

Unclassified**English - Or. English****13 November 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Hub-and-spoke arrangements – Note by Sweden**

4 December 2019

This document reproduces a written contribution from Sweden submitted for Item 7 of the 132nd Competition Committee meeting on 3-4 December 2019.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/hub-and-spoke-arrangements.htm>

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1. Introduction

1. It has long been recognised in competition law that indirect information exchanges can be a way for cartel members to facilitate their collusive behaviour. Thus, while firms must not be deprived of their right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, the Court of Justice of the European Union has consistently held that direct *or indirect* contacts with an anti-competitive object or effect are strictly precluded under EU competition law.¹ Moreover, the Court of Justice has explained that EU competition law does not distinguish between legal and illegal arrangements based on their form or, in principle, by their horizontal or vertical character.² In fact, in *Anic Partecipazioni*, the Court said that “[t]he only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion.”³ The passing on of commercially sensitive information from one competitor to another via an intermediary, whether that intermediary is a retailer, a supplier or a third party, may therefore be caught by the prohibition in Article 101 TFEU if it has an anti-competitive object or effect, for instance, to fix prices, reduce output or share markets.

2. In vertical relationships, however, exchanges of information between firms - even those which relate to commercially sensitive information - can be both natural and legitimate.⁴ Therefore, it is clear that enforcers face a number of challenges in detecting and proving anti-competitive arrangements of a hub-and-spoke type taking place in the course of interactions between suppliers and their distributors. Enhanced methods for distinguishing situations in which anti-competitive horizontal coordination may occur in otherwise beneficial vertical relationships are therefore important in the pursuit of ensuring effective competition to the benefit of consumers. This roundtable discussion is to be welcomed in this regard.

¹ See e.g. judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 117; and judgment of the Swedish Market Court of 10 September 2008, in case MD 2008:12, *Konkurrensverket mot AB Bil-Bengtsson m.fl.*

² Judgment of 10 February 2011, *Activision Blizzard Germany v Commission*, C-260/09 P, EU:C:2011:62, paragraph 71; cf. judgment of the Swedish Market Court of 30 January 2001, in case MD 2001:3, *Interflora AB mot Konkurrensverket*.

³ *Anic Partecipazioni*, paragraph 108; cf. judgment of 11 September 2014, *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 62 (Article 101 TFEU “catches all forms of cooperation and of collusion between undertakings, including by means of a collective structure or a common body, such as an association, which are calculated to produce the results which that provision aims to suppress”). See also Richard Whish, “Information agreements”, in *The Pros and Cons of Information Sharing*, Swedish Competition Authority, 2006, pp. 19–42, on p. 24, saying that “the method chosen to exchange information ought not to colour its analysis for the purpose of competition law” (available at: <http://www.konkurrensverket.se/globalassets/english/research/the-pros-and-cons-of-information-sharing.pdf>).

⁴ See e.g. Advocate General Szpunar’s opinion delivered on 16 July 2015, *Eturas and Others*, C-74/14, EU:C:2015:493, paragraph 65; and *Activision Blizzard*, paragraph 72.

3. This submission will briefly discuss the legal standard for hub-and-spoke arrangements (section 2) and make a few remarks regarding the gathering of evidence in Sweden with relevance to hub-and-spoke arrangements (section 3). The submission continues with a description of some recent case experience of the Swedish Competition Authority (SCA) where issues relating to hub-and-spoke arrangements were considered (section 4) and ends with a few concluding remarks (section 5).

2. The legal classification of hub-and-spoke arrangements

4. Similarly to Article 101 TFEU, Chapter 2, Section 1 of the Swedish Competition Act (SFS 2008:579), read in conjunction with Chapter 1, Section 6, prohibits anticompetitive agreements between undertakings, decisions by associations of undertakings and concerted practices.⁵ So far, no anti-competitive arrangement of a hub-and-spoke type has come before the Swedish courts. Nor has the SCA taken action against this type of arrangement. Guidance regarding hub-and-spoke cartels is therefore mainly found in the case law of the EU Courts and from international experience.

5. There is a solid basis in theory as well as experience that horizontal agreements between competitors on e.g. prices, output or market partitioning (i.e. cartels), are harmful for competition and consumers. To pursue such agreements, especially cartels, is a high priority for the SCA.⁶ Vertical agreements, on the other hand, are generally likely to be less harmful, especially if the firms do not have substantial market power.⁷ However, agreements between a supplier and a distributor on mandatory minimum prices, resale price maintenance (RPM), are considered to be hard-core restrictions under Article 4(a) of the Vertical Block Exemption Regulation.⁸ Investigating vertical restrictions capable of impeding effective competition is also a priority for the SCA.

