



Hubs, spokes, middlemen and signalling

Antitrust Update

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Despite European competition law's dynamic and ever-evolving nature, for a very long period of time undertakings could rely on two quasi-certainties: first, that vertical information gathering – gathering or exchanging information with an undertaking at a different level of the production or distribution chain – was not anti-competitive and thus unlikely to raise any competition law concerns; and second, that as long as they did not occupy a dominant position within the market, their unilateral behaviour could not fall afoul of competition law. However, these certainties have been blurred, in recent years, due to the emergence of the hub and spoke and price signalling doctrines, created by the competition authorities in their everlasting efforts to stretch the cartel concept.

Generally, a hub and spoke cartel involves competitors and one (or more) of their common suppliers and/or customers. The involved competitors exchange sensitive information through a third party that facilitates the cartelistic behaviour of the competitors involved. Price signalling, on the other hand, can be described as a company's public or semi-public unilateral announcement of potentially strategic information, e.g. future prices or future volumes.

Companies face a relatively high degree of legal uncertainty at the European Union level because the body of uniform EU case law on hub and spoke cartels and price signalling is scant. However, a number of national competition authorities have dealt with these issues.

On the other side of the Atlantic, American courts have analysed potential violations of antitrust laws using the hub and spoke concept since the late 1930's. Yet, the constant evolution of general antitrust theories affect the analysis of hubs and spokes, as any other type of potential restraint on competition. The Supreme Court recently denied a petition to hear a hub and spoke case and has left untouched a decision in which the lower court found that vertical agreements between the hub and each spoke were considered per se unlawful because they facilitated a horizontal conspiracy amongst the spokes.

'Middlemen' have been sued for their roles in alleged anticompetitive conduct. Enforcement authorities and private plaintiffs have notably focused on trade associations, acting on their own or at the behest of their members, and private companies active in one market and owned by competitors in another related market.

Price signalling has been a feature of American antitrust law for over ninety years. Similarly to the hub and spokes concept, price signalling has evolved somewhat in tandem with the general thinking of each era of antitrust law.

Hub and spoke cases

The UK

During the mid-2000s, a number of retail investigations in the United Kingdom brought hub and spoke collusion to the surface. Due to the lack of EU case law on hub and spoke cartels, many national competition authorities look at the UK precedents for guidance.

In the Replica Kit decision (2003) - the first on this topic - the Office of Fair Trading (OFT) found that a number of sportswear retailers and suppliers had entered into price fixing agreements with regard to replica football kits through a common contractual partner. The OFT fined all involved parties. JJB Sports, one of the fined undertakings, appealed the OFT's decision before the UK Competition Appeal Tribunal (CAT). The CAT dismissed JJB Sports' appeal and held that an anti-competitive concerted practice exists "if one retailer 'A' privately discloses to a supplier 'B' its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions, and B then passes that pricing information on to a competing retailer 'C'".[1]

This test, as put forward by the CAT, requires the competitor providing the information to have reasonably foreseen that the information provided would be passed on to a competitor. This test could have grave consequences as it puts every undertaking that exchanges information with its suppliers or customers in jeopardy, as they should have foreseen that their information could have been passed on by their vertical contact. The CAT also extended this reasoning to complaints. The CAT stated that an anti-competitive concerted practice can be said to exist when a competitor complains to a supplier about the market activities of another competitor, and the supplier acts on the complaining competitor's complaint in a way which limits the competitive activity of the other competitor.

JJB Sports also appealed the decision of the CAT. Before the UK Court of Appeal JJB Sports argued that the reasonable foreseeability test as formulated by the CAT was too general and too extensive.[2] After all, the more informed and intelligent we are, the higher the risk gets that the passing on of information might be deemed "reasonable foreseeable".

The UK Court of Appeal was of the opinion that the test should indeed be narrowed down to a test where a requirement of intent is essential. Therefore the UK Court of Appeal formulated a more nuanced test to determine the existence of hub and spoke collusion. It stated that hub and spoke collusion exists if:

1. "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),
2. 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
3. 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."[3]

In the 'Toys' case (Hasbro/Argos/Littlewoods - 2003), the OFT decided that Hasbro, Argos and Littlewoods entered into an overall agreement and/or concerted practice to fix the price of certain Hasbro toys and games. This overall agreement included two bilateral price-fixing agreements and/or concerted practices which in themselves constitute infringements: one between Hasbro and Argos and the other between Hasbro and Littlewoods.

Although Argos and Littlewoods appealed the OFT's decision[4], the CAT dismissed the appeals on liability in their entirety, finding that there had actually been bilateral agreements or concerted practices between, on the one hand, Hasbro and Argos and, on the other, Hasbro and Littlewoods, and a trilateral (hub-and spoke) concerted practice between all three undertakings.

