# HUB AND SPOKE CONCERTED PRACTICES

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*In a series of cases competition authorities and courts in the UK and elsewhere have established the existence of unlawful horizontal cooperation between competitors on the basis of a "hub and spoke" conspiracy rather than direct contact between them. In the Dairy Products case in the UK the Competition Appeal Tribunal identified five conditions that must be met to establish a concerted practice in such circumstances.*

## 1. INTRODUCTION

In 2003 the United Kingdom Office of Fair Trading, the predecessor to today's Competition and Markets Authority, adopted two decisions in which it found there to be so-called "hub and spoke" concerted practices, contrary to Article 101 TFEU and the Chapter I prohibition of the UK Competition Act 1998; significant fines were imposed. These cases involved the finding of a horizontal concerted practice between retailers of, in the first case, football shirts[1] and, in the second, toys[2]. In 2011 the OFT adopted a third hub and spoke decision, this time in relation to dairy products; again fines were imposed[3]. For the most part these decisions were upheld on appeal to the Competition Appeal Tribunal and the Court of Appeal[4]. There have been hub and spoke cases in other jurisdictions, notably in Belgium, where in 2015 the Belgian Competition Authority settled a case with producers and retailers in the drugstore, perfumery and hygiene sector that were found to have

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1 *Football Kit price-fixing*, OFT decision of 1 August 2003.

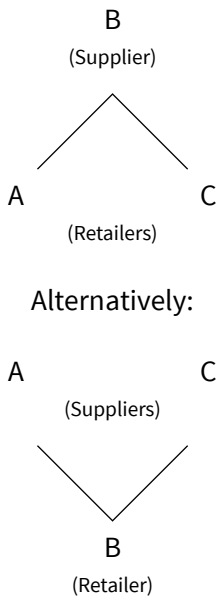
2 *Hasbro UK Ltd/Argos Ltd/Littlewoods Ltd*, OFT decision of 2 December 2003.

3 *Dairy retail price initiatives*, OFT decision of 10 August 2011.

4 See eg *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; Case 1188/1/1/11 *Tesco Stores Ltd v OFT* [2012] CAT 31.

coordinated on prices between 2002 and 2007. Most of Belgium's major retail chains were involved[5]. Two notable hub and spoke cases in the US, where the hub was a retailer and the spokes led to suppliers held liable for horizontal coordination, were the *Toys "R" Us* case of 2000[6] and the *Apple/e-Books* case of 2015[7]. There are other cases currently under investigation within the EU and in Latin America.

The great interest of hub and spoke cases lies in the fact that horizontal coordination between firms at the same level of the market (between retailers in the UK and Belgian cases and between suppliers in the US ones) is established not on the basis of direct communications between the retailers or suppliers, but as a result of indirect communications between them via their mutual suppliers or retailers. This can be presented in diagrammatic form where the "hub" is B and the spokes lead to A and C, who are found to have coordinated their conduct at their level of the market:




5 Decision of 22 June 2015.

6 *Toys "R" Us, Inc. v. F.T.C.*, 221 F.3d 928 (7th Cir. 2000).

7 *United States v. Apple, Inc.*, 791 F.3d 290 (2nd Cir. 2015).

In some cases where retailers are suspected of horizontal coordination of their prices there may be evidence that this is attributable to direct contact between them, in which case it would be clear that there is a horizontal agreement or concerted practice. In other cases a competition authority may find there to be a series of vertical agreements, for example imposing minimum resale prices; the prohibition of those agreements may have the effect of disrupting parallel horizontal behaviour. However the interest of the hub and spoke cases is the establishment of horizontal collaboration through the medium of vertical discussions with the relevant hub.

## 2. DEFINITION OF A CONCERTED PRACTICE

In the UK hub and spoke cases the retailers were found to have coordinated their behaviour not by agreement but through a concerted practice. There are many ways in which firms can coordinate their behaviour on the market, and in some cases it is easy to see – as a linguistic matter – that they have done so by agreement. For example they may have entered into a formal contract or be party to a so-called "gentlemen's agreement": perhaps a dinner followed by a shaking of hands that prices will be raised the following week. However in some cases firms may coordinate their behaviour in circumstances where one would hesitate linguistically to say they had "agreed" to do so. For example where competitors meet and discuss their future pricing or capacity-expansion plans, this may lead to a coordination of behaviour, and yet it would not be appropriate to say that this was by agreement. It is for this reason that Article 101 TFEU applies not only to agreements but also to concerted practices. It has been pointed out that "*concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice*"[8], and in Tesco v OFT[9] the UK Competition Appeal Tribunal described a concerted practice as a "versatile concept".