6. Moreover, vertical RPM agreements may under certain circumstances be substitutes for horizontal collusive agreements between distributors.⁹ The Court of Justice has cautioned that whilst situations where a franchisor provides franchisees with price guidelines are not restrictive of competition, this is not the case where there are concerted practices between the franchisor and the franchisees or between the franchisees themselves

⁵ A translation of the text of the Swedish Competition Act is available at: <http://www.konkurrensverket.se/-/en/publications-and-decisions/swedish-competition-act/>.

⁶ See the SCA's *Prioritisation Policy for Enforcement*, available at: <http://www.konkurrensverket.se/-/globalassets/english/about-us/english-prioritisation-policy-for-enforcement.pdf>.

⁷ See the Commission's *Guidelines on Vertical Restraints* (OJ C 130, 19.5.2010, p. 1–46), paragraph 6.

⁸ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p. 1–7).

⁹ See OECD Policy Roundtables, *Resale Price Maintenance*, DAF/COMP(2008)37, p. 12. See also judgment of 19 April 1988, *Erauw-Jacquery v La Hesbignonne*, C-27/87, EU:C:1988:183, paragraph 15. This can especially be the case when they are accompanied by regular meetings between manufacturers and distributors, see judgment of 7 June 1983, *Musique Diffusion française v Commission*, Joined cases 100 to 103/80, EU:C:1983:158, paragraphs 74–75.

for the actual application of prices.¹⁰ Where an RPM strategy is put into practice by means of continuous price information exchanges between the supplier and several distributors, such exchanges may also stray into hub-and-spoke-like behaviour.

7. A hub-and-spoke arrangement might be characterised as a means by which two or more competitors (A and B) exchange sensitive commercial information via the facilitator (C), thereby enabling them to reach an understanding about which parameters to collude on and to enhance the sustainability of their cartel. In this scenario C may be a third party or it may be in a vertical, non-competitive, relationship with A and B, such as a supplier.¹¹

8. There can also be scope for A to urge C to take action against B – when it deviates from the strategies of the other ‘spokes’ – in order to align B’s commercial strategy with A and with the other spokes.¹² Whether this type of concerted action between A and C against B should properly be called a hub-and-spoke arrangement or whether it should be considered as potential RPM is perhaps debatable, but examples of similar arrangements that have been pursued in other jurisdictions include concerted actions taken against a firm at the same level of the distribution chain using, or being used by, C as the hub.¹³

3. Gathering of evidence

9. The SCA has noted in the past that refusals to supply have been initiated by competing retailers that threatened their supplier with a concerted buyers’ boycott unless the supplier stopped supplying a discounter. An obvious problem in cases like these, where a complaint is received from the marginalised discounter, is to find sufficient evidence to pursue the anti-competitive arrangement.¹⁴

¹⁰ Judgment of 28 January 1986, *Pronuptia*, C-161/84, EU:C:1986:41, paragraph 25.

¹¹ Even though the Court of Justice’s case law does not explicitly refer to hub-and-spoke arrangements as such, its judgment of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, and the judgment of the General Court of 10 November 2017, *Icap and Others v Commission*, T-180/15, EU:T:2017:795 (appealed on other grounds in C-39/18 P); are interesting in this respect since they concern liability for firms that have facilitated infringements. See also Communication from the Commission — *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (OJ C 11, 14.1.2011, p. 1–72), paragraph 55, referring to indirect data sharing through third parties, such as the companies’ suppliers or retailers.

¹² Cf. judgment of 21 February 1984, *Hasselblad v Commission*, C-86/82, EU:C:1984:65; and the UK Court of Appeal (Civil Division), judgment of 19 October 2006, *Argos Limited and Littlewoods Limited v Office of Fair Trading*, Cases 2005/1071 and 1074 ; *JJB Sports PLC v Office of Fair Trading*, Case 2005/1623.

¹³ See the preceding footnote and Harrington, J. and P. Harker (2018), “How Do Hub-and-Spoke Cartels Operate? Lessons from Nine Case Studies”, *SSRN Electronic Journal*, pp. 10–18, concerning *inter alia* the US case *Toys “R” Us* (available at: <http://dx.doi.org/10.2139/ssrn.3238244>). Cf. the arrangements in the European Commission’s decision of 12.12.2012 in Case COMP/AT.39847 – *E-Books*; and the US case *United States v. Apple Inc.*, 791 F.3d 290 (2d Cir. 2015).

¹⁴ See proposition 1999/2000:140, *Konkurrenspolitik för förnyelse och mångfald*, p. 84. See also the SCA’s report *Konkurrensen i Sverige under 90-talet – problem och förslag* (KKV 2000:1), pp. 280 *et seq.* (available at: <http://www.konkurrensverket.se/publikationer/huvuddel---konkurrensen-i-sverige-under-90-talet---problem-och-forslag/>).