The CAT's judgment was challenged before the Court of Appeal on the grounds that there was no evidence of there being a horizontal agreement or consensus between the retailers which was necessary for a finding of an agreement or concerted practice. However, the Court of Appeal held that "concerted practices can take many forms, and courts have always been careful not to define or limit what may amount to a concerted practice".[5]

In the Private Schools case (2006), the OFT reached a settlement decision with 50 fee-paying independent schools which had "engaged in the exchange of specific information regarding future pricing intentions on a regular and systematic basis." The information exchanged was organised by the bursar of Sevenoaks School, to whom the participant schools submitted details of their existing fee levels, proposed fee increases (expressed as a percentage) and the resulting intended fee levels. The information was subsequently circulated amongst the participant schools in tabular form. The OFT held that the "(P)articipant schools exchanged on a regular and systematic basis highly confidential information regarding each other's pricing intentions for the coming academic year that was not made available to parents of pupils at Participant schools or published more generally." The OFT concluded that the arrangement constitutes an obvious restriction of competition whereby the Participant schools knowingly substituted practical co-operation for the risks of competition amounting to an agreement and/or concerted practice having as its object the prevention, restriction or distortion of competition.

In the Tobacco case (2010), the OFT imposed record total fines of £225 million on two tobacco manufacturers and 10 retailers in the UK for having entered into a series of bilateral arrangements whereby the retailers agreed to set the shelf prices for the relevant manufacturer's products in accordance with a set parity and differential requirements.[6] The OFT considered that the agreements had as their object the prevention, restriction or distortion of competition because the retailers' ability to determine selling price was restricted. The OFT reached early resolution agreements with a number of parties. However, appeals were lodged with the CAT by a number of parties, including one of the settling parties. During the CAT case, the foundation of the OFT's case was called into question and the OFT subsequently attempted to refine its case during the proceedings. However, the CAT concluded that it was unable to hear the modified case that OFT wished to make since it was not the basis of the original OFT decision and that it did not have jurisdiction to continue to hear the appeal (or, even if it did have jurisdiction, it would decline to exercise such jurisdiction). The CAT therefore quashed its decision insofar as it related to the appellants.[7]

In the Dairy Retail Price Initiatives decision (2011), the OFT decided that the UK's big supermarkets had exchanged information about their retail pricing intentions for milk and cheese. The OFT decided that on 8 occasions in 2002 and on 5 occasions in 2003 there had been anticompetitive exchanges of information pursuant to a plan to coordinate the retail process for cheese. All retailers and suppliers (except for Tesco) admitted the infringements and settled the cases (by means of Early Resolution Agreements). Tesco, on the other hand challenged the OFT's decision before the CAT which held that there was insufficient evidence of a secret plan to coordinate retail prices of cheese in 2003 or for 5 of the 8 occasions in 2002. However, the CAT held that on the remaining 3 occasions in 2002 the Tesco cheese buyers had participated in unlawful exchanges of information with Sainsbury's. Tesco and the OFT subsequently settled the case with Tesco agreeing to pay £6.5 million.[8]

Preliminary observations on the UK cases

These cases highlight the importance of the intentional element in hub and spoke collusion investigation because vertical information exchange is not per se prohibited: it even plays an important role in the day-to-day business of most companies. Therefore there cannot be a presumption on A or C's state of mind, and they shouldn't be held liable for the actions of B, over whom they have no or little control.

While the state of mind test remains rather ambiguous, it leaves more room for lawful information exchanges than its predecessor, the reasonable foreseeability test. However, caution is advisable as the thin line between necessary and legitimate information exchanges and a punishable cartel is still easily crossed due to the ambiguity of this state of mind test. If there is any doubt about where the information might end up or why information has been received, parties would be well advised to take steps to mitigate such doubts at the earliest possible stage.

Belgium

On 22 June 2015, the Belgian Competition Authority adopted a settlement decision and fined 18 parties, both retailers and suppliers for their involvement in hub and spoke collusion in the drugstore, perfumery and hygiene sector between 2002 and 2007. Most of Belgium's major retail chains were involved, and the authority opened an investigation following a leniency application by one of the hubs.

Price coordination had been orchestrated through indirect contacts between the retailers. The retailers exchanged information through their suppliers, which acted as intermediaries for their own products. The BCA found that the

parties' behavior met the state of mind test because the retailers had conveyed certain information to their common supplier, and the competing retailer that was on the receiving end was aware of the context and purpose of the information exchange.

Italy

There are no decisions by the Italian Competition Authority (ICA) properly regarding hub and spoke collusion. Nonetheless, in some cases the ICA has deemed that an indirect information exchange between competitors, by means of a third party, could fall afoul of competition law.

RC Log [9] and IAMA Consulting[10] are strong examples of behaviour that the ICA has considered as a collusion. The parties used a database, managed by a third party to share and exchange sensitive commercial information (in both cases, the undertakings involved in the practice entrusted an external advisory with the task of creating and managing the database, collecting and developing the information).

