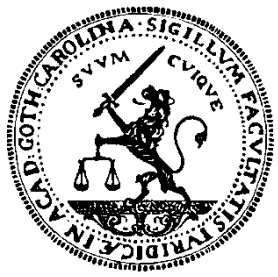

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Legal uncertainty in the scrutiny of hub-and-spoke arrangements under Article 101(1) TFEU: A proposal to reinforce Commission's guidance for Horizontal Cooperation Agreements

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Contents

Abstract

Direct or indirect exchange of commercially sensitive information between competitors is prohibited by Article 101(1) TFEU. Such disclosures enable undertakings to collude, that is, to trade practical cooperation for the risks of competition. Collusion is detrimental for consumer welfare as it allows the colluding parties to raise prices, reduce output and to share markets and customers. Due to these anti-competitive effects, all types of collusion must be prohibited by law, which is why the EU legislator intended to retain a broad scope for Article 101(1).

Hub-and-spoke arrangements can be classified as indirect information exchanges. These arrangements occur where two or more competitors (spokes) share commercially sensitive information between each other via a third-party intermediary (hub) who operates at a different level of the supply chain or at a different market altogether. Hub-and-spoke information exchange can seem *prima facie* legitimate as vertical disclosures of strategic information are legitimate and often necessary in functioning business relations. Thus, the hub can act as a smokescreen hiding the anti-competitive conduct of the spokes. This makes it challenging to distinguish illegitimate conduct from legitimate conduct.

The legal test, for hub-and-spoke arrangements at the EU level, was established in *VM Remonts*. This thesis argues that there is substantial legal uncertainty relating to hub-and-spoke analysis due to a broad legal test which is accompanied by insufficient guidance from the Commission and the EU courts. The pertaining legal uncertainty can lead to increasingly risk-aversive behaviour of undertakings which, in turn, leads to the loss of consumer welfare through the elimination of competitive bargaining.

***Keywords*: Hub-and-spoke arrangements, indirect information exchange, concerted practices, legal uncertainty, loss of consumer welfare.**

Abbreviations

EU	European Union
TFEU	Treaty on the Functioning of the European Union
Commission	European Commission
CJEU	Court of Justice of the European Union
NCAs	National Competition Authorities
Draft Guidelines	Commission's Draft Guidelines for Horizontal Cooperation Agreements
Future Guidelines	Commission's Future Guidelines for Horizontal Cooperation Agreements
ECJ	European Court of Justice
GC	European General Court
AG	Advocate General
OFT	Office of Fair Trading (Competition and Markets Authority)
CAT/Tribunal	Competition Appeal Tribunal
RRPs	Recommended Retail Prices
MFN	Most Favoured Nation clauses

1 Introduction

1.1 Background

One of the central objectives of EU competition law is to promote and enhance consumer welfare.[1] It has been deemed that undistorted competition results in healthy rivalry which can *inter alia* lead to lower prices, increased efficiency and innovation.[2] For those reasons Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) is designed to broadly prohibit all forms of joint conduct that can distort competition within the internal market.[3] Joint conduct or collusion means that the welfare enhancing objectives of competition law cannot materialise.

Companies have various incentives to collude, which are primarily linked to obtaining higher profit margins.[4] When two or more competitors agree to fix prices, those undertakings can assure themselves not to lose sales due to being undercut by their fellow competitors. Therefore, with an agreement the competitors can make an otherwise unprofitable price increase profitable. This will then have a negative impact on consumers who will have to pay higher prices. Companies may also wish to collude by sharing markets and controlling supply.[5] The underlaying motivation, however, is often the same. That is to eliminate the risks inherent in competition for the purposes of maximising company profits or, at least, to preserve current profit margins in declining markets.[6]

Since collusion can prove advantageous for firms, firms have come up with new non-traditional ways to collude which are often harder for the

[1] Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases and Materials* (7th edn, Oxford University Press 2019), pp. 28–30.
[2] Ibid, pp. 69–70.
[3] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/49, Art. 101.
[4] Christopher Harding and Julian Joshua, *Regulating cartels in Europe* (2nd edn, Oxford University Press 2010), pp. 1–2.
[5] Ibid, pp. 1–2.
[6] Ibid, pp. 1–2.

authorities to detect. A hub-and-spoke arrangement refers to a unique form of collusion. In a hub-and-spoke situation, with reference to the UK's A-B-C test, competitor A (spoke 1) passes sensitive commercial information to a third-party B (hub) who operates at a different level of the supply chain or at a different relevant market altogether.[7] Third-party B then further relays competitor A's information to competitor C (spoke 2).[8] This leads to a situation where two competitors are presented with an opportunity to collude by adjusting their commercial conduct based on the exchanged information.

A challenge, in a hub-and-spoke context, is to distinguish illegitimate horizontal information exchange from legitimate vertical discussions.[9] In a vertical context, for instance between a manufacturer of sportswear and a sports retailer, it is necessary to hold discussions about bilateral trading conditions.[10] This naturally involves talks over sensitive commercial information, such as pricing. Otherwise, no agreement could exist between the vertical business partners. However, this means that an anti-competitive hub-and-spoke arrangement can, *prima facie*, seem like a legitimate vertical disclosure, making it harder to detect for the enforcer.[11] In other words, the hub can function as a smokescreen hiding the underlaying trilateral concerted practice.[12] For those reasons, the legal test for establishing a hub-and-spoke infringement must include an additional element of intent.[13]

In accordance with *VM Remonts*, an undertaking may be held liable over the acts of an independent service provider if: (i) the undertaking knew that the service provider will use its strategically sensitive information for the

[7] Organisation for Economic Co-operation and Development (OECD), *Hub-and-spoke arrangements – Note by the United Kingdom* (DAF/COMP/WD(2019)106, pp. 2–4.
[8] Ibid, pp. 2–4.
[9] Patrick Perinetto, 'Hub-and-spoke arrangements: future challenges within Article 101 TFEU assessment' [2019] European Competition Journal, Vol. 15, No. 2–3, pp. 283–284.
[10] Ibid, p. 304.
[11] Ibid, pp. 283–284.
[12] Ibid, pp. 283–284.
[13] Case C-74/14 *"Eturas" UAB and Others v Lietuvos Respublikos konkurencijos taryba* [2016] ECLI:EU:C:2016:42, Opinion of AG Szpunar, para 65.

purposes of facilitating an anti-competitive arrangement;[14] or (ii) if the undertaking could reasonably have foreseen that the service provider will act as depicted in point (i).[15] Those two criteria display the element of intent which must be present in order to prove the existence of a hub-and-spoke arrangement.

An issue, however, lies in the concept of reasonably foreseeable. It is an abstract and an ambiguous concept that has not been sufficiently clarified in current guidance at the EU level. The concept holds a central role in the finding of an infringement, but as it is not coherently defined, it can cause challenges for undertakings in terms of legal certainty. This means that companies may not be as promptly aware of their obligations under competition law,[16] which can consequently lead to the loss of consumer welfare through higher prices caused as a result of an elimination of competitive bargaining.

1.2 Research questions

This thesis aims to address the following research questions:

1.) *Is there legal uncertainty relating to hub-and-spoke analysis, which has the capacity to result in the reduction of consumer welfare?*

2.) *How could the European Commission's Future Guidelines be improved, so that undertakings could become more readily aware of their obligations under Article 101(1) TFEU in connection with hub-and-spoke infringements?*

[14] Case C-542/14 *SIA 'VM Remonts'(formerly SIA 'DIV un KO') and Others v Konkurences padome* [2016] ECLI:EU:C:2016:578, para 33.
[15] Ibid, para 33.
[16] Clifford Chance LLP, *Response of Clifford Chance LLP to the European Commission's consultation on the revised horizontal guidelines and horizontal block exemption regulations* (Executive summary 2022), p. 19.

3.) *What are the most common indicia whose presence have rendered an undertaking liable for a hub-and-spoke arrangement based on the criteria of reasonably foreseeable?*

4.) *Should the current legal test, for establishing a hub-and-spoke infringement, be amended in light of preserving the effectiveness of Article 101(1) TFEU?*

1.3 Research problem and purpose

This thesis addresses the problem relating to the abstract and ambiguous nature of the concept of reasonably foreseeable. Even though that concept occupies a central role in the finding of a hub-and-spoke infringement, in that it demonstrates the necessary presence of intent, it is nevertheless accompanied by insufficient guidance at the EU level. Neither the European Commission (Commission) nor the Court of Justice of the European Union (CJEU) have coherently defined what circumstances may entail that an undertaking should have been aware that it was conducting or facilitating an Article 101(1) TFEU infringement through hub-and-spoke collusion.

Evidence suggests that this ambiguity has led to weakened legal certainty in that undertakings have become, in some circumstances, unnecessarily risk aversive.[17] As a result of this risk aversiveness, a pro-competitive practice of competitive bargaining has been eliminated. This means that undertakings are keen to avoid situations where they would bargain for better bilateral trading conditions by using a competitor's previously submitted offer as a reference. Undertakings have been concerned that, in the above-mentioned circumstances, they could risk being found as hubs attempting to facilitate, through an indirect exchange, an anti-competitive arrangement between parties located elsewhere in the supply chain or at a different relevant market.

[17] Clifford Chance (n 16), p. 19.

Therefore, the purpose of this thesis is to strengthen the state of legal certainty by proposing clarifying solutions that could be presented in the Commission's Future Guidelines for Horizontal Cooperation Agreements (Future Guidelines). Intent, in a hub-and-spoke context, is inferred from a set of objective indicia present in each individual case. In terms of enhanced legal certainty, it would be beneficial to look at previous practices where inferences have been made and to codify them coherently in the Commission's Future Guidelines. Although such a list of indicia will have to be non-exhaustive for the purposes of preserving the effectiveness of the prohibition, that list would nevertheless, in the author's opinion, reduce the likelihood of undertakings behaving unnecessarily risk aversively.

1.4 Research methodology

This thesis relies on two different research methodologies. Firstly, this thesis relies on the legal-dogmatic method, which can be defined as:

> [R]esearch that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law.[18]

The legal-dogmatic method has three primary aims: (i) to describe the existing law within a particular field; (ii) to search for practical solutions that fit the existing system; and (iii) to justify that a new solution fits the regime, or, on the other hand, how it does not fit the regime and should therefore not be adopted to become a part of the regime.[19]

[18] Jan M Smits, 'What is legal doctrine? On the aims and methods of legal dogmatic research' [2015] Maastricht European private law institute working paper No. 2015/06, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644088> accessed 12 April 2023, p. 5. Citing Jan M Smits.
[19] Ibid, pp. 8–12.

Secondly, this thesis relies on comparative research. Although hub-and-spoke arrangements are a well-known concept at the EU level, those arrangements have been subject to closer scrutiny in other jurisdictions, namely, in the UK. For those reasons, this thesis uses comparative research to compare interpretations, especially, between EU and UK law. Since there are limited interpretations, in this regard, at the EU level, it is relevant to view how those concepts are assessed in the UK where more case law is available in relation to hub-and-spoke infringements. By making these comparisons, this thesis can take valuable inspiration for the purposes of strengthening legal certainty at the EU level.

The comparison between EU and UK law should be all the more relevant since the case law from the UK assessed herein is from a period prior to Brexit. Therefore, those interpretations, in relation to hub-and-spoke, have been made in compliance with the EU legal order. That implies, *inter alia*, that the Member States have to interpret their national competition law consistently with Article 101(1). Consequently, any inspirations from the UK should be easily transferable to Future Guidelines at the EU level.

To reach the objectives of the research herein, this thesis will explore the following types of sources: (i) normative sources (i.e., Treaties, legislation, general principles of law and Commission Guidelines); (ii) scholarly legal writings (text books and academic research articles relevant to the field); (iii) case law of the CJEU as well as case law from other mainly European jurisdictions; and (iv) other relevant sources supplied by well-known international organisations and companies.

1.5 Scope and delimitation

The focus of this thesis is in clarifying the ambiguity around the concept of reasonably foreseeable. By making these clarifications, this thesis can fulfil its main purpose of attempting to contribute towards the making of better guidance, at the EU level, for the scrutiny of hub-and-spoke arrangements.

