The Notion of Restriction of Competition
Case studies under Article 101 TFEU
Hub and Spoke Cartels

Yves Botteman

Presentation to the 11th Annual Conference of the Global Competition Law Centre – 26-27 November 2015
Hub & Spoke (H&S)?
National Authorities’ Approach to H&S

- The UK, German, Austrian and Belgian authorities have been particularly active.
- British case law usually relied on. Describes H&S in this way:
H&S and RPM Distinguished
H&S and RPM Distinguished

- H&S requires at least three parties
  - Contrast with RPM, where two parties would be sufficient

- Vertical link: supplier / distributors
  - Usually involving supplier acting as hub
  - Required in RPM: supplier must play an “active” role in fixing retail prices

- Horizontal dimension: indirect contact between competitors
  - Facilitated by a common trading partner
  - Not present, not required in RPM

- Exchange of strategic business information between distributors
  - Cases brought so far involved intentions on future prices
  - Not present, not required in RPM
H&S vs. RPM: Blurring Lines?

- Recent developments at national level (2015)
  - Belgian Competition Authority (BCA): Belgian household/body-care products (H&S and RPM)
  - German Federal Cartel Office: German food sector price fixing cases (RPM, falling short of H&S)
  - Austrian cases (Spar, Pfeiffer and Zielpunkt): Austrian food sector price fixing cases (RPM, falling short of H&S)

- Practices involved:
  - Suppliers as intermediaries & facilitators to secure retailers’ adherence to coordinated retail price increases (e.g. assurances that other retailers would follow)
  - Retailer’s active role in urging/encouraging suppliers to persuade other retailers to join the initiative
  - Critical issues in the German/Austrian cases:
    - Retailers’ intention to seek horizontal coordination via suppliers not established
    - Some retailers hesitant to disclose their future price intentions, only after pressure from suppliers
Two selected issues

1. Intent requirements to establish the infringement?

2. Effect on competition? Where is the consumer harm?
Intent?

- Evidence requirements:
  - Flow of business sensitive information has to move from A to C, via B
  - A and C must be shown to have a specific state of mind

- *Direct* information exchange between competitors
  - Sharing of intentions on future prices by its very nature considered deleterious to competition
  - Difficult to justify with alternative plausible explanations (but see price signaling?)
  - No need to prove initiator’s/receiver’s state of mind?

- *Indirect* sharing of information via common trading partner
  - State of mind has to be shown…
  - …as there may be legitimate reasons for sharing such information vertically:
    - Distributors sharing intentions on future prices to suppliers is common practice
    - Supplier communicating own price expectations/speculations also common
UK Courts’ Approach (i)

- Retailer A must have specific state of mind
  - It must be taken to intend that supplier B will make use of its future pricing intention to influence market conditions by passing that information to other retailers
  - Alternative wording used: “must have realised”, “must have known” or “must have been aware”
  - State of mind inferred from circumstances of the case
    - E.g.: absence of any legitimate commercial reason for disclosure. Justification may be found in the context of a price reduction (seek support from supplier to protect margin). Less so in order to raise prices
  - Highly fact sensitive examination
UK Courts’ Approach (ii)

- Retailer C must also have a state of mind (albeit a slightly different one?)
  - It must have known the circumstances in which Retailer A disclosed its future pricing intention
    - If C does not believe that the information it has received is really confidential information that belongs to Retailer A (because, for example, it thinks that B is just engaging in market speculation or bluffing), then C does not have the requisite state of mind
    - If C knows that Retailer A and Supplier B are in negotiations about costs and retail price increases and B subsequently tells C about Retailer A’s upcoming price increase on a specific date, then difficult for C to argue that it did not occur to it that the information came from Retailer A
  - State of mind inferred from circumstances of the case
  - Again, highly fact sensitive examination required
Intent and EU competition law?

- Under EU case-law, subjective intention of the parties unnecessary to support a finding of infringement. UK Courts consider it relevant, but not conclusive evidence

- UK Courts relied on *Bayer* (C-2/01 & C-3/01), which focuses on the notion of agreement (concurrence of wills), to establish the requisite state of mind
  - However, H&S involving A, B and C more appropriately captured as a concerted practice

- Concert defined by EU case-law (starting with *Dyestuffs*) as *knowingly* adopting or adhering to collusive devices that facilitate the coordination of their commercial behavior
  - Knowledge requirement recognised by UK Courts
  - BCA in *household and body-care* (Decision n° ABC-2015-1, §36) relies on the fact that the distributors at the initiation and receiving ends knew the context in which the information exchanges were taking place
  - *e-Books* (Apple), although not H&S: Apple ensured that each publisher (i) knew about the terms offered by Apple to each one of them and (ii) was kept appraised of negotiations between Apple and other publishers
What About B, the Supplier?

- UK Courts silent on it, but maybe that is because Supplier B has always known what it was doing
  - The facts usually show Supplier B being more than a passive conveyor of information

- Role of facilitator?
  - Position of AG Wahl in *AC-Treuhand*
    - Facilitator cannot be a party to infringement where (i) it is not active on the affected or related markets and (ii) is not restricted in the way it offers its own products and services
    - Position does not affect common trading partners as they are present on related markets
  - CoJ’s ruling on October 22, 2015: facilitator can be charged for violating EU competition law even if its own conduct is not affected by the infringing conduct
Brings us to Effect on Competition

- Based on *AC-Treuhand*, limited relevance in inquiring into Supplier B’s economic incentives/interests?
  - H&S normally counterintuitive as Supplier B typically seeks to expand sales
  - But, sometimes, Supplier B faces market power from Retailers. Facilitating horizontal price fixing at retail level may make sense when: (i) it has otherwise to finance lower retail prices by conceding lower wholesale prices; or (ii) retailers refuse a cost increase unless their rivals follow suit

- Economic theory suggests that:
  - Effect of H&S ambiguous where Supplier enjoys strong bargaining power: it reduces the double-marginalisation problem
  - H&S seen as harmful where Retailers enjoy strong market power
  - Even then, upon closer examination of all circumstances, price effect may be unclear

- Effect/impact of pricing coordination not examined
  - Appears consistent with the law on concerted practices prosecuted as infringement by object
  - BCA seems, however, to have looked at the actual price effect of the practices, at least in terms of extent/success of their implementation
Concluding remarks

- UK, Austrian and German cases suggest that H&S is difficult to establish in practice (OFT case against Tesco; German/Austrian food retail cases)

- Intent requirement
  - The test for H&S shares similarities with price signaling
  - The factual examination boils down to inquiring whether collusion is the only plausible explanation for the conduct (see *Woodpulp II*).
  - Defense against a finding of concerted practice: “It is sufficient [...] to prove circumstances which cast the facts established by the Commission in a different light and thus allow another explanation of the facts to be substituted for the one adopted by the Commission.” (GC in *CISAC*, § 99)
  - Although the case may be built on a restriction *by object*, need to provide a precise and consistent body of factual and economic evidence to render the alternative explanations “implausible”

- Effect-based analysis called for?
Concluding remarks

- Most cases involving two levels of trade are looked at as vertical restraints: either as RPMs or MFNs

- Few situations where fact pattern is prosecutable only as H&S?
  - Horizontal coordination (in particular the “intent” test) is clearly met; and
  - Where supplier’s active role in setting up a resale price increase is unclear or not well established (RPMs in the German/Austrian retail food sectors, arguably also in Football Kits/Toys and Games)
Questions?