Portugal: Hub & Spoke Cases - Trends and Developments

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1. Introduction

A hub and spoke cartel (hereinafter referred to as "H&S")[1] comprises a hybrid figure, blending elements of horizontal collusion and vertical restraints, with the intervention of at least three undertakings, one of which (the "hub") operating at a different level of the value chain, upstream or downstream from the "spokes", which compete in the same relevant product or service market. The horizontal element typically consists of a concerted practise[2], by which coordination is achieved without concluding any agreement and oftentimes without any sort of direct contact between the spokes. The vertical element, further developed bellow, generally assumes the form of RPM mechanisms, that may constitute a vertical restraint in of itself, but in these arrangements has an instrumental nature[3].

In the Portuguese Competition Authority's (henceforth "PCA") practical experience since 2017[4], the majority of these allegedly infringements have consisted of price setting behaviour between a common supplier that, via negotiations with food retailers, intermediates information flows between the spokes, thus reducing uncertainty about the competitors' current and future market strategies and facilitating explicit or tacit horizontal collusion. Note that in the cases pursued by the PCA several retailers are parties to more than one case, while each supplier is party to only one case[5].

The complex nature of this infringement raises questions as to the requisite standard of proof for horizontal collusion. The ECJ'S *VM Remonts*[6] jurisprudence has concluded that a

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[1] This typology of arrangement is also called "ABC cartel", see Levy & Patel, 2010 *Apud* POÇAS, João Miranda, «O ENQUADRAMENTO DA FIGURA HUB-AND-SPOKE NA JURISPRUDÊNCIA DO TRIBUNAL DE JUSTIÇA DA UNIÃO EUROPEIA E DOS TRIBUNAIS BRITÂNICOS», Available at: https://www.concorrencia.pt/sites/default/files/imported-magazines/CR_37_-_Joao_Miranda_Pocas.pdf

[2] The classical definition of concerted practise stems from the *ICI v. Commission* case (Case 48/69), also known as the *Dyetuffs* case, in which the Court defined it as "*a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition*".

[3] In the Portuguese Competition Authority's decisions this is oftentimes expressly stated, considering that the principal hub-and-spoke restraint consumes the instrumental vertical restraint, see par. 2340 of PRC/2017/12, Available at https://www.concorrencia.pt/sites/default/files/processos/prc/AdC-PRC_2017_12-Decisao-VNC-final-net.pdf

[4] We have identified *circa* 10 local cases resulting in sanctioning decisions, still pending final judicial decisions. Several major food retailers were sanctioned as spokes in all the identified cases. The hubs were in different relevant product markets, from alcoholic beverages, non-alcoholic beverages and juices, pre-packaged bread and substitutes and cakes, personal care products, and others. Most of the infractions had allegedly happen for more than one decade. The fines, for each case, have been in the range of tens of millions total.

[5] OECD, «Hub-and-spoke arrangements – Note by Portugal», par. 14

[6] Par. 29 and 31 of Judgement of 21 July 2016, Case- C-542/14.

concerted practise may be attributed to the undertakings that were aware or could have reasonably foreseen that the information passed on to the hub was being transmitted to the spokes and accepted that risk (see also *Anic*, par. 87), full knowledge of the anticompetitive objective not being necessary[7].

In fact, the mere participation in a meeting[8] or the receiving of a message in a common platform's inbox[9] are enough to give rise to a rebuttable presumption of knowledge of the practise, unless the undertaking expressly denounced it or took steps to distance itself from the collusion.

The PCA's reasoning is in-line with ECJ's case law. For example, all the decisions explicitly referred the ECJ's judgement on the *Anic Partecipazioni* case[10], considering that heterogeneous patterns of conduct with the same anti-competitive object can constitute different manifestations of the same single and complex infringement of Article 101(1) TFEU, corresponding partly to an agreement and partly to a concerted practise.

2. The Nature of the Infringement and Market Conditions

The main principle of competition is that each undertaking determines independently its economic conduct on the relevant market[11]. Whilst, information exchanges in the context of vertical agreements maybe generally seen as pro-competitive[12], being necessary to improve the production or distribution of the contract goods or services, and benefiting from a block exemption under VBER[13], when the information is shared between competitors (via unilateral

[7] OECD, «Hub-and-spoke agreement - Note by the European Union», 4 December 2019, Available at: https://one.oecd.org/document/DAF/COMP/WD(2019)89/en/pdf

[8] See the aforementioned *Anic* case, as well as Judgement of 7 January 2004, *Aalborg Portland A/S*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P e C-219/00 P, par. 80 *et. seq.*, and the *T-Mobile Netherlands* case, C-8/08, par. 26.

[9] See Judgement from 21 January 2016, *Eturas*, C-74/14,

[10] See Judgment of the Court (Sixth Chamber) of 8 July 1999. Commission v Anic Partecipazioni SpA, C-49/92, paragraphs 112 *et seq.*, and *ICI v Commission*, paragraph 64

[11] See Communication from the Commission, «Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements». (2023/C 259/01), Chapter 6.