This thesis is limited in the following ways: (i) it mainly focuses on the exploration of EU law, and in the exploration of practices established in the Member States. Although hub-and-spoke arrangements have also been subject to close scrutiny in the US, this thesis will not take a deep delve into exploring US law. The main reason for this is that, in the author's opinion, enough case law and material is available from Europe to make conclusions in terms of strengthening Future Guidelines; (ii) this thesis does not address the challenges related to the enforcement against hub-and-spoke collusion. In some situations, an alleged hub-and-spoke infringement has fallen due to the challenges in obtaining evidence. Those cases have often been scrutinised under other areas of competition law. It could be beneficial to research whether the Commission's burden of proof for hub-and-spoke collusion is unnecessarily high or not. This debate will, however, be left outside the scope of this thesis; and (iii) this thesis does not make a deep analysis on which hub-and-spoke arrangements would be considered as by object restraints and which would restrict competition through their effects.

1.6 Outline

This thesis is divided into four sections. The first section contains the introduction along with some relevant background information. Additionally, the first section defines and elaborates on the issues which the thesis aims to address. The second section contains information about Article 101 TFEU. Since this Treaty provision provides the wider framework for scrutinising restrictive hub-and-spoke arrangements, it is necessary to understand what its scope entails. Defining the wider framework further helps the reader to understand the conclusions of the research in a more comprehensive way. In addition, the second section defines hub-and-spoke arrangements and determines which legal tests have been used to prohibit those practices. The third section focuses on creating a set of recommendations to improve the current Draft Guidelines for

Horizontal Cooperation Agreements (Draft Guidelines).[20] Furthermore, this section aims to clarify some of the most ambiguous elements within the legal test which are liable for creating uncertainty. The fourth section of this thesis contains the concluding remarks.

[20] See Draft Guidelines– Approval of the content of a draft for a 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 [2022] OJ C164/1, paras 435–440.

2 Defining the issues

2.1 Legal certainty

Legal certainty is a general principle of EU law, which means that it has the same value as the founding Treaties.[21] The principle entails that:

> Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.[22]

Legal certainty does not require the laying down of exhaustive certainty by legal rules. In fact, that would be impossible. Exhaustive certainty would narrow the scope of a legal norm to such an extent that it would eliminate any creative interpretations of the law.[23] That could make the legal provision devoid of its purpose. A legal rule must be flexible, so that the effectiveness of the regime is not hampered. For those reasons, it is enough that a general definition of a prohibition is provided by law, which can then be interpreted by the courts.[24] From that definition operators must be able to determine with a sufficient degree of certainty which types of conduct are prohibited. Most legal rules are vague. It is up to the parties to gain knowledge on how a provision has been interpreted in the past, and where appropriate resort to professional legal advice in order to succeed in that initiative. Having to resort to legal advice does not make a provision of law contrary to the principle of legal certainty.[25]

[21] Jeremie Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust' [2016] European Law Review, Vol. 41, No. 41, p. 280.
[22] Ibid, p. 280. Citing Jeremie Van Meerbeeck.
[23] Peter Whelan, 'Legal Certainty and Cartel Criminalisation within the EU Member States' [2012] Cambridge Law Journal, Vol. 71, No. 3, pp. 680–682.
[24] Ibid, pp. 680–682.
[25] Ibid, p. 681.

The intention of this thesis is not to argue that Article 101(1) TFEU does not preserve the general principle of legal certainty. Rather, the purpose is to argue that increased certainty would result in a more effective competition regime. If operators could, with greater certainty, determine what their obligations under Article 101(1) are, unnecessarily risk aversive behaviour could be reduced.

Legal uncertainty within the meaning of this thesis refers to uncertainty that undertakings have concerning their legal obligations in relation to hub-and-spoke arrangements. The vague and ambiguous test for establishing a hub-and-spoke arrangement[26] makes it challenging for operators to determine what is expected of them in front of the law.

2.2 Eliminating competitive bargaining as a consequence

The elimination of competitive bargaining can be illustrated with reference to a hypothetical situation. In this hypothetical setting, there are four main suppliers who are supplying or willing to supply a common downstream customer. The common customer may have an incentive to order the goods from all four suppliers for the purposes of mitigating its business risk. In case one or several of the suppliers began to have supply difficulties, the common customer could switch the cancelled supplies to be delivered by one of the remaining suppliers as the goods in question would be homogeneous. In this way the business operations of the common customer cannot come to a stall. The loss of consumer welfare through higher prices can occur when the common customer engages in parallel negotiations with all suppliers. In these vertical negotiations the parties will naturally hold

[26] A hub-and-spoke "arrangement" in this thesis refers to both restrictive agreements and/or concerted practices within the meaning of Article 101(1) TFEU.

discussions concerning sensitive commercial information[27] as that is both legitimate and often necessary in this context.

As per current suggestions, as determined in the Netherlands' tobacco case, undertakings are incentivised to conclude confidentiality agreements with their customers on the use of sensitive commercial information.[28] In this way an undertaking (disclosing party) can mitigate its risk of being potentially alleged of a hub-and-spoke infringement. In addition, undertakings are required to publicly distance themselves in accordance with *Anic* in case they received information concerning their competitor's strategic conduct.[29] These are beneficial measures as they further mitigate the chance of anti-competitive concertation.

However, these well-known suggestions may have negative implications in that they can prevent the common customer (hub) from bargaining with the suppliers (spokes) over more competitive prices or other trading conditions. The inability to bargain in this context means that if the customer received a more competitive offer from another supplier, it cannot utilise this offer in its bilateral negotiations with another supplier. This means that it cannot use the more attractive offer in an attempt to obtain better trading conditions from one of the alternative suppliers. In case the customer did bargain, it could be held liable for a breach of its confidentiality agreement with a supplier, given that such an agreement had been concluded. Most importantly, however, the customer could revert from bargaining out of fear that it will infringe Article 101(1) by facilitating anti-competitive collusion on the upstream market. The suppliers (spokes) would also likely be hesitant towards receiving their competitor's pricing information from the common

[27] Freshfields Bruckhaus Deringer, 'Working Group on Euro Risk-Free Rates: Competition Law Compliance Guidelines (2018) <https://www.esma.europa.eu/sites/default/files/library/eu_competition_law_guidelines_for_the_working_group_on_euro_risk-free_rates.pdf> accessed 22 May 2023, pp. 4–6. See which types of information may be regarded as sensitive commercial information.
[28] *Netherland's Authority for Consumers and Markets (ACM) v Philip Morris Holland and Others* (2020) ACM/19/035337 (Summary of the ACM Decision), para 9.
[29] Case C-49/92 P *Commission of the European Communities v Anic Partecipazioni SpA* [1999] ECR 1-04125, para 121.

customer as that would, in turn, constitute an indirect exchange of commercially sensitive information between competitors. In such circumstances, a diligent supplier would likely rather perform the items in *Anic* to be on the safe side. In the author's opinion, this elimination of bargaining can lead to the loss of consumer welfare through higher prices. Consequently, enhanced guidance on the field is needed to prevent unnecessarily risk aversive behaviour of undertakings.

This issue has also been highlighted by firms who have submitted responses to the Commission's consultation regarding the implementation of new Guidelines for Horizontal Cooperation Agreements. In Clifford Chance's submission, it is stated that the firm has encountered several instances where a common customer is reluctant to bargain in order to obtain a better price due to the false perception that if it did so it could be held liable for a competition law infringement.[30] This determination further warrants the need of increased clarity and guidance around the interpretation of the law. In the author's opinion, the current guidance through the Draft Guidelines is insufficient as it merely re-states the findings contained in *VM Remonts* and *AC-Treuhand*.

[30] Clifford Chance (n 16), p. 19.

3 The broader framework for scrutinising hub-and-spoke arrangements

3.1 Article 101 TFEU

A hub-and-spoke arrangement is ultimately a form of joint conduct between three or more undertakings.[31] Those arrangements usually involve indirect exchanges of commercially sensitive information between horizontal competitors,[32] which are capable of removing natural uncertainties inherent in healthy competition.

Therefore, an anti-competitive hub-and-spoke arrangement falls under the scope of Article 101(1) TFEU.[33] Article 101(1) prohibits agreements, decisions by associations of undertakings (Decisions) and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the internal market.[34] The wording of Article 101(1) implies that the prohibition has a wide scope.[35] The purpose of the prohibition is to ensure undistorted competition within the internal market by precluding all types of collusion notwithstanding their form.[36]

Article 101(1) does not apply to unilateral conduct.[37] Thus, in a hub-and-spoke context, an undertaking can intelligently adjust its behaviour to match that of its competitors based on the available public information.[38] An undertaking can, in principle, use a third-party intermediary to supply it with

[31] Andrew Groves, 'Hub-and-spoke arrangements' [2020] Competition Law Journal, Vol. 19, No. 2, pp. 79–80.
[32] Ibid, pp. 80–81.
[33] Perinetto (n 9), pp. 290–291.
[34] TFEU (n 3), Art. 101.
[35] Jones, Sufrin and Dunne (n 1), p. 165.
[36] Ibid, pp. 42–43.
[37] Paul Craig and Grainne De Burca, *EU Law: Text, Cases and Materials* (7th edn, Oxford University Press 2020), pp. 1037–1039.
[38] Ibid, p. 1040.

public information relating to its competitors, and that would not be classified as a hub-and-spoke arrangement because it would not remove uncertainties between competitors. On the other hand, if the exchanges would concern future prices, that would remove spontaneity as firms would know how their competitors are going to act in the future.[39] Therefore, the existence of an infringement or its seriousness will depend on the nature of the information exchanged.

When a hub-and-spoke exchange concerns particularly sensitive commercial information, it will be deemed as a by object restraint. The by object category refers to the most serious restrictions of competition.[40] That category creates an almost *per se* prohibition for certain types of joint conduct. This is because it is extremely hard to argue that a by object restraint would satisfy the requirements for exemption under Article 101(3).[41] A by object restraint is so likely to have a negative impact on competition without creating any pro-competitive advances that it has been deemed redundant for the Commission or the National Competition Authorities (NCAs) to prove that the measure actually has an anti-competitive effect.[42] A by object restriction can be distinguished when a measure has a sufficiently deleterious impact on competition by taking note of its contents (provisions), objectives (purpose) and the economic and legal context of which it forms a part.[43] In *T-Mobile* the ECJ confirmed that exchanges of sensitive commercial information between competitors which are designed to directly or indirectly fix purchase or selling prices are considered as by object restraints.[44]

[39] Perinetto (n 9), p. 296.
[40] Jones, Sufrin and Dunne (n 1), pp. 219–221.
[41] Julian Nowag, 'When sharing platforms fix sellers' prices' [2018] Journal of Antitrust Enforcement, Vol. 6, No. 3, p. 401.
[42] Jones, Sufrin and Dunne (n 1), p. 221.
[43] Case C-67/13 P *Groupement des Cartes Bancaires (CB) v Commission* [2014] EU:C:2014:2204, para 53.
[44] Case C-8/08 *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-04529, paras 36–43.