The Netherlands

The JJB Sports test, as it was extended to complaints, was recently used by the Dutch Supreme Court (Hoge Raad) in the Batavus case.[11] In this case, Dutch bicycle retailers complained and practically forced bicycle producer Batavus to end its distribution agreement with an Internet retailer. This Internet retailer was offering the same bikes at a much lower consumer price than the other retailers were willing to offer. The Dutch Hoge Raad held that the termination of the distribution agreement could be incompatible with the Dutch Competition Act, if the termination could be found to restrict competition appreciably. The Dutch Hoge Raad referred the case back to the Arnhem Court, which held that the termination of the distribution agreement indeed appreciably restricted competition and that the termination therefore was null and void.[12]

Poland

In December 2015, in a case involving establishing minimum retail prices on watches, the Office of Competition and Consumer Protection, Polish Competition Authority, fined five companies more than PLN 2 million and ordered them to abandon the illegal practices. Proceedings in the case took two years and the Office's decision is not yet final as it may be appealed.

According to the Office, Swatch Group Polska and its several retailers entered into price-setting agreement on a few watch brands. Their agreement concerned both traditional retail shops and online sales and included various unlawful actions. While it was an illegal vertical agreement between Swatch Group and its retailers, it had also hub-and-spoke elements. In addition, three of the involved retailers exchanged information on prices between themselves directly. The hub and spoke aspect of this behaviour was done through Swatch Group. The individual retailers had no any direct contact with each other, but still obtained information on competing entities' pricing policies. Swatch Group's hub character was revealed in the electronic correspondence exchanged between all of the companies.

Romania

In 2013, the Romanian Competition Council (RCC) fined four undertakings active in either the production or the supply of ammunition for their participation in an anti-competitive concerted practice. The participants were considered to have been rigging various tenders through a common undertaking which represented the three undertakings during those tenders organised by the Romanian Ministry of Defence in 2005-2007. It was the first time in a bid rigging case where the RCC fined undertakings for exchanging sensitive information through a common representative.

Three of the tendering undertakings all mandated the same undertaking – Transcarpat – to represent them during the tender process. However, Transcarpat surpassed the provisions of its mandate by drafting, submitting and signing the bids on behalf of the three undertakings. Based on the sensitive information Transcarpat obtained in its capacity as a representative, Transcarpat divided the product portfolios of the undertakings, so that the undertaking's chances of winning were maximized. Transcarpat, as an undertaking active in the market for the supply of ammunition, also submitted qualification documents for the 2005 tender in various forms (individual participation and association with various companies).

Transcarpat drafted the proposals for each of the undertakings in order to prevent potential overlaps in the undertakings' product portfolio. Therefore the RCC took the view that the investigated undertakings did not participate independently in the tenders, and thus unlawfully shared the markets. The RCC concluded that commercially sensitive information does not necessarily have to be exchanged through a circular scheme, but that it also may be exchanged by way of a radial flow towards and from Transcarpat and the three companies.

This decision is the first bid rigging case appraised by the RCC in relation to information exchange facilitated by a third party, however the RCC decision contains no reference to hub and spoke in particular. The RCC mainly relied on circumstantial evidence and on the documents submitted by Transcarpat to prove the undertakings' alleged anti-competitive behaviour. The RCC specifically stated that appointing a representative in a tender process does not constitute an infringement. However, the competitive element of the tender process gets eliminated when multiple undertakings appoint the same representative to draft their proposals.

The decision of the RCC was appealed by the undertakings. At least one of the appeals was dismissed in its entirety.

The US

The hub and spoke structure – if not the term – has been subject to antitrust scrutiny pursuant to Section 1 of the Sherman Act since at least 1939.[13] An oft-cited 2000 Seventh Circuit opinion held that a toy retailer, Toys "R" Us, was the "hub," and the main toy manufacturers the spokes, thereby infringing upon competition by other retailers, in this case warehouse clubs, such as Costco.[14] The vertical element of the hub and spoke conspiracy was a policy issued by Toys "R" Us, which the main toy manufacturers adopted. The court held that the horizontal element of the hub and spoke conspiracy existed because the record showed that the toy manufacturers wanted to sell their wares to the warehouse clubs in an effort to diversify their retailer base and reach more potential consumers. Yet, they agreed to limit their sales to those warehouse clubs only after assurances from Toys "R" Us that every other toy manufacturer would abide by the same policy, which the court found was "direct evidence of communications." [15] The court thus ruled that the evidence excluded independent action of the toy manufacturers. [16]

The Supreme Court recently refused to hear a factually similar e-Books case to the one discussed in the EU portion of this article.[17] The ruling of the U.S. Court of Appeals for the Second Circuit ruling is now final.[18] It affirms the district court's finding that Apple had participated in "a conspiracy among the [publishers] to raise prices of [e-Books]."[19] The court held that vertical agreements between Apple and the publishers were illegal *per se*, as they facilitated a horizontal price-fixing conspiracy among the publishers.[20]

Australia

The potential for competitors to form an anti-competitive contract, arrangement or understanding (agreement) that is facilitated by a third party is not a new concept in Australia. However, over the last couple of years it has attracted increased attention due to recent cases and a competition policy review which recommended the introduction of a concerted practices prohibition.