[12] Note that under article 4-a) of the Vertical Block Exemption Regulation, «*the restriction of the buyer's ability to determine its sale price*», including the setting of a fixed or minimum sale price as the result of pressure rom, or incentives offered by, any of the parties, not only removes the vertical agreement from the block exemption, being subject to article 101(1) of TFEU, but constitutes a *hardcore* or object restriction.

[13] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) TFEU.

disclosure[14], a multilateral exchange[15] or by indirect means, via a platform, an algorithm[16] or common agency or supplier) it can lead to anti-competitive outcomes.

According to the Commission's Guidelines[17], information exchanges on "commercially sensitive information" are considered *per se* restrictions, without needing to evaluate the market structure or its anti-competitive effects.

The Guidelines on Vertical Restraints also alert that RPM clauses may serve as a commitment device between undertakings to promote or maintain a horizontal price alignment, and even progressively raise it towards supercompetitive levels. The consequence is the reduction of *intra-brand* competition and the artificial enhancement of price transparency, thereby helping buyers reach or stabilise a collusive equilibrium and detecting when a party is deviating from the price benchmark[18], which can augment the efficacy of pre-existing anticompetitive agreements.

The economic effects of these practises depend on factors such as market transparency (e.g. in the food retail market, price variations are disseminated by means of publicity and public campaigns – making control of deviation more effective), demand elasticity (consumer behaviour is highly price-sensitive, which can make led to lower margins in price war situations, but also increases the incentive between firms for aligning their end price), market concentration, the exitance of barriers to entry and the complexity of the market (e.g. if the products exchanged are heterogeneous)[19].

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[14] Comprising the situations in which one undertaking discloses commercially sensitive information, either out of its own initiative (with the other part at least accepting it, without publicly distancing itself from the disclosure), following a request or during a meeting, contact, or even by a public announcement.

[15] Paradigmatic examples include data sharing arrangements and other forms of collaboration that may emerge in R&D agreements, purchasing agreements and sustainability agreements.
In the *Eturas* case, the information was transmitted through the internal messaging system of an online booking platform, informing about an amendment to the platform terms and conditions.

[16] "Hub-and-spoke-like" coordination may emerge when competing firms outsource the creation of dynamic pricing or yield management algorithms to third-party developers, or even when they're using the same algorithm or *software* that that the market leader uses, effectively allowing them to mimic and harmonize their strategy. See OECD, *Algorithms and Collusion: Competition Policy in the Digital Age* https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/05/algorithms-and-collusion-competition-policy-in-the-digital-age_02371a73/258dcb14-en.pdf

[17] See paragraph 414 of the aforementioned Guidelines. These include exchanges about current and future pricing intentions, current and future production capacities, current and future commercial strategy, forecasts on current and future demand, etc.

[18] Paragraph 196 of C (2022) 3006, Communication from the Commission: Guidelines on vertical restraints

[19] See also judgement of 4 January 2020, *Generics*, C-307/18, paragraph 116 and, judgment of 11 September 2014, MasterCard and Others v Commission, C-382/12 P, paragraph 165.

3. The Underlying Rationale for H&S

The principal motivation for undertakings to participate in hub-and-spoke schemes could be in general to maintain intended margins on their products' retail prices. The OECD, on its Background Notes to the Report on H&S practises[20], stated: «*it's a common situation for a supplier to hear retailers expressing concerns about low retails prices or margins (because of fierce intra-brand competition*», this has been the case in the CAT's *Replica Kit* case (*infra* developed) and the PCA's *Major Food Retailers* cases[21]).

As the PCA noted in the *Major Food Retailers* cases, based on OECD's and the Commission's Guidelines, these practises tend to emerge in market structures where the retail market has high concentration ratios, and the retailers have considerable negotiating power[22] over the supplier. This circumstances leave the supplier with two options, when pressured to increase margins downstream: (i) either reduce the wholesale price at the cost of his own margin – which could be unsustainable, for example, if the supplier has multiple distribution contracts with MFC clauses; (ii) or promote stabilisation of retail prices through co-ordinated action, this can be achieved by implementing a network of resale price maintenance (RPM) clauses in its distribution contracts with retailers.

4. The development of case-law on H&S cartels

To the best of our knowledge, while the ECJ has not directly dwelled on hub-and-spoke collusions, with most refences being made *en passant*, in Advocate General's opinions or in judgements, in most cases to exclude the application of the figure[23], its jurisprudence on concerted practises has been apparently used by the PCA, namely the *Treuhand I*, *AC Treuhand II*, *Eturas* and *VM Remonts* cases, considered similar to the major food retailers cases, insofar

[20] Organization for Economic Co-operation and Development, *Roundtable on Hub-and-Spoke Agreements – Background Note*, DAF/COMP(2019)14, 25 November 2019, Available at: https://one.oecd.org/document/DAF/COMP(2019)14/en/pdf

[21] See paragraph 843 of PCA's Sanctioning Decision, PRC/2017/12, Available at: https://www.concorrencia.pt/sites/default/files/processos/prc/AdC-PRC_2017_12-Decisao-VNC-final-net.pdf