Since the by object category only concerns the most serious restrictions of competition, the category must be interpreted restrictively.[45] However, it remains a little unclear what the true scope of the by object category is. In *T-Mobile* the ECJ accepted the Advocate General's (AG) finding that a measure can be considered as a by object restriction even if it merely has the potential of having a negative impact on competition.[46] This implies that maybe the by object category is not interpreted so restrictively after all. In case a measure does not satisfy the by object category, its anti-competitive effects must be convincingly demonstrated.[47]

Finally, to fall within the scope of Article 101(1) a measure must both appreciably effect trade between the Member States and it must appreciably restrict competition within the internal market.[48] The effect on trade concept applies to both restrictions by object and effect.[49] The requirement of appreciably restricting competition, on the other hand, only applies to measures that have a restrictive effect.[50] An agreement is generally not capable of affecting trade between the Member States if: (i) the aggregate market share of the parties does not exceed 5% at any relevant market affected by the arrangement; and (ii) the combined aggregate turnover of the parties does not exceed €40 million within the internal market.[51]

A restriction by object is automatically seen to appreciably restrict competition.[52] However, a measure that restricts competition by effect still falls outside the scope of Article 101(1) if: (i) in case of agreements made between competitors the aggregate market share of the parties does not

[45] *CB* (n 43), paras 58 and 99.
[46] *T-Mobile* (n 44), para 31.
[47] Jones, Sufrin and Dunne (n 1), pp. 239–246.
[48] Ibid, pp. 196–202 and 237–239.
[49] Commission Notice of 27 April 2004– Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81, para 50.
[50] Communication from the Commission of 30 August 2014– Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C291/1, para 8.
[51] Notice on the effect on trade concept (n 46), para 52.
[52] Jones, Sufrin and Dunne (n 1), p. 238.

exceed 10% at any relevant market affected by the agreement; or (ii) in case of agreements made between non-competitors the aggregate market share of the parties does not exceed 15% at any relevant market affected by the agreement.[53]

After the Commission or the NCA has established that a measure restricts competition by object or effect, the parties can then argue that their arrangement nevertheless satisfies the criteria of Article 101(3).[54] To be exempted an arrangement must meet the following four cumulative conditions: (i) the arrangement must contribute to improving production, the distribution of goods or to promoting technical or economic progress; (ii) consumers must gain a fair share of the resulting benefit; (iii) the restrictions must be essential to achieving the efficiency gaining objectives; and (iv) the arrangement does not give the parties an opportunity to eliminate competition in respect of a substantial part of the products in question.[55]

3.2 Concerted practices

Hub-and-spoke arrangements most often present themselves as concerted practices.[56] Although the concept of agreement is interpreted broadly under Article 101(1), in that it merely requires a concurrence of wills between the parties, and it is not relevant in which form that concurrence is given,[57] it is still unlikely that hub-and-spoke arrangements would be classified as agreements.

[53] De Minimis Notice (n 47), para 8.
[54] Jones, Sufrin and Dunne (n 1), p. 261.
[55] Case T-168/01 *GlaxoSmithKline Services Unlimited (GSK) v Commission* [2006] ECR II-2969, paras 233–236.
[56] Sofia Oliveira Paris, 'Hub-and-Spoke Agreements and Tacit Collusion: Recent National Decisions and the Competition Market Authority Paper on Algorithms, Competition, and Consumer Harm' [2021] Market and Competition Law Review, Vol. 5, No. 1, p. 178.
[57] Jones, Sufrin and Dunne (n 1), pp. 166–169.

A concerted practice is a looser way of achieving a collusive outcome.[58] The CJEU has defined the concept of a concerted practice in its case law. In *Dyestuffs* the court ruled that a concerted practice refers to:

> Co-ordination between undertakings which, without having reached the stage where an agreement, properly so called, has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.[59]

Furthermore, in *Suiker Unie* the court clarified that a concerted practice results from:

> Any direct or indirect contact between 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.[60]

A concerted practice requires concertation and subsequent conduct, and a causal connection between the two.[61] In *T-Mobile* the ECJ found that telecommunications operators had concerted by exchanging sensitive commercial information at a meeting.[62] The participants had collectively agreed to reduce dealer remunerations for the sale of post-paid subscriptions (concertation).[63]

Subsequent conduct can be demonstrated by relying on the Anic-presumption. This means that the mere presence of an undertaking at an

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[58] Ibid, pp. 177–178.
[59] Case 48/69 *Imperial Chemical Industries Ltd. (Dyestuffs) v Commission of the European Communities* [1972] ECR 1972 -00619, paras 64 and 65.
[60] Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities* [1975] ECR 1975 -01663, para 174.
[61] Jones, Sufrin and Dunne (n 1), pp. 177–178.
[62] *T-Mobile* (n 44), para 63.
[63] Ibid, paras 12–13.

anti-competitive meeting will make it liable for a concerted practice under Article 101(1), unless it can rebut the presumption.[64] According to *Anic* an undertaking is presumed to have taken into account the information discussed at an anti-competitive meeting if: (i) it did not publicly distance itself from the received information; or (ii) it did not report the behaviour to the relevant authorities.[65] The same logic can be applied to a hub-and-spoke situation. When A's information reaches C via B, C will be presumed liable for a concerted practice unless it can adduce evidence to rebut the presumption.

Anic concerned information exchanged via a meeting whilst in *Eturas* information that would have enabled concertation to occur was distributed by an online platform.[66] The administrator of the platform had made its users aware that it would be implementing a technical restriction on the platform to cap all discounts to 3%.[67] The ECJ deemed that in situations such as in *Eturas* where information has not been exchanged via a meeting, undertakings can resort to additional indicia to rebut the presumption that they had taken note of the exchanged information.[68] This seems logical as there can be genuine reasons why a firm has not gained knowledge of the information because it has been supplied indirectly to a remote location. On the other hand, when one has received information at a meeting, it should justifiably be harder to rebut the presumption as it is also less likely that the firm would not have received the information.

Therefore, in situations analogous to *Eturas* an undertaking can, on top of the indicia established in *Anic*, resort to prove that it never received the message, it never opened the message or that it never looked at the particular section of the message containing the information.[69] In addition,

[64] Jones, Sufrin and Dunne (n 1), p. 170.
[65] *Anic* (n 29), para 121.
[66] Case C-74/14 *"Eturas" UAB and Others v Lietuvos Respublikos konkurencijos taryba* [2016] ECLI:EU:C:2016:42, para 43.
[67] Ibid, para 10.
[68] Ibid, para 46.
[69] Ibid, para 41.

an undertaking could have indicated that it had systematically adopted discounts in excess of 3% to show that it had *de facto* not complied with the concerted practice.[70] *Eturas* shows that in case of some hub-and-spoke information exchanges, undertakings have an opportunity to resort to an extended set of indicia beyond *Anic* to rebut the presumption for their participation in a concerted practice.

[70] Ibid, para 49.

4 Hub-and-spoke arrangements

4.1 The nature of a hub-and-spoke arrangement

A hub-and-spoke arrangement can be understood as a trilateral concerted practice enabling horizontal competitors to collude with the assistance of a third-party intermediary.[71] The objective of the scheme, in most cases, is to eliminate pricing competition either at the downstream or upstream market.[72] Arranging the concertation in this trilateral manner can help the parties hide the anti-competitive conduct from the authorities.[73] In order for a hub-and-spoke arrangement to materialise, all of the participants usually have to have an incentive to facilitate the practice.[74] For instance, in *Replica Kit* it was in the interest of Umbro, acting as the hub, to reduce margin pressure at the retailer level because that resulted in the lower likelihood of having to accept cost price reductions in the future.[75] In some cases, however, the motivation of the hub to engage in a hub-and-spoke arrangement has remained unclear.[76] In these cases, it is likely that the hub has engaged in the practice because it was unaware that it was conducting an illegal act or that it has simply dealt with a business partner with significant market power, and as a result of pressure it has participated in concertation.[77]

[71] Nicolas Sahuguet and Alexis Walckiers, 'Hub-and-spoke conspiracies: the vertical expression of a horizontal desire?' [2014] Journal of European Competition Law & Practice, Vol. 5, No. 10, p. 2.
[72] Roberto Amore, 'Three (or more) is a magic number: hub & spoke collusion as a way to reduce downstream competition' [2016] European Competition Journal, Vol. 12, No. 1, p. 28–29.
[73] Perinetto (n 9), pp. 283–284.
[74] Amore (n 72), p. 29.
[75] Groves (n 31), p. 83.
[76] Nicolas Sahuguet and Alexis Walckiers, 'A theory of hub-and-spoke collusion' [2017] International Journal of Industrial Organisation, Vol. 53, p. 353–370.
[77] Joseph E. Harrington Jr. and Patrick T. Harker, 'How Do Hub-and-Spoke Cartels Operate? Lessons from Nine Case Studies' [2018] Department of Business Economics & Public Policy, The Wharton School, University of Pennsylvania, pp. 10–18.

A hub-and-spoke arrangement can best be understood with reference to the UK's A-B-C test. Competitor A (spoke 1) passes commercially sensitive information to a third-party intermediary (hub) who operates at a different level of the supply chain or at a different relevant market altogether.[78] The hub then further relays competitor A's information to competitor C (spoke 2).[79] This means that two competitors, through an indirect exchange of information, become aware of each other's current or future strategic conduct.[80] The exchanged information must be capable of removing uncertainties in the participant's minds to an extent that spontaneity inherent in healthy competition is removed.[81] For those reasons, an anti-competitive hub-and-spoke arrangement cannot materialise if the exchanged information is publicly available for all.

In terms of the hub, it must be noted that the hub does not necessarily have to be an undertaking. The hub can also be an algorithm developed for an undertaking. Discussions have emerged around taxi services, such as Uber, who apparently use an algorithm to determine the prices set by each of their drivers.[82] In this context, one could argue that there is a restrictive hub-and-spoke arrangement between the drivers of the taxi service and the algorithm. This is because the independent undertakings (being the taxi drivers) are no longer independently determining their course of action at the market. Each driver should *inter alia* be free to set their own price for a ride.

Most typically a hub-and-spoke arrangement is facilitated by either an upstream supplier or by a downstream customer.[83] In *Replica Kit* Umbro was the common supplier of football shirts and other sports wear to various

[78] OECD– Note by the UK (n 7), pp. 4–5.
[79] Ibid, pp. 4–5.
[80] Patrick J.G Van Cayseele, 'Hub-and-spoke Collusion: Some Nagging Questions Raised by Economists' [2014] Journal of European Competition Law & Practice, Vol. 5 Is. 3, p. 164.
[81] ACM Decision (n 28), paras 20–21.
[82] Nowag (n 41), pp. 382–383.
[83] Amore (n 72), p. 29.

sports stores operating at the retailer level.[84] The UK's Office of Fair Trading (OFT) argued that there was a hub-and-spoke concerted practice between Umbro and its two retailer customers JJB Sports (JJB) and Sports Soccer.[85] JJB was the largest retailer customer at the downstream market, and Umbro was keen to keeping JJB satisfied.[86] JJB was unhappy about Sports Soccer's aggressive discounting because that resulted in it losing sales to a competitor.[87] For the purposes of being able to charge higher prices for a football shirt during a peak season and without having to worry about pricing pressure from Sports Soccer, JJB effectively asked Umbro to get Sports Soccer in-line with JJB's conduct on the market.[88] This, in the end, and after having satisfied the requirements of the relevant legal test was considered as a hub-and-spoke arrangement distorting competition.[89]

The Commission has also had a case in its hand displaying elements of hub-and-spoke collusion. In its *E-books* case the Commission argued that four large publishers of e-books had concerted with the assistance of Apple in jointly switching their distribution strategy from a wholesale model to an agency model.[90] Publishers were keen to avoid the wholesale model as they wanted to control the prices at which e-books were sold to consumers. The wholesale model had previously enabled Amazon, in the US, to sell e-books from the same publishers at a low price of $9.99, a price which was often lower than the price Amazon had to pay to the publishers.[91] This strategy allowed Amazon to increase its market share in e-books and thus to solidify its presence within the business. For the publishers, on the other hand, this strategy was not appealing because as a result the popularity of the far more

[84] Case 2005/1623 *JJB Sports plc v Office of Fair Trading (Replica Kit)* [2005] EWCA Civ 1318, paras 35–61.
[85] Ibid, para 63.
[86] Ibid, paras 35–61.
[87] Ibid, paras 35–61.
[88] Ibid, paras 51–61.
[89] Ibid, paras 102–106.
[90] *E-books* Case Comp/AT.39847 (Commission Decision, 12 December 2012), paras 28–35.
[91] Ibid, paras 22–27.

profitable hard copy books decreased.[92] Consequently, the publishers wanted to join forces and collectively change to the agency model in order to retain control over the prices at which e-books were sold to consumers.[93]

The Commission found that Apple maintained contacts with each of the four publishers and made them know about the terms and conditions it was entering into with each publisher.[94] This allowed a situation to materialise where each publisher entered into an agency agreement with Apple under the same conditions. The Commission concluded that this amounted to a concerted practice which had as its object to raise the prices of e-books or to prevent the emergence of cheaper e-books on the market.[95] Apple was an important facilitator in terms of meeting the objective of the concerted practice as it had included, in the agreements, the same Most Favoured Nation (MFN) clause, which incentivised each publisher to revert to an agency model with all their existing customers, including Amazon.[96] This, in the end, would have resulted in more expensive e-books and thus in the reduction of consumer welfare.