In Australia, it is unlawful to make an agreement between two or more actual or potential competitors that contains a cartel provision, such as a provision fixing prices. It is also unlawful to form an agreement between two or more parties that has the purpose, effect or likely effect of substantially lessening competition. The mere sharing of information between competitors (including through a third party) does not necessarily result in an agreement. Nor does it necessarily have the purpose or effect of substantially lessening competition. Whether such conduct has the purpose or effect of substantially lessening competition is likely to be dependent upon the facts of each particular case. However, as outlined below, Australia's law may soon change to prohibit concerted practices that have the purpose or effect of substantially lessening competition.

The potential for competitors to form an anti-competitive agreement through a third party was recognised by the Court in 1996 in *News Ltd v Australian Rugby League Ltd (No 2)*. News Ltd alleged that rugby league clubs had each entered agreements with the league organiser that contained exclusionary provisions. For an exclusionary provision to have been made it must have been part of an agreement between at least two persons that were competitive with each other. The Court found that there was powerful support for a hub and spoke agreement – that is the proposition that there was an arrangement amongst the clubs, to which the NSWRL and the Australian Rugby

League were also parties. [21]

In *ACCC v Air New Zealand* (2014) the Federal Court considered allegations that Air New Zealand had breached the anti-competitive agreements prohibition by exchanging future surcharge pricing intentions with other airlines through surveys and meetings conducted by an industry association. [22] The Court observed that the exchange of future pricing intentions would not necessarily result in a substantial lessening of competition. [23] Although the matter was heavily fact specific, the Court ultimately concluded that the ACCC had not established its case. In respect of the allegations of price fixing on air cargo services ex Singapore, the Court concluded that the exchange of future surcharge intentions would not have resulted in a substantial lessening of competition for reasons including that surcharges formed only part of the overall price of air cargo services. [24]

Recent proceedings brought by the ACCC relating to information sharing in the petrol industry reignited the focus on alleged anti-competitive hub and spoke agreements in Australia. In *ACCC v Informed Sources* (2014), the ACCC commenced proceedings against Informed Sources (a company that collected information about retail petrol prices and disseminated that information to subscribers to its service) and petrol retailers who subscribed to the service. The ACCC alleged that the information sharing between Informed Sources and the retailers had the effect or likely effect of substantially lessening competition in markets for the sale of petrol. In contrast to previous cases brought by the ACCC in the petrol industry alleging understandings between retailers to fix the price of petrol, the ACCC alleged in the Informed Sources case that the information sharing arrangements between Informed Sources and the retailers (rather than between the retailers directly) were likely to increase retail petrol price coordination and cooperation and were likely to decrease competitive rivalry, such that they had the likely effect of substantially lessening competition.

The case was settled in December 2015, so the question of whether this type of conduct falls within the prohibition on agreements that substantially lessen competition was not ultimately determined. Most of the retailers involved settled on a basis that allowed them to continue using Informed Sources in the same way, provided the information received through the service is made available to consumers and third party organisations at the same time. However, two of the retailers settled earlier with the ACCC and agreed that they would not subscribe to the Informed Sources service or similar services for five years.

To address concerns about anti-competitive information sharing and perceived difficulties with fitting such conduct within the concept of an agreement, the recent competition policy review in Australia recommended introducing a new prohibition on concerted practices that substantially lessen competition. In November 2015, the Australian Government announced that it supported that recommendation. It is expected that draft legislation incorporating the proposed new provision will be released for consultation this year.

In *ACCC v Australian Egg Corporation Limited* (2016) the ACCC brought proceedings against the Australian Egg Corporation Limited (AECL), which was an egg industry representative, two egg producers, and some of their representatives, alleging that they attempted to induce a cartel arrangement between egg producers that were members of the AECL to cull hens or otherwise dispose of eggs, for the purpose of reducing the amount of eggs available for supply in Australia. The case is the most recent proceeding involving an alleged attempt to form a hub and spoke cartel agreement in Australia.

In February 2016, the Court found that the AECL and the relevant egg producers had not attempted to induce a cartel amongst egg producers. [25] The Court found that the AECL was accustomed to engaging in actions such as providing advice to egg producers in relation to reducing egg supply. [26] However, the Court noted the distinction between industry participants being brought to an appreciation of what is in their interests, independently of what others are doing, to act a certain way (which did not breach the cartel provisions), and industry participants being invited to agree to act in a certain way in the expectation of reciprocal conduct by others. [27] The Court found there was insufficient evidence to conclude that the options to reduce the oversupply of eggs were proposed as a form of collective action involving reciprocal obligations or understandings by the egg producers.

Middlemen liability in cartel cases

The EU

At EU level, there is a lack of case law on (genuine retail) hub and spoke cartels, and even though on a European

level a milestone judgment or decision has yet to be issued, there have been some cases that may shed indirect light on how the European institutions may approach hub and spoke cases. These cases are the AC Treuhand I and AC Treuhand II cases. Neither of these cases is a genuine hub and spoke case; each featured a the "hub/facilitator" that was not active on the cartelised market or on any related market. However, these cases will likely play a crucial role in the analysis of hub and spoke cases under EU competition law.