The classic definition of a concerted practice was set out in ICI v Commission[10] (usually referred to as the *Dyestuffs* case). The Court of Justice

8 *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318, para 22.

9 Case 1188/1/1/11 Tesco Stores Ltd v OFT [2012] CAT 31, paras 55-56, citing the Court of Appeal"s judgment in Argos Ltd v OFT [2006] EWCA Civ 1318, para 22.

10 Case 48/69 EU:C:1972:70.

said that the object of bringing concerted practices within Article 101 was to prohibit:

> "*a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition*[11]".

In *Suiker Unie v Commission*[12] (the *Sugar cartel* case) the Court of Justice held that it was not necessary to prove that there was an actual plan. Article 101 strictly precluded:

> "*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*"[13].

## 3. HOW TO ESTABLISH A HUB AND SPOKE CONCERTED PRACTICE: *DAIRY PRODUCTS*

The fact that horizontal coordination between suppliers or between retailers can be established without any direct contact between them is of far-reaching importance, not least because of the possibility of fines and damages claims. It is clearly of importance that the law in this area should not be stretched too far, and there was much concern at the time of the *Football Shirts* and *Toys and Games* cases that innocent, vertical discussions between a supplier and a retailer might lead to a finding of infringement. In *Dairy Products* the Competition Appeal Tribunal, applying the earlier judgment of the Court of Appeal in Football Shirts and Toys and Games[14], provided a useful guide as the the cirumstances in which a concerted practice between A, B and C

11 Case 48/69 EU:C:1972:70, para 64; see similarly Case C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* EU:C:2009:343, para 26 and the cases cited therein.

12 Cases 40/73 etc EU:C:1975:174.

13 Cases 40/73 etc EU:C:1975:174.

14 [2006] EWCA Civ 1318, para 141.

might be established. The Tribunal considered that five conditions should be met[15]:

- retailer A discloses to supplier B its future pricing intentions
- 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)
- B passes that information to C
- C may be taken to know the circumstances in which the information was disclosed by A to B and
- C uses the information in determining its own future pricing intentions.

The CAT explained that it is necessary to prove each retailer's "state of mind" to establish that discussions between a supplier and a retailer have gone beyond normal commercial dealings, for example as to the retailer's profit margin or the terms of trade, and have instead given rise to an unlawful, albeit indirect, "horizontal element"[16]. The absence of any legitimate commercial reason for a disclosure by retailer A of its future pricing intentions to supplier B may indicate the requisite state of mind[17]. The CAT left open whether a lesser state of mind, such as recklessness as to transmission or receipt of A's pricing intentions, would be sufficient[18]. In *VM Remonts*, however, the Court of Justice held that liability could be established when A could reasonably have foreseen that B would disclose confidential information about A's intentions to C and A was prepared to accept the risk that this entailed[19].

These cases mean that an undertaking in the position of B must take care to ensure that it does not, consciously or unconsciously, act as the facilitator of horizontal collusion between A and C; it will be recalled that the facilitator of a horizontal transgression of the law may itself be fined, as in *AC Treuhand v Commission*[20] and *ICAP v Commission*[21]. Whilst bilateral discussions

15 Case 1188/1/1/11 [2012] CAT 31, para 57.

16 See paras 65–66 of the CAT judgment; see also para 106 of the Court of Appeal's judgment.

17 [2012] CAT 31, para 72.

18 Ibid, paras 73 and 350–354.

19 Case C-542/14 *VM Remonts* EU:C:2016:578, para 33; cf the English Court of Appeal's view that the criterion of reasonable foreseeability "may have gone too far": [2006] EWCA Civ 1318, paras 91 and 140.

20 Case C-194/14 P *AC-Treuhand v Commission* EU:C:2015:717.

21 Case T-180/15 *Icap v Commission* EU:T:2017:795.

between a supplier and a dealer of a purely vertical nature about matters such as likely retail prices, profit margins and wholesale prices are permissible, suppliers must be cautious about how they seek to influence the pricing behaviour of their retailers. Retailers, for their part, must be careful about telling suppliers about their intention to maintain or increase retail prices: an authority may consider that A anticipated that B would disclose that information to C, opening up the possibility of a hub and spoke infringement.