Although *E-books* displayed clear elements of a hub-and-spoke arrangement, the Commission, in its arguments, focused on the direct exchanges of information between the publishers.[97] Thus, *E-books* sheds little light on how the Commission would conduct a hub-and-spoke analysis.

VM Remonts is another case, at the EU level, whose facts resemble the peculiarities of a hub-and-spoke arrangement. In this case, a Latvian municipal council asked for tender offers for the supply of food products to

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[92] Bram Vereecken, 'Hub and Spoke Cartels in EU Competition Law' (master's thesis, Ghent University academic year 2014–2015) <https://libstore.ugent.be/fulltxt/RUG01/002/213/684/RUG01-002213684_2015_0001_AC.pdf> accessed 22 May 2023, p. 23.
[93] Ibid, pp. 23–24.
[94] *E-books* (n 90), para 33.
[95] Ibid, para 81.
[96] Ibid, para 38.
[97] Organisation for Economic Co-operation and Development (OECD), *Hub-and-spoke arrangements – Note by the European Union* (DAF/COMP/WD(2019)89), p. 3.

educational establishments. One of the participating undertakings to the tender, Partikas kompanija, asked for legal advice from a private undertaking in the preparation of its offer.[98] The private undertaking further relied on a subcontractor for the provision the advice. The subcontractor prepared Partikas' offer and submitted it to the municipality.[99] However, it later became evident that this same subcontractor had prepared various other tender offers on behalf of undertakings who were Partikas' competitors. The subcontractor had used Partikas' offer as a reference point and it drafted the competing offers in a similar fashion (the price given was almost identical).[100] This then raised questions as to whether the competitors (submitters of the tender offers) had engaged in a concerted practice to fix their tender offers via a third-party (in this case the subcontractor).[101]

4.2 Legal test: EU approach

As determined by AG Szpunar in *Eturas*, hub-and-spoke analysis requires an additional assessment concerning the subjective intent of the parties.[102] Without an assessment of intent, all, including legitimate vertical disclosures of sensitive commercial information would fall within the ambit of hub-and-spoke analysis.[103] This would be inefficient and devoid of purpose. It would furthermore make the distinction between legitimate and illegitimate conduct impossible.

VM Remonts sheds some light into how a potential hub-and-spoke arrangement would be scrutinised by the CJEU. The court determined that an undertaking may be held liable for a concerted practice on behalf of an independent service provider if: (i) the undertaking knew about the anti-competitive intentions of the service provider, and if the undertaking

[98] *VM Remonts* (n 14), paras 4–8.
[99] Ibid, paras 4–8.
[100] Ibid, paras 4–8.
[101] Ibid, para 15.
[102] Opinion of AG Szpunar (n 13), para 65.
[103] Ibid, para 65.

explicitly or tacitly agreed with the service provider that the provider will relay its commercially sensitive information to competitors;[104] or (ii) the undertaking could reasonably have foreseen the anti-competitive intentions of the service provider, and could reasonably have foreseen that the service provider will relay its commercially sensitive information to competitors.[105] The court further determines that liability cannot be adduced if the service provider has, without informing the undertaking using its services, distributed its commercially sensitive information to competitors which has enabled collusion to materialise.[106]

The test laid out in *VM Remonts* applies to both party A or spoke 1 and party C or spoke 2, which is confirmed by the Commission's Draft Guidelines.[107] Thus, when C receives A's commercially sensitive information via B, it must know, or it must be able to foresee the underlaying objective of the parties to restrict competition.[108]

The ruling in *VM Remonts* is limited as it provides no guidance on what the elements within the legal test entail.[109] For instance, how can liability be adduced upon an undertaking based on the condition of reasonably foreseeable? The court could have, for instance, aided the national court on how a diligent business operator should select a service provider. As an example, if there was evidence that the service provider in question was prone to distributing its customer's sensitive commercial information amongst competitors, and the undertaking using its services knew about this or should have known about it through easily obtainable information, those factors might have been relevant when evaluating whether liability can be adduced based on foreseeability.

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[104] *VM Remonts* (n 14), paras 30–31.
[105] Ibid, paras 30–31.
[106] Ibid, para 30.
[107] Draft Guidelines (n 20), para 437.
[108] Ibid, para 437.
[109] Ioannis Apostolakis, 'Antitrust Liability in Cases of Indirect Contracts between Competitors: VMRemonts' [2017] Common Market Law Review, Vol. 54, Is. 2, pp. 628–629.

When it comes to party B or the hub, the CJEU's determination in *AC-Treuhand* proves useful. This judgement concerned a Swiss consultancy firm who was seen to facilitate an anti-competitive arrangement between various producers in the tin stabilisers and ESBO/esters sectors.[110] As a consultancy firm, AC-Treuhand was not active in these markets. It nevertheless organised several meetings between the producers where it explicitly offered its services for remuneration in order to help the parties implement various anti-competitive practices i.e., price-fixing, market-sharing, customer allocation.[111] It enabled the anti-competitive agreements/concerted practices to materialise by sharing commercially sensitive information of each producer to their respective competitors.[112] It was considered that AC-Treuhand was aware or, at least, should have been aware that its conduct amounted to an infringement under Article 101(1).[113]

Hence, as further stated in the Draft Guidelines, the hub will be held liable for a concerted practice if it intended to contribute by its own conduct to the common objectives pursued by all the participants and that it knew or could reasonably have foreseen the anti-competitive conduct pursued by the participants to the scheme.[114] Importantly, the hub's participation in terms of liability will not be affected by the fact that it operates at a different relevant market to that where the concerted practice takes effect.[115] The court reiterated that if that would not be the case, the full effectiveness of the Article 101(1) prohibition would be negated.[116]

Looking at *E-books* in light of the test established in *VM Remonts*, the Commission could have argued that Apple was aware or, at least, could have foreseen that through its conduct of maintaining contacts with each of

[110] Case C-194/14 P *AC-Treuhand AG v European Commission* [2015] ECLI:EU:C:2015:717, paras 5–10.
[111] Ibid, para 38.
[112] Ibid, para 38.
[113] Ibid, para 43.
[114] Draft Guidelines (n 20), para 438.
[115] Anne Vallery and Caroline Schell, 'AC-Treuhand: Substantial Fines for Facilitators of Cartels' [2016] Journal of European Competition Law & Practice, Vol. 7, No. 4, p. 255.
[116] Ibid, p. 255.

the four publishers,[117] it was enabling concertation to occur in the upstream market. Furthermore, the Commission could have argued that Apple was aware or, at least, could reasonably have foreseen that its tactic of including the same MFN clause to each of the contracts with the publishers will motivate these publishers to ditch the wholesale model for the agency model with all existing customers, which will consequently lead to an increase in the prices of e-books.[118]

As to the publishers or the spokes, the spokes must have been aware that they were concerting with each other as Apple kept them aware of the negotiations and the terms and conditions it was entering into with each of the four publishers.[119] Therefore, the parties in full awareness, through an indirect exchange of sensitive commercial information, concerted for the purposes of raising the prices of e-books.[120] Although this analysis is purely speculative, it does indicate that the Commission could have argued the case as a single hub-and-spoke infringement between apple and the four publishers.

4.3 Legal test: UK approach

Although this thesis addresses the scrutiny of hub-and-spoke arrangements under EU law, the case law of the national courts of the Member States may prove useful in explaining some of the uncertainties present at the EU level. This is because national interpretations of competition law should be made in compliance with the EU legal order. All UK case law assessed throughout this thesis is from a time period prior to Brexit.

Hub-and-spoke arrangements have been subject to closer examination in the UK.[121] The most notable judgements in this respect have been given in

[117] *E-books* (n 90), para 33.
[118] Ibid, para 38.
[119] Ibid, para 33.
[120] Ibid, para 81.
[121] Perinetto (n 9), p. 288.

Replica Kit, *Toys* and *Dairy*. The UK's test for the scrutiny of hub-and-spoke collusion is worded slightly differently to the test at the EU level. Originally the UK's Competition Appeal Tribunal (Tribunal/CAT) adopted a test which closely resembled the current EU approach.[122] Just as in *VM Remonts*, the Tribunal's test accepted the use of the criteria of reasonably foreseeable. This was changed, however, by the UK's Appeal Court who adopted a more nuanced test.[123] At first it seems that the newly formulated test is narrower in scope as the criteria of reasonably foreseeable is replaced with where 'one may have taken to intend that party B will pass sensitive commercial information on to competitor C'.[124] Although the Court of Appeal used the words 'the Tribunal may have gone too far',[125] referring to the original test, which does indicate that the new test is narrower in scope. However, in the author's opinion the evidence suggests that there is little or no difference between the new UK's approach and the EU's approach through *VM Remonts* and *AC-Treuhand*. This determination is also consistent with the principle of primacy of EU law.

The UK jurisprudence has formed the so-called A-B-C test.[126] With reference to this test, hub-and-spoke collusion (according to UK guidance) requires the following demonstrations: (i) A passes sensitive commercial information to B in circumstances where A may have taken to intend or did in fact foresee that B will pass its information to C; (ii) B did in fact pass the information to C; and (iii) C may be taken to know or did in fact know the circumstances where A made the initial disclosure to B.[127]

In case *Dairy*, Tesco's employee passed sensitive commercial information in the form of future pricing intentions to its supplier Dairy Crest. Dairy Crest was a common supplier of cheeses and it supplied, among others,

[122] Groves (n 31), p. 83.
[123] Case 2005/1071 and 1074 *Argos Limited and Littlewoods Limited (Toys) v Office of Fair Trading* [2005] EWCA Civ 1318, para 141.
[124] Ibid, para 141. Citing *Toys*.
[125] *Replica Kit* (n 84), para 91. Citing *Replica Kit*.
[126] OECD– Note by the UK (n 7), pp. 4–5.
[127] Ibid, pp. 4–5.

Tesco and Sainsbury's, two large supermarket retailers. Dairy Crest then passed Tesco's pricing intentions to Sainsbury's, which meant that the horizontal information exchange was complete.[128] The UK Tribunal finally examined the question of whether the parties acted with the requisite state of mind.

Practices from the UK have also made the following important declarations in relation to hub-and-spoke analysis: (i) there is no need for reciprocal exchanges.[129] This means that if A's information reaches C via B, it is not necessary that C makes its own disclosure in a similar fashion.[130] A single unilateral disclosure is enough for enabling concertation. Although the OFT did point out that in case there were reciprocal exchanges, the infringement will be all the more serious.[131] This shows that it is relevant to distinguish between unilateral and reciprocal disclosures; and (ii) the presumption contained in *Anic* is applicable.[132] Thus, if C gains access to A's information and C knows that the information is from A, C should perform the items in *Anic* to avoid liability. This is an important clarification from the UK case law as it insists on the horizontal interpretation of hub-and-spoke arrangements. The Anic presumption is naturally not applicable in a vertical context as it would make no sense that an undertaking publicly distances itself from necessary business information obtained in a legitimate context. It is important to acknowledge the peculiarities of a hub-and-spoke arrangement with its mixed horizontal and vertical dimensions. Although such arrangements contain a vertical dimension, there is *de facto* nothing vertical about them as information is passed horizontally from competitor A to competitor C. Such an interpretation is also consistent with the known priority given to substance over form with not only Article 101 but with also the entire competition law regime.[133]

[128] Case 1188/1/1/11 *Tesco Group v Office of Fair Trading (Dairy)* [2012] CAT 31, paras 287–297.
[129] OECD– Note by the UK (n 7), p. 5.
[130] Ibid, p. 5.
[131] Ibid, p. 5.
[132] Ibid, p. 5.
[133] Perinetto (n 9), p. 302.

5 Proposal for reinforced guidance

5.1 Introduction

To address the research problem, this section of the thesis is devoted to clarifying the most ambiguous elements within the legal test. By making these clarifications, the thesis can further contribute towards the making of enhanced guidance by providing suggestions as to how to apply the law in the future. The suggestions put forth in this section are inspired by the case law of the CJEU, the UK courts and Tribunals as well as by the decisions given by the competent authorities of other Member States.