AC Treuhand is a Swiss consultancy firm that was found to have contributed to the implementation of a cartel and was fined for complicity in two separate cases. In both cases, AC Treuhand was entrusted with storing certain secret documents relating to the cartel on its premises, collecting and treating information concerning the commercial activity of the parties to the cartel, communicating to them the data thus treated, and completing logistical and clerical-administrative tasks associated with the meetings among those producers, such as reserving hotel rooms and reimbursing their representatives' travel costs. [28]

The AC Treuhand I case kicked off after a leniency application of one of the cartel parties. During its investigation, the European Commission found that AC Treuhand had played an essential role in the cartel by organising the meetings and covering up evidence of the infringement. For those reasons, the Commission concluded that AC Treuhand had also infringed the competition rules and imposed a fine of €1,000. [29] The fine was rather modest due to the novelty of the policy followed in that area, but by levying the fine the European Commission sent a clear message: those who organise or facilitate a cartel must be aware that they are infringing competition law, and that heavy sanctions can be imposed on them. [30]

On appeal, the Court of First Instance held that the fact that the consultancy firm was not active on the market on which the restriction of competition occurred does not exclude liability for the infringement as a whole. [31] Indeed, the Court found that the mere fact that an undertaking has participated in a cartel only in a subsidiary, accessory or passive way is not sufficient for it to escape liability for the entire infringement. [32] However, notwithstanding that the Court confirmed AC Treuhand's fine in 2008, AC Treuhand was fined again in 2009 for very similar behaviour in the Commission's decision in AC Treuhand II. As in the first case, AC Treuhand was not a party to the cartel agreement as such, but it played an essential facilitating role in the cartel that covered price fixing, market sharing, customer allocation and exchanges of commercially sensitive information. For those reasons, the European Commission imposed a total fine of €348,000 on AC Treuhand. [33] The General Court confirmed the fine in 2014, and AC Treuhand then appealed the case once more. Recently, the Court of Justice issued its decision in that case. [34]

On 22 October 2015, the EU's highest court dismissed AC Treuhand's appeal and confirmed the General Court's judgement. The Court of Justice stated that it cannot be inferred from its case law that Article 101(1) TFEU concerns only either (i) the undertakings operating on the market affected by the restrictions of competition or indeed the markets upstream of that market or neighbouring market or (ii) undertakings which restrict their freedom of action on a particular market under an agreement or as a result of a concerted practice. [35] The Court's well established case law refers generally to all agreements and concerted practices which, in either a horizontal or vertical relationship, distort competition in the internal market, irrespective of the market in which the parties operate, and that only the commercial conduct of one of the parties needs to be affected by the terms of the arrangements in question. [36]

The Court of Justice confirmed that, by playing an essential role in the infringements at issue, the conduct adopted by AC Treuhand was directly linked to the parties' efforts in the cartel, regarding both the negotiation of the parties' cartel obligations and the monitoring of the cartel's implementation. As a result, the Court concluded that the actions undertaken by AC Treuhand did not constitute mere peripheral services that were not connected to the parties' obligations to the cartel in order to ensure competition restrictions. [37] Furthermore, the Court was also of the opinion that AC Treuhand could have reasonably foreseen that its conduct was incompatible with the EU competition rules. [38] As a result, the Court dismissed AC Treuhand's appeal in its entirety and confirmed the General Court's judgment and the fine that had been imposed on AC Treuhand, thus confirming cartel middleman liability.

The US

Although not entirely apposite to the AC Treuhand fact pattern above, American courts have reviewed, for anticompetitive conduct, agreements limiting competition in one market through a company owned by competitors

in another related market. In *American Needle, Inc. v. National Football League*, the United States Supreme Court ruled that the decisions "by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that deprive the marketplace of independent centres of decision making . . . and therefore of actual or potential competition." [39] The implication of trade associations in their members' economic activities may also be subject to antitrust scrutiny. Mere membership and participation in a trade association [40] and conduct consistent with the independent economic interest of trade associations [41] generally do not offend the antitrust laws. When trade associations have a purpose or effect of unreasonably restraining trade, however, courts have found that trade associations may run afoul of Section 1 of the Sherman Act. [42]

Price signalling

The EU

In a hub and spoke scenario, information exchanges could amount to a punishable cartel. A comparable problem arises with regard to unilateral public announcements of future prices or of conceivable sensitive information. Communicating such factors as prices or volumes to customers also forms an essential part of competition and is day-to-day practice for many companies. However, since competition authorities are stretching the boundaries of competition law, these unilateral price communications could potentially amount to a concerted practice, since the communicated information may also be noted by competitors, who take it into account when determining their own commercial conduct.

Nonetheless, the EU's 2011 Horizontal Guidelines show that in a case of price signalling, finding a competition law infringement is highly dependent on the facts. [43] The guidelines state: "Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1). However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other's public announcements."

Unfortunately, due to the scarcity of case law on price signalling, the conditions under which price signalling becomes a punishable anti-competitive practice are still unclear. This scarcity can be explained, since most companies, subject to a price signalling investigation, have opted for behavioural commitment decisions, rather than taking any risk for an often significant fine.

