution channel, and accepting TRU's demand for exclusive distribution was a significant shift in their business plans. This move was contrary to their individual economic interests, as it would limit their ability to sell to warehouse clubs, a growing retail sector. As a result, the FTC viewed this as a Hub and Spoke conspiracy, with TRU acting as the hub and the toy manufacturers as the spokes. The Court later confirmed that the manufacturers only agreed to limit their sales to warehouse clubs after TRU assured them that other toy manufacturers would adhere to the same policy.

In U.S., to prove the existence of a Hub and Spoke conspiracy, there must be evidence of a "rim" connecting the competing spokes. This can be inferred from vertical information exchanges without a legitimate business justification, parallel actions by competitors, or a significant departure from normal business practices.

Several other cases have been judged as Hub and Spoke cartels in this jurisdiction, including *Interstate Circuit*, *Masonite*, *Eaton Corp.*, *General Motors*, *Parke Davis*, *E-books*, *Disposable Contact Lenses*, and *Klor's*. According to the U.S. District Court (DC), a plaintiff can allege an agreement based on either direct or circumstantial evidence, or a combination of both. Direct evidence that is adequately detailed can be sufficient by itself to establish the existence of an agreement.

In the *Interstate Circuit* case, a first-run movie operator, *Interstate Circuit*, believed that second-run theaters were competing too aggressively and, as a result, engaged in bilateral communications with movie distributors. *Interstate Circuit* demanded a minimum price for second-run theaters and a policy against double features, threatening that it would not show the distributors' films if they did not comply.

In these cases, there is clear evidence of horizontal arrangements, as each party involved was aware of the others' participation in the conspiracy. For example, in *Interstate Circuit*, the manager of *Interstate* sent a letter with its demands to all distributors, naming each one as a recipient, thus providing direct evidence of coordination. The trial court inferred the existence of an agreement from the nature of the proposals, from how they were conducted, from the substantial unanimity of action taken, and from the lack of evidence of a benign motivation. Similarly, in *Toys R Us*, *Godden*, the president of Merchandising at TRU, admitted that they made a point to inform each vendor that they would be speaking to other key suppliers as well. This demonstrates the

coordinated effort between the retailer and manufacturers. In *Masonite*, the U.S. Supreme Court noted that there was a signed agreement by all parties and that each of them knew and was a condition to proceed with the agreement to every element except the entrance of a new element.

A common feature in these cases is that the acceptance of the agreement was contrary to the economic self-interest of each spoke. The spokes would only be willing to follow the agreement if they were convinced that their competitors would do the same. The hub facilitated this by engaging in bilateral communications with the spokes, attempting to convince them to accept the terms of the agreement.

In both *Interstate Circuit* and *Masonite*, the Court outlined the conditions under which a Hub and Spoke conspiracy can be established. It was sufficient for the distributors to be aware that concerted action was intended and encouraged, and for them to adhere to the scheme. Each distributor was informed that others had been asked to participate and knew that cooperation was essential for the success of the plan. The distributors understood that, if executed, the plan would result in a restraint of commerce, which was deemed unreasonable under the Sherman Act. Knowing this, all participants willingly took part in the scheme.

In conclusion, these cases demonstrate how Hub and Spoke conspiracies can arise when a central player (the hub) coordinates the actions of multiple independent parties (the spokes). Even in the absence of direct agreements between the spokes, the communication and coordination facilitated by the hub, along with the resulting harm to competition, is enough to establish an antitrust violation. Courts assess these cases by looking at direct and circumstantial evidence, the economic self-interest of the parties involved, and the impact on competition. These factors, when combined, can lead to a finding of an illegal conspiracy under U.S. antitrust laws.

IV. DIFFERENCES' ANALYSIS

When analyzing “Hub and Spoke” conspiracy cases, and recovering *Amore's* theory, it is important to understand the distinction between Type 1 and Type 2 cases, which refer to the structure of the alleged conspiracy. Type 1 cases involve a hub (usually an upstream supplier or manufacturer) who sets the terms for the spokes (typically downstream

retailers or distributors). In contrast, Type 2 cases involve suppliers or manufacturers at the upstream level acting as the spokes, with a common downstream retailer as the hub. In both types of cases, the hub plays a central role in coordinating the actions of the spokes, which could include setting prices, refusing to deal with competitors, or other forms of anti-competitive conduct.

All the cases from the UK that have been classified as “Hub and Spoke” are of Type 1, such as Replica Kit, Cheese, and Toys. These cases involve a clear relationship where the hub, typically the upstream supplier, sets pricing terms that the spokes, the downstream retailers, are expected to follow. The Masonite, Eaton Corp., General Motors, and Parke Davis cases in the U.S. also fall under Type 1, where the hub directly influences the pricing behavior of the spokes.