5.2 What does reasonably foreseeable entail in practice?

5.2.1 Experience at the EU level

Undoubtedly a great contributor to the pertaining legal uncertainty is the criteria of reasonably foreseeable inherent in hub-and-spoke analysis. This criterion makes the legal test for hub-and-spoke collusion very broad in scope as one could ask what is not reasonably foreseeable for a diligent business operator. A broad legal test is of course in the interests of regulators whose aim is to secure the effectiveness of the law in an ever more changing environment. A narrower test, on the other hand, could improve the state of certainty, however, this could come at the expense of lessened adaptability. A narrow legal test is often not as vigilant in front of change and may become ineffective when new technologies and technical solutions emerge. Therefore, in case of a broad legal test, it is important to generate proper guidance to signal how the law is to be interpreted and applied.

Starting from the case law of the CJEU, it becomes apparent that the case law sheds little light on what reasonably foreseeable entails in practice. *VM Remonts* confirms that the concept is a part of the legal test for establishing an Article 101(1) TFEU infringement through an indirect information exchange.[134] *VM Remonts* merely states that an undertaking can be held liable over the acts of an independent service provider in case it knew or could reasonably have foreseen that the service provider will use its confidential information with the objective of distorting competition.[135] The judgement does not, however, clarify how the condition of foreseeability is satisfied. In other words, what kind of objective indicia will indicate that the undertaking should have known of its service provider's anti-competitive intentions. In this sense the court's determination in *VM Remonts* is not very useful as knowledge portrays a strong indication of intent which is present in the most obvious infringements. More difficult is to show intent in circumstances where there are no explicit indicators.

The judgements in *AC-Treuhand* and *Eturas* shed more light into what is meant by foreseeability. In *AC-Treuhand* the court indicates that foreseeability results from an undertaking's negligence.[136] In this judgement a consultancy firm, AC-Treuhand, seemed to be unaware of its obligations under competition law. The firm believed that it could not be held liable under Article 101(1) for facilitating a cartel arrangement between producers in the tin stabilisers and ESBO/esters sectors because it operated at a completely different relevant market than those producers.[137] The court then ruled that AC-Treuhand was fully aware that its role as a facilitator of a cartel was illegal. Even if AC-Treuhand had somehow misunderstood the law, and its intent was not to facilitate an anti-competitive arrangement, it would nevertheless be held liable as it should have found out, by resorting to legal advice where appropriate, that its conduct infringed Article

[134] *VM Remonts* (n 14), paras 31–33.
[135] Ibid, para 33.
[136] *AC-Treuhand* (n 110), para 40. Negligence, in this sense, meaning that an undertaking has failed to gain full knowledge of its obligations under the law.
[137] Ibid, para 20.

101(1).[138] Thus, the failure of a professional business operator to gain full knowledge of its obligations under the law can constitute negligence on its behalf, which then triggers the establishment of intent under hub-and-spoke analysis.

Eturas, on the other hand, is from the other end of the spectrum where intent through foreseeability was not established. In *Eturas* the operator of an online platform implemented a technical restriction to the system which prevented its customers (travel agencies) from offering discounts exceeding 3%.[139] The court determined that undertakings cannot be expected to take excessive and unrealistic means to rebut the presumption that they were aware of information which enabled a concerted practice to materialise.[140] In this case, the travel agencies, at least those who attempted to implement discounts in excess of 3%, and who as a result had to override the technical restriction, could have become aware that the technical restriction may enable a concerted practice to materialise. The judgement, however, confirms that to require such an analysis from an undertaking would be unreasonable.[141] In other words, the failure of an undertaking to piece together fragmented information which may provide evidence of a concerted practice when taken together does not trigger the condition of foreseeability. Thus, such failure cannot result in competition law liability.

5.2.2 Experience in the UK

In the UK, the OFT, CAT and the national courts have examined the meaning of intent more extensively. In case law (in the UK), it has been described that:

[138] Ibid, paras 26–47.
[139] *Eturas* (n 66), paras 10–11.
[140] Ibid, para 41.
[141] Ibid, para 50. A concerted practice could only be attributed on an undertaking if it was aware of the content of the message. Thus, the presence of the technical restriction did not result in awareness.

> Since there is no window into another mind, the only way to form a view on these matters is to draw inferences from what [an individual] knew, said and did, both then and later, including what he said in evidence.[142]

In other words, the only way to establish intent is to conduct a case-by-case analysis in light of the prevailing objective circumstances. Based on those circumstances, it is then possible to form a view of one's subjective intent.

Case *Dairy* displays a classical example of a hub-and-spoke arrangement between various retailers and their common suppliers. In 2002 the UK's dairy market was placed under pressure by farmers who threatened to cut their supplies of cheese for suppliers and retailers.[143] This was due to the long-lasting declines in the prices of dairy products.[144] The farmers were hoping that suppliers and retailers could stop the decline in prices by increasing their prices.[145] Eventually it was agreed that the farm-gate price (prices paid to farmers) of cheese would be increased by £200 per tonne in accordance with the 2002 cheese initiative.[146] The ultimate burden for this increase in costs would be borne by the consumers through higher retail prices. Many retailers became concerned over the increases in retail prices as consumers were particularly price sensitive with dairy products.[147] It was thus in the interests of retailers to facilitate an across-the-board increase in cheese prices, so that none of the retailers would lose any market share or sales to their competitors.[148] Such collusion was then effectively facilitated through the common suppliers, who maintained contacts with all major

[142] *Barlow Clowes International Ltd v Eurotrust International Ltd (Isle of Man)* [2005] UKPC 37, para 26. Citing *Isle of Man*.
[143] *Dairy* (n 128), paras 163–170.
[144] Ibid, paras 25–26.
[145] Ibid, para 164.
[146] Ibid, para 284.
[147] Groves (n 31), p. 80.
[148] *Dairy* (n 128), para 230.

retailers, and who themselves had an incentive to collude in an attempt to obtain cost price (price which retailers pay to suppliers) increases.[149]

One of these arrangements occurred between Tesco, Dairy Crest and Sainsbury's.[150] Tesco as a major supermarket retailer passed sensitive commercial information (future retail pricing intentions) to its supplier Dairy Crest. Dairy Crest then relayed this information further to Tesco's competitor Sainsbury's.[151] The Tribunal considered whether Tesco and Sainsbury's had acted with the requisite state of mind when disclosing/receiving sensitive commercial information. In other words, was the intention of the parties to trade practical cooperation between them for the risks of competition.

The CAT determined that the following factors were relevant in establishing Tesco's intent to collude: (i) Tesco disclosed detailed information of all its cheese lines to Dairy Crest.[152] The Tribunal considered it suspicious that Tesco's disclosure was not limited to those cheeses supplied by Dairy Crest. There was no rationale (other than concertation) as to why Tesco made such a substantial and disproportionate disclosure; (ii) there was no labelling justification.[153] The Tribunal noted that with some cheese lines the retailer would have to inform its supplier of a change in its retail price so that the supplier can print the new price to the subsequent cheese packages.[154] This could not, however, have been the justification behind Tesco's disclosure as most of the information disclosed contained information about cheeses to which labelling did not even apply;[155] (iii) Tesco was aware that all suppliers were attempting to obtain a similar cost price increase from all retailers.[156] It was deemed that Tesco could have foreseen that suppliers

[149] Ibid, para 166. Suppliers were keen on obtaining cost price increases, so that they could maintain their profit margins.
[150] Ibid, paras 282–314.
[151] Ibid, paras 287–297.
[152] Ibid, paras 298–305.
[153] Ibid, paras 298–305.
[154] Ibid, para 300.
[155] Ibid, para 300.
[156] Ibid, paras 298–305.

could obtain their desired cost price increases more easily when they made assurances to retailers by declaring the strategic positions of the other retailers (i.e., Dairy Crest assuring Tesco that Sainsbury's will likewise increase their prices); and (iv) Tesco was aware that suppliers were willing to distribute confidential information forward.[157] The CAT confirmed the OFT's finding that Tesco knew what was going on as it had previously received Sainsbury's future pricing intentions via a common supplier McLelland.[158]

This was an interesting determination as Tesco had previously received Sainsbury's pricing intentions from another supplier, McLelland, and not Dairy Crest.[159] Thus, one could argue that how could Tesco have foreseen that Dairy Crest will pass its information on as there was no evidence that Dairy Crest was prone to such behaviour. Although all the suppliers were under substantial pressure from the farmers, that factor alone cannot justify the assumption that all suppliers are automatically engaged in anti-competitive relaying of confidential information. The CAT reasoned its determination by the fact that Tesco was aware that all suppliers (including McLelland and Dairy Crest) were doing everything they could to secure cost and retail price increases.[160] That should have raised alarm bells at Tesco whereby Tesco should have made sure that Dairy Crest would not handle its confidential information similarly as McLelland had done with Sainsbury's.[161] For instance, Tesco could have made an explicit demand for confidentiality or even better could have disclosed only that information that was necessary in the vertical context. This lack of action on Tesco's behalf indicated that, in fact, its desire was not to keep the information confidential.[162]

[157] Ibid, paras 304–305.
[158] Ibid, paras 304–305.
[159] Ibid, para 304.
[160] Ibid, para 304.
[161] Ibid, paras 304–305.
[162] Ibid, para 305.

The CAT's determination of establishing Tesco's intent through the relaying of information by McLelland is debatable. In the author's opinion such a determination should never be enough on its own to establish the requisite state of mind of a party. It must be noted that in the present case there were other objective circumstances which indicated that Tesco acted with an anti-competitive intent,[163] namely the fact that there was no other explanation for Tesco's conduct other than concertation. The presence of all the above-mentioned elements allowed the CAT to conclude that Tesco's intention was to collude with other retailers through a common supplier Dairy Crest.

A concerted practice was established between all three parties once it became evident that Dairy Crest had, in fact, relayed the information on to Sainsbury's, and Sainsbury's may be taken to have known the circumstances under which the initial A to B transmission was made.[164] In the author's opinion the UK's "may be taken to have intended/known" can be compared to the EU's criteria of reasonably foreseeable as there are little or no substantive differences between the two wordings.

Sainsbury's guilty intentions as party C in this transmission were shown by the following factors: (i) there was no doubt that the received information originated from Tesco as the email sent by Dairy Crest was titled 'TESCO PRICE INCREASES'.[165] Thus, Sainsbury's was aware that it was receiving information concerning its horizontal competitor; (ii) the employee at Sainsbury's who received the information was the company's senior cheese buyer. According to the Tribunal, a senior cheese buyer noticed or, at least, should have noticed that there were no legitimate reasons as to why Dairy Crest was holding such substantial information concerning Tesco's cheese lines.[166] That cheese buyer should have recognised that a labelling justification could not have been at issue in the present case as to most of the cheeses contained in the email, the labelling justification was not

[163] Ibid, paras 298–305.
[164] Ibid, para 307.
[165] Ibid, para 309. Citing *Dairy*.
[166] Ibid, para 310.

applicable.[167] Thus, Sainsbury's should have noticed that the only plausible explanation to why Dairy Crest held this information was for the purposes of colluding; and (iii) Sainsbury's had, in a previous transmission, acted as party A, and was thus aware that suppliers were transmitting confidential information with an intention to facilitate collusion.[168]

Point (iii) above is the same line of argument as discussed in point (iv) in respect of Tesco's intent. Again, the OFT's argument and the CAT's approval of this argument can be criticised. This means that Sainsbury's was only aware, up until this point, that McLelland was distributing confidential information among retailers. Why should knowledge of the behaviour of a completely separate undertaking justify the assumption that all other similar suppliers are engaged in illegal transmissions? In the author's opinion the CAT does not properly justify the use of this argument. It merely states that the parties 'knew that both McLelland and Dairy Crest were doing everything they could to get the retailers to increase their cost and retail prices, and for the same reasons'.[169] The Tribunal, thus, seems to indicate that 'everything they could' means also resorting to illegal activity. That kind of assumption is questionable.

The author is of the opinion that such line of reasoning is too weak to be relied upon when establishing one's intent in a hub-and-spoke context. Instead, the Tribunal could have merely remarked that this B to C disclosure now confirms that also Dairy Crest is willing to illegally distribute its customer's confidential information in a similar manner as McLelland. This is not to indicate that knowledge of McLelland's behaviour would not be relevant in any form in a separate analysis. In the author's opinion, it would be reasonable that such knowledge should stark an increased level of attention when dealing with a similar albeit different supplier. Overall, the present indicia were enough to determine that Sainsbury's may have taken

[167] Ibid, para 310.
[168] Ibid, para 312.
[169] Ibid, para 304. Citing *Dairy*.

to have known the illegal circumstances under which Tesco passed its sensitive information to Dairy Crest.[170]

The McLelland infringement occurred before the transmissions via Dairy Crest in the context of the same 2002 cheese initiative. In that infringement, Sainsbury's was party A, McLelland was B and Tesco acted as party C.[171] Although the CAT's lines of reasoning were similar in both infringement strands, the McLelland arrangement nevertheless provides some additional factors that may prove relevant when establishing one's state of mind.