A recent example is the container liner shipping investigation by the European Commission. The 15 container liner shipping companies under investigation offered commitments in order to address the European Commission's concerns relating to concerted practices through price signalling. The European Commission has concerns that the container liner shipping companies' practice of publishing their future intentions to increase their prices may harm competition. Although the container liner shipping companies have not admitted to any anti-competitive behaviour, they agreed to offer binding commitments to settle the European Commission's investigation.

These announcements, known as General Rate Increases or GRI announcements only indicated the increase in U.S. Dollars per transported container unit (as an amount or percentage of the change), the affected trade route and the planned date of implementation. The GRI announcements were generally made 3 to 5 weeks before their implementation, and during that period other container liner shipping companies would announce similar increases.

The European Commission's concern was that the GRI announcements may not provide full information on the new prices to customers, but merely allowed them to explore each other's pricing intentions and subsequently coordinate their behaviour.

To address the European Commission's concerns, the container liner shipping companies offered to stop publishing the GRI announcements in their current form. In order for customers to be able to understand the and rely on their price announcements, the announcements will have to be more transparent and include at least the five main elements of the total price (i.e. the base rate, bunker charges, security charges, terminal handling charges and peak season charges, if applicable). Furthermore any future announcement shall be binding on the carriers as a maximum price and will not be made more than 31 days before their entry into force.

The commitments will be made legally binding by the European Commission and would apply for three years.

However, there are two exceptions. The commitments would not apply to communications with purchasers who on that date have an existing rate agreement in force on the route to which the communication refers, and to communications made during bilateral negotiations or communications tailored to the needs of a specifically identified purchaser.

If a company would break one of the agreed commitments, the European Commission can impose a fine of up to 10 percent of the company's worldwide turnover, without having to find a competition law infringement.

The Netherlands

In January 2014, the Netherlands Authority for Consumers and Markets (the ACM) ended an investigation into mobile telephony operators KPN, Vodafone and T-mobile with a commitment decision. [44] During its investigation, the ACM had identified anti-competitive risks of public statements made by the operators about possible future changes to their commercial terms. These statements included media reports, speeches, presentations and contributions to panel discussions at conferences, as well as interviews through both traditional and digital media.

By way of example, the AMC mentioned a statement made by a representative of one of the mobile operators at a conference that is considered the most important telecom event in the Netherlands. This representative publicly announced that his company was considering the reintroduction of separate connection fees (payable by customers who conclude a new contract). The ACM found internal documents of other mobile operators, showing that they had taken note of the announcement. The ACM considers it a risk to competition if companies take note of (and may follow) public statements of their competitors about intended future changes to their commercial policies, as this can lead to a collusive market outcome which is harmful to consumers.

The three mobile operators therefore made the commitment to the ACM to refrain from public statements about any intention to change commercial policies that might be unbeneficial to consumers when the company's internal decision to adopt the change is not yet final. They also promised to incorporate this commitment into their compliance programs and to give the matter special attention in employee training workshops.

The ACM declared the commitments binding on the mobile operators, which risk being fined if they do not act in accordance with such commitments. Due to the nature of a commitment decision under Dutch competition law, the ACM did not have the opportunity to formally decide that the public announcements at issue actually did violate the cartel prohibition. However, the statement of reasons for the decision leaves little doubt on the ACM's conviction that public announcements in circumstance such as those in the case at hand may well be within that prohibition's scope.

The UK

In January 2014, following a two year investigation, the UK's Competition Commission (CC, now forming part of the CMA) concluded that certain features of the British aggregates, cement and ready-mix concrete market had an adverse effect on competition. The CC required Lafarge Tarmac to sell one of its cement plants and Hanson to sell one of its ground granulated blast furnace slag (GGBS) plants to enhance competition in the cement and GGBS markets.

The CC found that certain large UK cement producers were using generic price announcement letters to their customers in order to facilitate the eon of their behaviour, potentially even accommodating the price increases of their competitors. On 22 January 2016, the CMA published the Price Announcement Order 2016, which prohibits UK cement suppliers from sending generic price announcement letters to their customers and instead, any price announcement letter has to be specific and relevant to the customer receiving it, including setting out the last unit price paid, the new unit price, and specific details of other charges that apply to the customers. The CMA recognises that while information can still leak back via customers, because price increases will be specific to each customer, this should mitigate the possibility for the announcements to continue the previous practice.

The US

US courts have dealt with several iterations of price signalling over the years. [45] Yet "the dissemination of price information is not itself a per se violation of the Sherman Act." [46] Indeed, the enjoinder of open advertisement of price fluctuation "comes dangerously close to precluding lawful pricing activity as part of vigorous price competition." [47]

Courts have held that signalling future prices is lawful as long as it serves a legitimate, procompetitive purpose, such as customer necessity. [48] However, courts may find evidence of unlawful behaviour in regard to the publication of tentative prices. [49] Such publication of tentative prices has led the US Department of Justice to sue several airlines and an airline tariff publishing company. In that case, the airline companies used the airline tariff publishing company to communicate with each other about their prices: "they [i.e., the airlines] conducted negotiations, offered explanations, traded concessions with one another, took actions against their independent self-interests, punished recalcitrant airlines that discounted fares, and exchanged commitments and assurances - all with the goal of reaching agreements to increase fares, eliminate discounts, and set fare restrictions." [50]