Type 2 cases, which are much less common in Europe but more frequently seen in the U.S., involve a situation where the suppliers or manufacturers in the upstream level act as spokes, and the hub is a common downstream retailer. The Interstate Circuit, Toys R Us, MyLan Laboratories, E-books, Disposable Contact Lenses, and Klor’s cases are examples of Type 2 Hub and Spoke conspiracies. In these cases, the spokes (the suppliers or manufacturers) are influenced by the common downstream retailer, which seeks to coordinate the actions of its suppliers, often to block competition or to fix prices.

In Type 1 cases, the hub generally sets prices or terms for the spokes, often in response to complaints or requests from the spokes themselves. The hub then communicates with the spokes bilaterally to ensure that the agreed-upon terms are adhered to. In many cases, such as Replica Kit, Toys, Cheese, and Parke Davis, the hub is found to impose fixed prices or minimum prices through Resale Price Maintenance (RPM) agreements, effectively controlling pricing across the market. In some instances, the hub may go as far as threatening to stop dealing with the spokes if they do not comply with the pricing terms. This was seen in both Replica Kit and Parke Davis, where the hub also threatened to cut off relationships with non-compliant retailers. Additionally, these cases differ in how the conspiracy begins. In Replica Kit and Toys, the hub responded to complaints from a spoke, whereas in Parke Davis and Cheese, it was the hub's initiative to set prices.

In Type 2 cases, the situation is slightly reversed. In these instances, the spokes, typically suppliers or manufacturers, are requested or influenced by the hub (the

downstream retailer) to impose certain terms on the market. This may include refusing to deal with competitors or agreeing to harsh conditions for their competitors, which can suppress competition and protect the hub's market position. In *Eaton Corp.* and *General Motors*, which are Type 1 cases, and *Interstate Circuit*, *Toys R Us*, and *Klor's*, which are Type 2 cases, the hub often requests that the spokes limit or restrict their dealings with competitors. These actions are usually taken to protect the hub's market position and prevent new entrants or competitors from undermining the established pricing or market structure.

The *General Motors* case, for example, involved a refusal to deal based on a complaint from one of the spokes, while in *Eaton Corp.*, this was achieved through exclusive agreements between the hub and spokes, making it more difficult for competitors to enter the market. These types of agreements were also used to ensure that the spokes adhered to the hub's pricing or marketing conditions. In the *Interstate Circuit* and *Toys R Us* cases, the hub went further by threatening to stop carrying the spokes' products unless they complied with the coordinated actions, which is a clear indication of anti-competitive behavior.

Finally, in *Masonite* (Type 1) and *e-books* (Type 2), the conspiracies were implemented through agency agreements. In these cases, the hub entered into arrangements with individual spokes, where the spokes were effectively acting on behalf of the hub to carry out the coordinated pricing strategies or other anti-competitive actions. Each spoke knew that the other spokes were following the same set of conditions, ensuring that the conspiracy remained intact and successfully restricted competition.

In all these cases, whether involving Type 1 or Type 2 conspiracies, the key element is that the retailers or spokes agreed to follow the conditions set by the hub, which could involve adhering to minimum pricing, refusing to deal with competitors, or participating in agency agreements. The retailers were fully aware that others were also participating, reinforcing the concerted nature of the conspiracy and the resulting anti-competitive effects on the market.

V. CONCLUSION

Here, we can conclude without a shadow of a doubt that the great particularity of Hub and Spoke agreements lies in the triangular relationship established between the parties and in the mix of vertical and horizontal elements that this relationship entails. While it is indisputable that a typically vertical relationship is established between the hub and the spokes, there is no clear consensus on the nature of the relationship between the spokes themselves. However, we believe that it is not as straightforward as saying that these are strictly horizontal relationships. In any case, it is this triangulation and the triggering of a sensitive information exchange chain that leads to the reduction of uncertainty typical of the market, the primary concern of competition authorities. And it is precisely “on the existence of an information exchange or a conduct that *could* prevent, restrict or distort competition”³⁷ that Cartel investigations focus on, namely through “hot documentary evidence, the so called «smoking guns»”, or on a combination of evidence concerning direct or indirect information exchanges and behavior that is likely to be anticompetitive in the market. The core of the investigation does not focus on the plausibility of whether or not a Cartel is present, however, as we have seen, the detection of a Hub and Spoke cartel can become a very convoluted path due to the particularities of the indirect exchange of information, and one of the major criteria discussed is the intent of the parties with that exchange of information, a careful analysis of the economic theory of harm aligned with the characteristics of the Hub and Spoke agreements may be not only a great help complementing the legal presumption of the parties knowledge of the scheme, but also a way of strengthen the harmonization of the different legal frameworks. Finally, the measures being taken and the sanctions applied have been increasingly harsh, but it is foreseeable that this trend of escalation will continue, at least until their deterrent effect is achieved. It is worth noting that the work of distinguishing the practice and defining its characteristics is already remarkable and a great help in achieving a more competitive and fair market.

³⁷ AMORE, “Three (or more) is a magic number: Hub & spoke collusion as a way to reduce downstream competition”. European Competition Journal 12, 1 (2016): 28-53 – p.53

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