The CAT found that Sainsbury's acted with the requisite state of mind due to the presence of the following elements: (i) Sainsbury's had told McLelland that it would accept a cost price increase of 20 pence per kilo as it would subsequently increase its retail price by the same amount, but only if other retailers were willing to do the same.[172] Sainsbury's, therefore, made a clear conditional commitment to its supplier in circumstances where it knew that natural market forces will not support such a cost price increase.[173] The conditional commitment accompanied by Sainsbury's knowledge of the situation at the dairy market should have made it foreseeable to it that McLelland will distribute its pricing intentions to other retailers. By telling other retailers that Sainsbury's is onboard with the new proposal, if others are as well, McLelland will increase its likelihood of succeeding with its cost price increase,[174] and this Sainsbury's knew or, at least, should have known; and (ii) there were no legitimate reasons as to why Sainsbury's made a detailed disclosure of sensitive commercial information to McLelland. The Tribunal considered that no labelling nor any other justification existed, which meant that the only plausible explanation for the disclosure was that Sainsbury's wanted to collude with its competitors.[175]

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[170] Ibid, paras 307–313.
[171] Ibid, paras 221–225.
[172] Ibid, para 237.
[173] Ibid, para 237.
[174] Ibid, para 237.
[175] Ibid, paras 238–241.

In respect of Tesco's state of mind as party C, the Tribunal evaluated the presence of similar factors as has already been discussed in this section.[176] Namely, the CAT considered that Tesco should have noticed that, in fact, there were no legitimate reasons why McLelland had such detailed information on Sainsbury's pricing intentions.[177] It should have been clear, to a senior employee at Tesco who was familiar with the execution of similar transactions from the past, that no labelling justification nor any other justification explained why McLelland was in possession of such strategic information.[178]

Case *Dairy* also consisted of another cheese initiative, the 2003 initiative.[179] In 2003, McLelland was the sole common supplier while Sainsbury's, Tesco and Asda were the partaking retailers.[180] The OFT argued that there was a hub-and-spoke arrangement, between the retailers and their common supplier McLelland, through an indirect information exchange.[181] The OFT found that Sainsbury's had acted with the requisite state of mind as it knew that McLelland was seeking for an across-the-board increase in cost prices for all cheeses.[182] Despite its knowledge, Sainsbury's made no effort to distance itself from the practice.[183] The CAT, however, concluded that the OFT was not able to substantiate its findings through sufficient evidence.[184] The CAT determined that there was no 'Cloud of illegality'[185] in the vertical disclosures between Sainsbury's and McLelland as Sainsbury's had only disclosed the future retail price of one cheese, and that disclosure had been made due to packing and labelling reasons.[186] In addition, the CAT observed that the presentation where McLelland had disclosed its intention of seeking

[176] Ibid, para 253.
[177] Ibid, paras 273–275.
[178] Ibid, paras 273–275.
[179] Ibid, paras 402–405.
[180] Ibid, pp. 150–180 (2003 initiative).
[181] Ibid, paras 432–440.
[182] Ibid, para 437.
[183] Ibid, para 437.
[184] Ibid, para 438.
[185] Ibid, para 439. Citing Lord Justice Lloyd, see also *Toys* (n 123), para 106.
[186] Ibid, paras 438–440.

for an across-the-board price increase was not convincing nor sophisticated enough to support the finding of a concerted practice between the parties.[187]

Tesco and Asda were also alleged of engaging in a concerted practice with McLelland. Again, in respect of these allegations, the arguments of the OFT in favour of a hub-and-spoke arrangement failed.[188] With Tesco, the CAT concluded that Tesco had disclosed its pricing intentions due to legitimate packing and labelling reasons.[189] Tesco had merely instructed McLelland to pack certain random-weight cheese lines at new retail prices as indicated in a spreadsheet attached to an email.[190] The OFT argued that the packing and labelling justification could not apply as Tesco had made a disproportionate disclosure by exchanging information on a cheese line to which packing and labelling did not apply. Tesco denied that they had disclosed any future retail prices to McLelland concerning this particular cheese line.[191] Tesco indicated that the price included in the disclosure was only a suggested retail price and not an actual retail price it was planning to implement.[192] The CAT determined that Tesco's statements were consistent with its own interpretations of the emails and their attachments.[193] Thus, the OFT's decision was overturned, and Tesco was not held liable for a concerted practice.[194]

In respect of Asda in strand 1, the Tribunal also overturned the OFT's decision.[195] The OFT argued that Asda had engaged in a hub-and-spoke concerted practice.[196] However, the OFT was not able to substantiate its conclusion based on the gathered evidence. The OFT *inter alia* relied on factors gathered in connection with the 2002 initiative to try and establish

[187] Ibid, para 438.
[188] Ibid, para 484.
[189] Ibid, paras 480–481.
[190] Ibid, paras 480–481.
[191] Ibid, para 481.
[192] Ibid, para 481.
[193] Ibid, para 481.
[194] Ibid, para 484.
[195] Ibid, para 430.
[196] Ibid, para 422.

Asda's intent in 2003.[197] The Tribunal determined that relying on those factors were irrelevant and provided no weight upon the OFT's arguments.[198] In the end, due to the lack of evidence indicating to the contrary, it was deemed that Asda had made its disclosure due to legitimate reasons.[199]

Another case that involved a hub-and-spoke arrangement in the UK occurred in *Replica Kit*.[200] *Replica Kit* concerned a trilateral concerted practice between two large sports retailers JJB and Sports Soccer and their common supplier Umbro.[201] *Replica Kit* occurred before the *Dairy* case, in the early years of the UK's Competition Act.[202] *Replica Kit* was appealed from the OFT to the CAT and then further appealed from the CAT to the Court of Appeal.[203]

In *Replica Kit* Umbro was the common supplier of sportswear to JJB and Sports Soccer. Along with a wide range of other sportswear, it supplied its retailers with replica football shirts.[204] Umbro was the manufacturer of England and Manchester United football kits.[205] When the concerted practice occurred, in the late 1990s/early 2000s, the Euro 2000 football tournament was approaching.[206] Umbro had just launched its new England kit ahead of the tournament. In this context, JJB was concerned that Sports Soccer's aggressive discounting will thrive the price of the newly launched football kit down during a peak season, just before the Euro 2000 tournament.[207] JJB and Sports Soccer had only recently been at a price-war, and JJB wanted to avoid similar price competition in respect of the new

[197] Ibid, para 422.
[198] Ibid, para 426.
[199] Ibid, paras 428–430.
[200] Groves (n 31), p. 79.
[201] Ibid, pp. 79–80.
[202] Ibid, p. 80.
[203] Ibid, p. 79.
[204] *Replica Kit* (n 84), paras 36–50.
[205] Ibid, paras 36–50.
[206] Ibid, paras 36–50.
[207] Ibid, paras 36–50.

England kit.[208] JJB wanted to make sure that it could sell the football kit at a high price during a peak season when demand was expected to be high. Thus, it had to make sure that Sports Soccer would not implement its aggressive pricing strategy in respect of the new England kits.[209]

The Court of Appeal confirmed that the following factors were relevant in showing the anti-competitive intent of JJB: (i) JJB disclosed its confidential pricing strategy to Umbro. It told Umbro that its future intention was to sell the football kit at a high-street price (£39.99) unless other retailers engaged in discounting;[210] and (ii) JJB was badgering Umbro for some time to "do something about" Sports Soccer's discounting.[211] It had indicated to Umbro that it does not want to engage in another price-war. JJB was Umbro's largest retailer customer[212] who had considerable influence over the supplier. Umbro had an incentive to keep its largest retailer customer satisfied. The Court of Appeal concluded that JJB's intention was to collude with other retailers in order to be able to charge higher prices for the Umbro manufactured England kit.[213] The court found that once JJB had pressurised Umbro to do something about the discounting, and when Umbro subsequently asked for JJB's pricing intentions, it was at least foreseeable to JJB that Umbro asked for those intentions in order to have discussions with other retailers (i.e., to do exactly what JJB had wanted Umbro to do for some time, namely, to eliminate other retailers' aggressive discounting).[214]

Even though there was no explicit reference to a retailer when Umbro asked for JJB's intentions, the court ruled that JJB should have connected the dots in that Umbro was asking for these intentions for the purposes of fulfilling JJB's desire.[215] To fill that desire (get other retailers in line with the £39.99 price), Umbro needed to know what JJB's intentions were. In the absence of

[208] Ibid, paras 36–50.
[209] Ibid, para 50.
[210] Ibid, paras 92–101.
[211] Ibid, paras 92–101.
[212] Ibid, para 37.
[213] Ibid, paras 102–106.
[214] Ibid, paras 92–101.
[215] Ibid, paras 92–101.

any indicators that would have determined that JJB's disclosure of its future pricing intentions to Umbro was made due to legitimate reasons, it was deemed that JJB was a party to a hub-and-spoke concerted practice.[216]

The hub-and-spoke arrangement was complete once Umbro did, in fact, pass JJB's pricing strategy to its competitor Sports Soccer, and Sports Soccer may have taken to have known the circumstances under which the initial A to B transmission was made (JJB – Umbro). The Court of Appeal ruled that the following factors were relevant in establishing Sports Soccer's state of mind: (i) Umbro assured Sports Soccer that if it raised its price, other retailers would do the same.[217] It was evident that Sports Soccer was not going to raise its price easily. It required assurances from Umbro in regard to the behaviour of other retailers, and even threats where Umbro declared that it will cut off Sports Soccer's supplies.[218] Although Umbro did not mention any retailer explicitly, Sports Soccer should have foreseen that Umbro's reference to the assurances of "other retailers" included JJB because JJB was the largest retailer on the market.[219] It is most likely, at least since nothing was indicated to the contrary, that Sports Soccer understood Umbro's statement to mean JJB. If it had understood "other retailers" to mean those other smaller retailers, in all likelihood those assurances would not have been enough for Sports Soccer to change its pricing strategy. Thus, Sports Soccer should have foreseen that it was engaging in a concerted practice with JJB; and (ii) Sports Soccer knew, based on what Umbro had disclosed, that Umbro held discussions with other retailers and was willing to distribute their confidential pricing information.[220] Based on that knowledge, it should have been foreseeable to Sports Soccer that its pricing strategy will likewise be distributed by Umbro.

[216] Ibid, paras 92–101.
[217] Ibid, para 97.
[218] Ibid, para 97.
[219] Ibid, para 97.
[220] Ibid, para 97.

Sports Soccer took none of the following steps to indicate that its desire was to act unilaterally: (i) it took no steps to publicly distance itself from the received information, namely, it did not perform the items determined in *Anic*; (ii) when Sports Soccer received other retailer's confidential information from Umbro, Sports Soccer took no steps to secure that Umbro would not treat its information similarly as it had done with other retailer's information. Sports Soccer could have done this by explicitly demanding confidentiality, or, even better, to not disclose any information in the first place, which was not necessary in its vertical relations with Umbro. This would have indicated that Sports Soccer's intention was to adopt independent/unilateral conduct on the market. The presence of the factors provided herein as well as the inaction of Sports Soccer made it a party to a hub-and-spoke concerted practice together with JJB and Umbro. Once Umbro had persuaded Sports Soccer not to discount and to sell the football kit at the high-street price, Umbro informed JJB of this (i.e., informed JJB that it had done "something about the discounting" as desired by JJB).[221]

The final case to be discussed in this thesis from the UK is case *Toys*. Just as cases *Dairy* and *Replica Kit*, *Toys* concerned a hub-and-spoke arrangement between two large retailers and their common supplier.[222] Hasbro was the common supplier of toys to both Argos and Littlewoods, two leading catalogue retailers in the UK.[223] Once it became evident that Argos had disclosed its future pricing intentions to Hasbro concerning the products Core Games and Action Man, the Court of Appeal began to evaluate whether Argos had acted with the requisite state of mind.[224] In other words, did Argos disclose its pricing intentions in circumstances where it may have taken to have intended that Hasbro will pass that information to other retailers.