10. Besides information provided by a complainant or leniency applicant, the SCA has the investigative power to gather evidence in a number of ways, such as by sending requests for information, organising hearings and, subject to a decision of the Patent and Market Court, by conducting unannounced inspections (dawn raids).¹⁵ Still, the prospect of a participant of a hub-and-spoke arrangement “turning an informer” and making an application for leniency may not be as likely as with members of a secret cartel simply because enforcement practices have not yet been established (which may include whether the arrangement is properly viewed as a vertical RPM agreement or as a horizontal cartel).

4. The SCA’s experience of investigations raising potential hub-and-spoke issues

11. As mentioned, the SCA’s experience concerning enforcement of hub-and-spoke arrangements is still rather limited. However, the SCA has fairly recently investigated a case where suspected RPM in relation to a certain product (a brand-name toilet) and the suspected indirect exchange of strategic information between retailers (via the supplier) were at issue.¹⁶ One interesting aspect of this case, which was ultimately closed without a finding of an infringement, was the potential of the suspected indirect information exchange to result in a concerted practice between the retailers. This suspicion – although ultimately not supported by the evidence on the file – led the SCA to consider analysing the case not only as possible RPM, but alternatively as a form of hub-and-spoke arrangement.

12. The case, which concerned the years 2013-2015, was initiated by a complaint from a retailer. The SCA’s investigation progressed by sending requests for information to a large number of operators active in the market. The SCA also obtained permission from the Patent and Market Court to conduct inspections on the premises of the retailers and held interviews with their employees. The market was preliminarily defined as the Swedish market for the manufacture and sale of floor mounted porcelain toilets on the upstream level, and the sale of these products in retail stores (including online shops) in Sweden on the downstream level. Both levels were concentrated with two main competing manufacturers and three main retailers representing 50% of sales in the downstream market. In Sweden, the manufacturer concerned sold the product through independent wholesale distributors.

13. The investigation indicated that there had been a downward pricing pressure on the product, largely as a result of e-commerce. The manufacturer, which was concerned about the effect that this had on sales in other distribution channels (such as for professional installers), began discussions regarding consumer prices with the main retailers. There were no indications that any of the retailers had direct contact with each other and one retailer protested against the desire of the manufacturer to establish a minimum resale price. The consumer price for the product was developed in accordance with the bilateral discussions between the manufacturer and two of the retailers respectively.

14. In its decision to close the case, the SCA held, *inter alia*, that two main situations may go beyond what is beneficial or neutral for competition in vertical relationships.

¹⁵ Chapter 5, Sections 1 and 3 of the Swedish Competition Act.

¹⁶ The SCA’s decision in Case 339/2015 (2018-06-01), “toilet seats”. The decision (in Swedish) is available at: <http://www.konkurrensverket.se/beslut/15-0339.pdf>.

15. One is when discussions between the manufacturer and one or more retailers result in an agreement or concerted practice to fix consumer prices. In this case, the SCA noted that there were no direct vertical relationships between the manufacturer and the retailers (as mentioned above, the manufacturer distributed the product through wholesalers in Sweden), which lessened their need to discuss prices. The evidence in the investigation did not, however, support the conclusion that the discussions between the parties had resulted in pricing by the retailers that signified a concurrence of wills and thus an agreement as defined in competition law.

16. The other type of conduct that may go beyond what is beneficial or neutral for competition in vertical relationships is when a manufacturer shares information between several retailers so that an agreement or a concerted practice is established between the retailers. Concerning this situation, the SCA explained that the concentration level on both the upstream and downstream market is an important factor in the assessment of horizontal effects. Another important factor is whether retailers with substantial market power have requested the manufacturer to ensure that other retailers maintain a certain price.

17. The evidence in the investigation did not support the conclusion that the shared information on prices was sufficiently detailed to reduce the strategic uncertainty on the market such that a horizontal agreement or concerted practice had occurred between the retailers.

5. Conclusions

18. The SCA's experience is that the emergence of e-commerce, price monitoring tools and price comparison websites, as well as the pressure that this has put on traditional (brick-and-mortar) retailers, has likely led to an increase in practices of an RPM-like nature by suppliers. In scenarios where a supplier's practice of fixing a minimum price is appreciated and supported (or perhaps even requested) by its retailers as a way of protecting their margins, such practices share many similarities with horizontal hub-and-spoke coordination. Depending on the way the practice is implemented by the supplier and its retailers, it may even be more accurately characterised as a hub-and-spoke arrangement. An assessment of whether this type of scenario should be characterised as an RPM or a hub-and-spoke arrangement will depend on a close evaluation of the factual circumstances of the particular case, especially considering that the disclosure of market information between a retailer and its supplier can often be justified and considered as part of a legitimate commercial practice. Relevant factors in the assessment include the nature and type of information that was actually exchanged between the retailer and its supplier and whether an agreement or concerted practice can be established between the parties signifying a concurrence of wills.