In the healthcare sector, the DOJ and the Federal Trade Commission issued a joint statement creating safety zones for price or personnel-related cost surveys, according to which those agencies would not challenge the exchange of price and cost information absent extraordinary circumstances. To fall within the ambit of the safety zones, the following requirements must be met: (i) "the survey is managed by a third-party (e.g., a purchaser, government agency, health care consultant, academic institution, or trade association)"; (ii) "the information provided by survey participants is based on data more than 3 months old"; and (iii) "there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider." [51] Similar safety zones have been applied in other industries as well. [52]

Australia

Since 2012, the Australian Competition and Consumer Act 2010 has had a specific division regulating the anti-competitive disclosure (both public and private) of pricing and other information. [53] However, the provisions currently only apply to the banking sector and there have not been any cases applying the provisions. In 2015, a competition policy review recommended that the provisions be repealed on the basis that they are not fit for purpose (including because the prohibition on public disclosure of prices may over-capture pro-competitive or benign conduct).

In other sectors, the exchange of information about matters such as price is currently considered under the cartel prohibitions and the general prohibition on agreements that substantially lessen competition in a market. However, as outlined in section 2 above, the competition policy review has recommended the introduction of a new prohibition on concerted practices that have the purpose, effect or likely effect of substantially lessening competition. The competition policy review's final report states that a concerted practice "would include the regular disclosure or exchange of price information between two firms, whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange". The Australian Government is expected to introduce draft legislation this year incorporating the proposed new prohibition and the repeal of the price signalling provisions.

Conclusion

Both price signalling and vertical information exchanges could amount to an Article 101 infringement without the infringing company being well aware of it. This was particularly the case when applying the first "reasonable foreseeability" test which was very ambiguous and easily satisfied. This reasonable foreseeability test rightfully concerned a lot of undertakings, especially since the exchange of sensitive information between undertakings operating at a different level of the production/distribution chain is a necessity in commercial relations.

It is precisely because of the necessity of the exchange of certain sensitive information in vertical commercial relations that UK Court of Appeal adopted a more nuanced and appropriate approach, a state of mind test. The UK Court of Appeal found it legitimate "for a manufacturer to ask its distributors, as a matter of routine, to inform it of the prices at which and the terms on which they sell its products, which it may wish or need to be aware of for its own commercial purposes and in the context of the on-going relationship with each distributor separately." [54] This approach seems to be followed by most competition authorities in the EU.

While this test remains rather ambiguous, it is less easily satisfied than its predecessor. In fact, since competition authorities started with applying the state of mind test, this test was only considered to be met in cases where there was indeed collusion.

A similar conclusion can be drawn in relation to price signalling. While the conditions which the price signalling has to satisfy in order to constitute a concerted practice are not entirely clear, most companies should not be too reluctant to communicate their prices to their customers. The horizontal guidelines are clear on the point that as long as the announcements of future prices are sincere and unequivocal, they do not amount to illegal price signalling. However, as is the case in vertical information exchanges, caution is advisable. Notwithstanding that competition authorities have only opened investigations where there was evidence of collusion, companies should not communicate more information than what is necessary, and only make announcements when their commercial decisions are final.

In the United States, the e-Books decision that the Supreme Court refused to review will allow litigants to claim that other alleged hub and spoke arrangements should be analysed under the per se rule, not under the rule of reason. This may encourage litigants to bring more claims under the hub and spoke theory.

'Middlemen' and price signalling are not currently under such a spotlight but remain issues that are part of the landscape in the American antitrust system.

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- [1] Case 1022/1/1/03 JJB Sports plc v Office of Fair Trading [2004] CAT 17, para 659.
- [2] Case 2005/1071, 1074 and 1623 Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports Plc v Office of Fair Trading [2006] EWCA Civ 1318, paras 32 – 34 and 91.
- [3] Case 2005/1071, 1074 and 1623 Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports Plc v Office of Fair Trading [2006] EWCA Civ 1318, para 141.
- [4] Hasbro escaped a penalty on the basis that it was the first to provide information to the OFT on the infringement and it cooperated with the OFT's investigation.
- [5] Case 2005/1071, 1074 and 1623 Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports Plc v Office of Fair Trading [2006] EWCA Civ 1318, para 21
- [6] This meant that if any price increase occurred for the named brand, a price increase for the other brands would automatically be implemented by the retailers.
- [7] The non-appealing parties which settled the case with the OFT subsequently decided to challenge the OFT on procedural grounds (unfairness that assurances mistakenly given to one party were not also given to the other non-appealing parties). However, those cases proved unsuccessful.
- [8] The OFT had originally imposed fines of £9.55 million as a result of the 2002 infringements.
- [9] Decision n. 8546 dated 28 July 2000, Case I377 - RC Auto.
- [10] Decision n. 13622 dated 30 September 2004, Case I575 - RAS-Generali / IAMA Consulting.
- [11] Arrest van de Hoge Raad van 16 September 2011, LJV BQ2213, point 3.7.
- [12] Arrest van het Gerechtshof Arnhem-Leeuwarden van 22 Maart 2013, LJV BZ5188, point 3.3.
- [13] Interstate Circuit, Inc. v. United States, 306 U.S. 208, 220 (1939).
- [14] Toys "R" Us, Inc. v. F.T.C., 221 F.3d 928 (7th Cir. 2000).
- [15] 221 F.3d at 935.
- [16] Id., at 936.
- [17] United States v. Apple, 791 F.3d 290 (2nd Cir. 2015), cert. denied, 84 U.S.LW. 3258 (U.S. March 7, 2016) (No. 15-565).
- [18] United States v. Apple, Inc., 791 F.3d 290 (2nd Cir. 2015).
- [19] United States v. Apple, Inc., 791 F.3d 290, 297 (2nd Cir. 2015).
- [20] Id., at 325.