[221] Ibid, para 98.
[222] *Toys* (n 123), paras 112–115.
[223] Ibid, paras 112–115.
[224] Ibid, para 142.

The court determined that: (i) Argos knew that Hasbro held discussions with other retailers (Argos' competitors);[225] (ii) Argos knew that Hasbro wanted to achieve a situation where all retailers sold Hasbro products at or close to Hasbro's Recommended Retail Prices (RRPs);[226] and (iii) Argos should have foreseen that once it disclosed its future pricing intentions (agreeing to price at RRPs) to Hasbro, this will aid Hasbro in reaching its objectives as it can use Argos' information as a negotiation tool to persuade other retailers to reach the same understanding.[227] Thus, having full knowledge of these circumstances, Argos should have foreseen that Hasbro will distribute its confidential information to other retailers.[228] This accompanied by the fact that Argos made no effort to keep its pricing intentions confidential resulted in the court determining that Argos' intention was that the information will be passed to competitors.[229]

The hub-and-spoke infringement was complete when Hasbro did pass Argos' information to Littlewoods, and Littlewoods received the information with the requisite state of mind.[230] The court determined that: (i) Littlewoods knew that the information it received concerned Argos as Hasbro had voiced that Argos has agreed to price at RRPs;[231] (ii) since Littlewoods had received its competitor's confidential information via Hasbro, it knew that Hasbro was prone to distribute pricing information among retailers.[232] Thus, it should have foreseen that Hasbro will do the same with Littlewood's information. Yet, knowing these circumstances, Littlewoods made no effort to secure the confidentiality of its pricing intentions.

The infringement was made all the more obvious when Littlewoods disclosed its own strategic information after receiving Argos'

[225] Ibid, para 142.
[226] Ibid, para 142.
[227] Ibid, para 142.
[228] Ibid, para 144.
[229] Ibid, para 144.
[230] Ibid, para 142.
[231] Ibid, para 142.
[232] Ibid, para 142.

information.[233] There was no evidence to suggest that that disclosure was made due to a legitimate reason.[234] The failure to perform the items in *Anic* and the failure to take any steps to secure the confidentiality of its pricing intentions suggested that Littlewoods had no intention of engaging in independent conduct on the market. The court deemed that Argos, Hasbro and Littlewoods were all liable for engaging in a hub-and-spoke concerted practice.[235]

5.2.3 Experience in other Member States

Hub-and-spoke arrangements have also occurred within the jurisdictions of other Member States. The Netherland's Authority for Consumers and Markets (ACM) recently adopted an infringement decision against four large tobacco manufacturers.[236] The ACM found that the tobacco manufacturers had colluded by exchanging commercially sensitive information indirectly through their common downstream buyer.[237] This case remarked the first time that the ACM had found a horizontal price-fixing arrangement to occur through an indirect exchange of information.[238]

In the Netherlands, the local excise-tax laws stipulated that each tobacco manufacturer had to unilaterally determine their price, and they had to print that price directly to the cigarette package along with an accompanying stamp.[239] This meant that in case the manufacturers desired to change the retail prices of cigarettes, they had to inform their buyers thereof well in advance. For those purposes the manufacturers sent pricelists to their buyers.[240] It became evident, however, that the cigarette manufacturers had sent those pricelists displaying their future retail prices to their buyers for

[233] Ibid, para 142.
[234] Ibid, para 142.
[235] Ibid, paras 126–133. Upholding the Tribunal's determinations.
[236] ACM Decision (n 28), para 2.
[237] Ibid, para 3.
[238] Ibid, para 3.
[239] Ibid, para 5.
[240] Ibid, para 9.

the purposes of colluding with other cigarette manufacturers.[241] The collusive outcome was achieved indirectly where the common buyer relayed those pricelists between all competing undertakings.[242]

In accordance with *VM Remonts* the ACM evaluated whether the manufacturers (spokes) knew or should reasonably have foreseen that the common buyer (hub) will relay their pricelists to other competing manufacturers. The ACM determined that once a manufacturer had received another manufacturers' pricing intentions via the common buyer, it should have been reasonably foreseeable to that manufacturer that its confidential pricing information will likewise be distributed by the common buyer.[243] That is especially the case when the manufacturers had taken no steps to secure the confidentiality of their pricelists.[244] This is a similar situation as in *Dairy* with Tesco. The fact that McLelland had distributed Sainsbury's pricing intentions to Tesco should have raised alarm bells at Tesco, which should have prompted Tesco to demand explicit confidentiality.[245]

The first steps that any undertaking should take when receiving strategic information about their competitors is to perform the items in *Anic*.[246] With reference to the present tobacco case, once a manufacturer received its competitor's pricing intentions from the common buyer they should have: (i) promptly publicly distanced themselves from the received information in accordance with *Anic*; and (ii) only after having publicly distanced themselves, an undertaking can make its own disclosure if such a disclosure is necessary for the purposes of maintaining its vertical business relationship. This means that there needs to be a legitimate explanation why an undertaking is disclosing sensitive strategic information, even when the disclosure is made in a vertical context. In case no rational explanation

[241] Ibid, paras 8–21.
[242] Ibid, paras 8–21.
[243] Ibid, para 9.
[244] Ibid, para 9.
[245] *Dairy* (n 128), paras 304–305.
[246] *Anic* (n 29), para 121.

exists, it may be taken that one's intention was to enable a horizontal exchange of sensitive commercial information.

In the tobacco case the ACM found further evidence that some manufacturers were actively asking for their competitor's pricing intentions from the common buyer.[247] In these circumstances, in the author's opinion, it is not necessary to make a closer evaluation of whether the party acted with the requisite state of intent. In those circumstances the intent is evident. There are no legitimate reasons why competitors should be in possession of each other's strategic information. Therefore, when a party actively seeks to obtain such information, it should be presumed that that is for the purposes of achieving an anti-competitive arrangement between competitors. The ACM concluded that the conduct of the parties removed market uncertainties inherent in healthy competition.[248] This enabled the parties to collude by jointly raising the prices of cigarettes to the detriment of consumer welfare.[249] Although the excise-tax laws served as a legitimate reason as to why manufacturers disclosed future pricing intentions to buyers. There were no legitimate reasons for the manufacturers to hold strategic information concerning their competitors.

A long-term hub-and-spoke arrangement was also recently found in Portugal.[250] This was a classical hub-and-spoke arrangement between one common supplier of beverages and multiple supermarket retailers.[251] The primary aim of the arrangement was to jointly raise the prices of specific Super Bock products through indirect exchanges of commercially sensitive information.[252] Those disclosures removed natural uncertainties inherent in

[247] ACM Decision (n 28), paras 10–15.
[248] Ibid, paras 20–21.
[249] Ibid, paras 20–21.
[250] Portuguese Competition Authority (AdC), 'AdC sanctions supermarkets and common beverage supplier' (press release, 3 November 2021) <https://www.concorrencia.pt/en/articles/adc-sanctions-supermarkets-and-common-beverage-supplier> accessed 26 April 2023.
[251] Ibid.
[252] Ibid.

healthy competition and consequently enabled the partaking retailers to collude with the help of the common supplier.

This arrangement in Portugal presents perhaps the most conclusive evidence of the existence of a hub-and-spoke conspiracy.[253] Rarely is it the case that party A expressly tells party B to relay its sensitive strategic information to party C. This is because in that case the existence of intent is obvious and therefore it is also easier for the authorities to find an Article 101(1) infringement. In such situations the enforcer does not need to delve into examining the objective circumstances to establish intent. It can merely show the existence of, for example, an email conversation where an undertaking declares that it wants party B to act as its facilitator in achieving a *de facto* horizontal disclosure of sensitive information. Similarly, in case of a direct horizontal exchange of sensitive commercial information, there is no need to show that the parties acted with the relevant state of mind.[254] That is because the state of mind has already been determined by the disclosure as there are no legitimate reasons for such an exchange.[255]

In this Portuguese case, party A expressly told party B to relay its future retail pricing intentions to competitor C.[256] It was clear from the communication that party A passed the information to B so that B can relay it to other retailers in order to achieve a collusive outcome on the market.[257] Thus, it was not necessary to evaluate whether it was foreseeable to A that its information will be passed to other competitors. Rather, it could be deemed that A knew that its information will be relayed as it had expressly demanded for such a disclosure. Furthermore, it was evident that B was willing to pass that information on as it had just previously persuaded A to sell the goods at a RRP.[258] The last piece of the puzzle was to collude by getting other retailers in line with A's conduct.

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[253] Ibid.
[254] *Dairy* (n 128), para 65.
[255] Ibid, para 65.
[256] AdC press release (n 232).
[257] Ibid.
[258] Ibid.

The last case to be discussed in this section is a Belgian hub-and-spoke arrangement concerning drugstore, perfumery and hygiene (DPH) products.[259] This was a relatively large infringement involving seven retailers and 11 suppliers.[260] The objective of the arrangement was to increase and stabilise the retail prices of DPH products between retailers at the same or similar price levels.[261]

From the get-go there were signs of an illegal concerted practice. It became evident that both retailers and suppliers had been in contact with each other for the purposes of implementing a retail price increase.[262] If, for instance, a retailer contacts its supplier regarding a retail price increase, it is going to raise the attention of the authorities. This is because the price at which the retailer sells its goods to consumers is no business of the supplier. Usually there are no legitimate reasons as to why a supplier should be informed of its customer's retail prices. Although, it must be noted, that in some cases such disclosures are legitimate as demonstrated by the judgement in *Dairy* with its packing and labelling justification.[263] However, in the present case there was no evidence that discussions over future retail prices between retailers and suppliers were made due to legitimate reasons.

Retailers disclosed their future pricing intentions to their supplier who then relayed the information between competitors.[264] In the end, once a desired price increase was agreed upon, the supplier informed all retailers of when the price increase will enter into force, which products it concerns and most importantly who the participating retailers are.[265] These findings concluded that there was a hub-and-spoke concerted practice between retailers and their common suppliers.[266] In the author's opinion, this case was more about actual awareness than foreseeability. One could use the "disclosing after

[259]Harrington and Harker (n 77), pp. 38–39.
[260] Ibid, pp. 38–39.
[261] Ibid, pp. 38–39.
[262] Ibid, pp. 38–39.
[263] *Dairy* (n 128), para 300.
[264] Harrington and Harker (n 77, pp. 38–39.
[265] Ibid, pp. 38–39.
[266] Ibid, pp. 38–39.

having received" argument where a retailer should have foreseen that their information will likewise be passed to competitors because their supplier was prone to making such distributions based on prior experience. More conclusive, however, is the fact that there was no legitimate explanation as to why the retailer made an initial request to the supplier for a retail price increase. When that is the case, there should be no need to conduct a closer examination. The burden of proof should shift to the parties to demonstrate that, in fact, there was a legitimate reason for the initial disclosure.

5.3 Proposal for a more coherent hub-and-spoke analysis

To reduce the state of uncertainty around hub-and-spoke analysis, various clarifications should be made to the Commission's Future Guidelines. Future Guidelines should clarify that a hub-and-spoke arrangement is a form of conducting an indirect information exchange between horizontal competitors. In essence, it leads to a similar outcome as a direct exchange of sensitive commercial information. It is only distinguishable from a direct information exchange by its form. In the author's opinion a hub-and-spoke situation should be distinguished as a peculiar way of infringing Article 101(1). This could help to reduce the legal uncertainty around the analysis.

By giving hub-and-spoke arrangements a peculiar nature, meaning that they are no longer solely referred to as situations of indirect information exchange, they need to be defined coherently. In this regard, the Future Guidelines should take inspiration from the CAT's A–B–C test. With the use of the A–B–C test it is also easier to depict the substantive legal test. In terms of the substantive test the author is of the opinion that the wording established in *VM Remonts*[267] should be preferred over the UK's[268] comparable test. The substantive analysis could be formulated as follows: (i) A is to be held liable for a hub-and-spoke concerted practice under Article

[267] *VM Remonts* (n 14), para 33.
[268] OECD– Note by the UK (n 7), pp. 4–5.