[22] Par. 844, *Ibid.*

[23] See, for example, the *Eturas* case (C-74/14), in which AG Szupnar noted the concerted practise did not resemble hub-and-spoke collusion, stating that «*such indirect exchange calls for additional consideration as to the state of mind of the parties involved, since the disclosure of sensitive market information between a distributor and its supplier may be considered a legitimate commercial practise*» or in the case *Associación Profissional Elite Taxi v Uber Systems Spain, SL* opinion, that alerted «*classifying Uber as a platform which groups together independent service providers may raise questions from the standpoint of competition law», insofar as the common platform might give rise to hub-and-spokes conspiracy concerns when the power of the platform increases*».

as an undertaking outside the relevant market (*cartel facilitator*) was sanctioned as part of a concerted practise for allegedly interchanging commercial information and helping achieve price harmonization.

To the best of our knowledge, the first jurisdictions to apply the concept have been the United States[24] and the United Kingdom[25]. The UK's Office of Fair Trading (henceforth "OFC"[26]) has led the charge in H&S cartel enforcement, with the *Replica Kit* (*JJB Sports*) Toys (*Argos*) and *Dairy* (*Tesco Stores*) cases[27]. In the *Replica Kit* and *Toys* judgements, the Competition Appeal Tribunal (henceforth "CAT") established the following legal test: (i) when a retailer (A) privately discloses to supplier (B) its future pricing intentions, (ii) must be reasonably foreseeable that B might make use of that information to influence market conditions and pass that commercially sensitive information to competing retailer (C); (iii) B then passes that pricing information to the competing retailer, which then goes on to use that information; (iv) even if A did not in fact foresee that possibility and/or if C did not appreciate the basis on which A had provided that information[28].

The standard of proof established by the CAT in the *Replica Kit* and *Toys* cases represents a more economical approach, focused on widening the protection of consumers and non-cartelized competitors, by facilitating the attribution of knowledge of the infringement to the targeted undertakings, even when direct proof of anti-competitive intent is not possible. However, this approach may constitute an additional burden for retailers when conducting their negotiations with suppliers, as they will have to consider if the information they provide will foreseeably be used in a hub-and-spoke arrangement – making the implementation of competition compliance programs even more important. As WHELAN[29] states, this approach may not be the most compatible with ECJ's case-law, which, namely the *Anic* jurisprudence definition of concerted practises as «*a form of collaboration between undertakings which, without having reach the stage of agreement (…), knowingly substitutes*

[24] See, for example, *Interstate Circuit v. United States,*306U.S.208 (1939).
[25] PAIS, Sofia Oliveria, «Hub-and-Spoke Agreements and Tacit Collusion: Recent National Decisions and the Competition Market Authority Paper on Algorithms, Competition, and Consumer Harm», p. 174
[26] Now the Competition and Markets Authority (CMA).
[27] See [2004] CAT 17 (Replica Kit); [2005] CAT 13 (Toys); and [2012] CAT 31 (Dairy).
[28] See paragraphs 91 and 104 of the *Replica Kit*'s Judgement.
[29] WHELAN, Peter, *Trading Negotiations Between Retailers and Suppliers: A Fertile Ground for Anti-Competitive Horizontal Information Exchange*', European Competition Journal, v. 5, n. 3, 2009, Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084756.

practical cooperation between them for the risk of competition». The question we should pose is whether the term *knowingly* implies that the knowledge must be actual or constructive.

Moreover, courts and competition authorities may recur to the presumption of causal connection established by the ECJ' Judgements in *T-Mobile Netherlands*[30] and *Hüls*[31], by which, for the purposes of the application of Article 101(1) TFEU, in the context of a concerted practise and information exchanges, when one of the colluding undertakings remains active in the market after the collusion (meeting, discussions, etc.), it is presumed that it has taken into account the shared information and conformed its market conduct accordingly.

5. Conclusions

Hub-and-spoke agreements present several challenges, both for enforcers and for market players operating in distribution channels. Companies must be especially careful in their contacts with third parties, enacting effective compliance programs and avoiding disclosure of commercially sensitive information not directly related and necessary to the distribution agreement, as they can be potentially held responsible for information exchanges that can reasonably be used for anticompetitive purposes.

For enforcers, in the assessment of evidence in the absence of direct contact and the proof of intent, awareness and contribution to the anticompetitive practise, it is necessary to strike a balance between the effectiveness of competition law and protection of consumer welfare, on one side, with the right of targeted undertakings to rebut the *Anic* and *T-Mobile* presumptions, with the presumption of innocence and *in dubio pro reu* principles enshrined in articles 6, nº. 2 of the ECHR and 48, nº. 1 of the Charter of Fundamental Rights[32].

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[30] Judgement of the Court (Third Chamber) of 4 June 2009, *T-Mobile Netherlands BV, KPN Mobile NV et. al.*, Case C-8/08, paragraphs 5, 6, 61 and 62.
[31] Judgement *Hüls* v *Commission* [1999], Case C-199/92
[32] For more information on the potential issues emerging from the application of the ECJ's concerted practises jurisprudence to hub-and-spoke cartels, see POÇAS, João Miranda, *Op. cit.*

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