- [21] News Ltd v Australian Rugby League Ltd (No 2) (1996) 64 FCR 410 at [573].
- [22] ACCC v Air New Zealand (2014) FCA 1157.
- [23] ACCC v Air New Zealand (2014) FCA 1157 at [1107].
- [24] Ibid.
- [25] Australian Competition and Consumer Commission v Australian Egg Corporation Limited [2016]

FCA 69.

[26] *Ibid*, at [259].

[27] *Ibid*, at [381].

[28] Case T-99/04, *AC Treuhand v Commission* [2008] ECR II-1501, para 2.

[29] COMP/E-2/37.857 – Organic Peroxides

[30] Case T-99/04, *AC Treuhand v Commission* [2008] ECR II-1501, para 7.

[31] Case T-99/04, *AC Treuhand v Commission* [2008] ECR II-1501, para 127.

[32] Case T-99/04, *AC Treuhand v Commission* [2008] ECR II-1501, para 131.

[33] COMP/38.589 – Heat Stabilisers.

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

[35] Case C-194/14P, *AC Treuhand v Commission*, not yet published, para. 34.

[36] Case C-194/14P, *AC Treuhand v Commission*, not yet published, para. 35, and the case law cited.

[37] Case C-194/14P, *AC Treuhand v Commission*, not yet published, para. 39.

[38] Case C-194/14P, *AC Treuhand v Commission*, not yet published, paras. 42-46.

[39] *American Needle, Inc. v. National Football League*, 560 U.S. 183, 197 (2010) (internal citations and quotations omitted).

[40] See generally *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 n.12 (2007).

[41] See *American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery*, 185 F.3d 606, 620 (6th Cir. 1999).

[42] See e.g., *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824-25 (6th Cir. 2011) (Owned by several associations of competing real-estate brokers, Realcomp maintained several real-estate related policies. The Court found that one of the policies challenged "constitute[d] an agreement governing the Realcomp [multiple listing service] among the Realcomp members. Realcomp is, therefore, a contract, combination, or conspiracy.").

[43] 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, point 63.

[44] ACM decision of 7 January 2014, case number 13.0612.53. See also the press release at <https://www.acm.nl/en/publications/publication/14326/Commitment-decision-regarding-mobile-operators/>.

[45] See for instance *Maple Flooring Manufacturers Ass'n v. United States*, 268 U.S. 563, 584-85 (1925) (upholding an open exchange dealing with statistical information regarding past prices and other data that nonetheless maintained customer anonymity).

[46] *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 113 (1975).

[47] *United States v. Gen. Motors Corp.*, 1974 U.S. Dist. LEXIS 6569, at *58 (E.D. Mich. 1974).

[48] See e.g., *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 54 (7th Cir. 1992) (the announcements 'served important purpose in the industry' because customers 'bid on building contracts well in advance of starting construction and, therefore, required sixty days' or more advance notice on price increases").

[49] See e.g., *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 445-48 (3rd Cir. 2004).

[50] *United States v. Airline Tariff Publishing Co.*, 59 Fed. Reg. 15,225, 15,230 (Mar. 31, 1994).

[51] DOJ and FTC, Statement on Provider Participation in Exchanges of Price and Cost Information (Statement 6) (Aug. 1996).

[52] For ground transportation, see DOJ Bus. Review Letter to Am. Trucking Ass'n, 2002 DOJBRL LEXIS 11 (Nov. 15, 2002) (allowing for a national trucking association to circulate a model contract to its members to be used on a voluntary basis, either in whole or in part, and lacking any reference to price, rates or charges). For consumer telecommunications, see DOJ Bus. Review Letter to National Consumer Telecommunications Data Exchange, 2002 DOJBRL LEXIS 1 (Mar. 12, 2002) (allowing for an expansion of credit information exchange to other utility industries).

[53] Division 1A of Part IV.

[54] Cases 2005/1071, 1074 and 1623, Argos Limited and Littlewoods Limited v Office of Fair Trading and JBB Sports plc v Office of Fair Trading [2006] EWCA Civ 1318, para 99.

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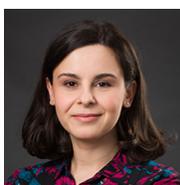
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