101(1) if it passes sensitive commercial information to B, without a legitimate reason, in circumstances where A knew or could reasonably have foreseen that B will pass its information to C; (ii) B is to be held liable under Article 101(1) as defined in (i) if it did, in fact, pass A's sensitive commercial information to C, and it knew or could reasonably have foreseen that it was facilitating a concerted practice between horizontal competitors; and (iii) C is to be held liable under Article 101(1) as defined in (i) if C knew or could reasonably have foreseen the circumstances under which the initial A to B transmission was made, namely that there were no legitimate reasons why A had disclosed its intentions to B. The failure of C to promptly publicly distance itself in accordance with the criteria established in *Anic*[269] provides a strong indication about the state of mind of C.

In terms of the substantive test, the author proposes that further inspiration is taken from the practices established in the UK. This means that a hub-and-spoke arrangement could nevertheless be established even if there is no evidence of an A to B transmission, but there is evidence of a B to C transmission where A's intentions are displayed.[270] The same could not, however, be said in case there was evidence of an A to B transmission, but no evidence of a B to C transmission.[271] This is logical as in the latter situation there is only evidence of a vertical disclosure which is legitimate and often a necessary part of functioning business relations.

The Guidelines should stipulate that the establishment of intent is a peculiarity to a hub-and-spoke analysis. This is because vertical disclosures of sensitive commercial information can be legitimate and are often necessary to maintain functioning business relations.[272] The establishment of intent is the dividing line between legitimate and illegitimate conduct. In the author's opinion, intent can be defined as one's desire to prevent, restrict or distort competition. In other words, a party is engaging in a *prima facie*

[269] *Anic* (n 29), para 121.
[270] OECD– Note by the UK (n 7), p. 5.
[271] Ibid, p. 5.
[272] Perinetto (n 9), p. 284.

legitimate disclosure without any legitimate reasons. The only real aim for the conduct is to achieve a collusive outcome on the market.

Demonstrating intent can be the most challenging part of establishing a hub-and-spoke arrangement due to the lack of evidence. Undertakings are aware or at least should be aware that any type of collusion irrespective of its form is prohibited. As a result, firms take initiative to attempt to hide the anti-competitive conduct, which means that intent usually has to be inferred from a set of objective circumstances. This means that one's subjective intent as defined herein is established by relying on objective circumstances.

The author proposes the following non-exhaustive list, displaying a set of circumstances that may be relevant in establishing one's intent, to be included in the Future Guidelines:

(i) When an undertaking discloses its strategic intentions in a vertical context, in circumstances where the same vertical business partner has previously disclosed to it sensitive information concerning its competitors.[273] The rationale herein is that the prior behaviour of a business partner should have sparked red flags on the disclosing party. In other words, the disclosing party should have foreseen that the business partner will do the same with its own strategic intentions. This justifies the determination that, in fact, the disclosing party had no intention of retaining the confidentiality of the information.

In the author's opinion this "disclosing after having received" argument went too far in the UK. In *Dairy* it was deemed that the same inference can be made when an undertaking has previously received its competitor's strategic information from another business partner, and not the business partner to whom it is now disclosing its

[273] ACM Decision (n 28), paras 8–21.

own intentions to.[274] The unlawful behaviour of a separate undertaking cannot justify the assumption that another similar undertaking also engages in unlawful behaviour. Therefore, the author proposes that in those circumstances enforcers should resort to other objective indicia to establish one's intent.

(ii) When an undertaking makes a conditional commitment to its vertical business partner to increase its price if its competitors are willing to do the same.[275] Such a statement is seen as a signal to the vertical business partner to relay the strategic intentions of an undertaking to its competitors in order to get other competitors in line with its conduct.

(iii) When an undertaking complains or makes threats to its vertical business partner concerning the behaviour of its competitors.[276] This is the situation referred to in *Replica Kit*. When an undertaking demands, from their vertical partner, to do something about another undertaking's competitive behaviour, it is usually implied that the spoke wants the hub to reveal its strategic intentions to the other spoke in order to get their conduct aligned.

(iv) In accordance with *Eturas* undertakings are not expected to take unrealistic means to show that, in fact, they had no idea that their business partner will relay their sensitive information to competitors.[277] To a degree this means that undertakings are not expected to piece together fragmented information as deemed in *Eturas*. However, undertakings are expected to have thorough knowledge of the market circumstances at which they operate. Undertakings are expected to make basic conclusions based on the available evidence. In *Toys*, for instance, Argos knew that Hasbro

[274] *Dairy* (n 128), para 304.
[275] Ibid, para 237.
[276] *Replica Kit* (n 84), paras 92–101.
[277] *Eturas* (n 66), para 41.

> was seeking for an across-the-board price increase towards their RRPs.[278] Based on that knowledge, Argos should have concluded that if it now discloses its pricing intentions to Hasbro, Hasbro will likely use that information as leverage to persuade other retailers to increase their prices as well.[279] In the author's opinion, the determination in *Toys* is in line with *Eturas*. It is not unreasonable to require that undertakings have thorough knowledge of the circumstances under which they operate, and to draw basic conclusions from particular action or inaction.

Although the set of objective circumstances are now laid out above, detecting those circumstances should not be the starting point for hub-and-spoke analysis in Europe. The author is of the opinion that a faster and a more effective way to distinguish legitimate conduct from illegitimate conduct is to first see whether there are any legitimate reasons for the initial A to B transmission.[280] If there are no explanations for the conduct other than concertation, it is redundant to delve deeper on the case-by-case objective circumstances. It should be up to the parties to demonstrate that information exchange was conducted due to a legitimate reason. As an example, in *Dairy* it was legitimate that a retailer disclosed its future retail prices of certain cheeses to its supplier due to packing and labelling reasons.[281] In the Dutch tobacco case, it was legitimate that a manufacturer disclosed its future retail prices to its buyers as that was required by the local excise-tax laws.[282]

If a *prima facie* legitimate reason exists, it should be referenced against the behaviour of the undertakings concerned. This enables the enforcer to distinguish whether the conduct of the undertakings is consistent with the

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[278] *Toys* (n 123), para 142.
[279] Ibid, para 142.
[280] Cases C-89, 104, 114, 116–117 and 125–129/85 *Re Wood Pulp Cartel: Ahlström Oy v Commission* [1993] ECR I-1307, paras 70–72 and 126–127. The author means to use the logic inherent in *Wood Pulp*. One could check whether the behaviour could be explained by any other means than concertation.
[281] *Dairy* (n 128), para 300.
[282] ACM Decision (n 28), para 5.

justification, or whether the justification is a mere smokescreen to hide the anti-competitive behaviour beneath. The principle of proportionality can serve as an important indicator determining whether the parties have acted consistently with the justification.

Finally, in the author's opinion, it should be deemed that information exchange for the purposes of competitive bargaining is legitimate. This means that an undertaking could use an offer received from one business partner to try and obtain better trading conditions from another who is a competitor of the initial undertaking. It should be clarified that such conduct does not *per se* lead to joint conduct as, in essence, the undertakings would be making unilateral business decisions. The retention of competitive bargaining is important as it can lead to increased consumer welfare through lower prices and better quality. In this sense, it is relevant to distinguish whether the proposed conduct leads to a price increase or a price decrease. If it leads to a price increase, then competitive bargaining cannot be in question.

Concerning party C, the analysis should likewise not begin by identifying the present objective indicia. It should rather begin by determining whether party C performed the items in *Anic*[283] when it received sensitive commercial information concerning its competitors from the hub. If the party has not performed the items in *Anic*, the burden of proof should shift to party C to rebut that presumption.

To conclude this section, it must be emphasised that it is important to retain a broad scope for the hub. Some commentators to the Commission's Draft Guidelines have proposed that the scope of the hub should be narrowed, so that a customer could never act as a hub.[284] In the author's opinion, this would be irrational even though customers, in most cases, would have less

[283] *Anic* (n 29), para 121.
[284] Clifford Chance (n 16), p. 19.

incentives to facilitate collusion. As established in *E-books*,[285] the Dutch tobacco case[286] and in a US toys case concerning Toys "R" Us,[287] collusion facilitated by a downstream customer does occur, and when it occurs, it is equally damaging to competition as any other form of collusion. This proposed narrowing would, in the author's opinion, go against the intentions of the EU legislator. The intention of the legislature was to retain a broad scope for Article 101(1) in order to prohibit all types of collusion notwithstanding the form in which it presents itself.[288] Therefore, since the narrowing of the scope of the hub would leave certain types of collusion outside the scope of the prohibition, it would be contrary to the purpose of the law. In *AC-Treuhand* the CJEU was also explicitly vocal in its ambition to retain a broad scope for the hub. In that judgement it was found that an undertaking can be deemed as a hub even if it conducts business at a separate relevant market to the one where the concerted practice is established.[289] For those reasons, to protect the effectiveness of the prohibition and to serve the intentions of the legislator, it is important that the scope of the hub will not be narrowed in the manner indicated herein.

[285] *E-books* (n 90), paras 28–39.
[286] ACM Decision (n 28), paras 8–21.
[287] Harrington and Harker (n 77), pp. 10–18.
[288] Jones, Sufrin and Dunne (n 1), p. 165 and pp. 42–43.
[289] *AC-Treuhand* (n 110), para 36.

6 Conclusion

The first research question of this thesis stated: *Is there legal uncertainty relating to hub-and-spoke analysis, which has the capacity to result in the reduction of consumer welfare?* In this respect, the research shows that due to insufficient guidance, at the EU level, concerning the scrutiny of hub-and-spoke arrangements, undertakings have become unnecessarily risk aversive in their dealings with a vertical business partner.[290] Risk aversiveness can be seen through the elimination of competitive bargaining, which has the capacity to result in the reduction of consumer welfare through higher prices. The thesis concludes that legal uncertainty exists[291] in the sense that firms are, to some degree, unaware of their obligations in relation to hub-and-spoke situations.

The second research question of this thesis stated: *How could the European Commission's Future Guidelines be improved, so that undertakings could become more readily aware of their obligations under Article 101(1) TFEU in connection with hub-and-spoke infringements?* In this respect, the thesis proposes for the introduction of a non-exhaustive list displaying a set of objective indicia which have, in the past, rendered undertakings liable for hub-and-spoke infringements based on foreseeability. This list could be codified to the Commission's Future Guidelines for the purposes of enhancing legal certainty. For companies, the list would provide a clearer picture on what one can and cannot pursue. On the other hand, for practitioners, the list would be beneficial in terms of having more available tools to ask the right questions from a client. Importantly, enhanced guidance should determine that competitive bargaining for the purposes of obtaining better trading conditions cannot constitute an infringement of Article 101(1).

[290] Clifford Chance (n 16), p. 19.
[291] Ibid, p. 19.

The third research question of this thesis stated: *What are the most common indicia whose presence have rendered an undertaking liable for a hub-and-spoke arrangement based on the criteria of reasonably foreseeable?* In most cases liability for a hub-and-spoke concerted practice is rendered based on the looser form of intent i.e., through the criteria of reasonably foreseeable. This means that intent is deferred from a set of objective circumstances different to each individual case.[292] One of the most common circumstances, by which an undertaking should have foreseen that its strategically sensitive information was being relayed, happened in circumstances where a firm disclosed that information to a business partner who was prone to sharing that information amongst competitors and other firms in general, without consent.[293] Significant weight was also attached to the rationale behind the initial A to B transmission.[294]

The fourth research question of this thesis stated: *Should the current legal test, for establishing a hub-and-spoke infringement, be amended in light of preserving the effectiveness of Article 101(1) TFEU?* The thesis concludes that the broad legal test serves to protect the effectiveness of the prohibition.[295] It provides the enforcer with the necessary tools to prohibit all types of hub-and-spoke arrangements, including those that may emerge in the future. As a result, the scope of the legal test should not be altered. Rather, focus should be placed on generating proper guidance. Proper guidance will aid in the maximal fulfilment of the underlaying welfare enhancing objectives of Article 101(1). As it currently stands, those welfare enhancing objectives cannot fully materialise.

[292] *Isle of Man* (n 142), para 26.
[293] *Dairy* (n 128), paras 304–305.
[294] Ibid, paras 298–305.
[295] Anne Vallery and Caroline Schell (n 115), p. 255.

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