

ICN Cartel Working Group Sub-group 1 webinar

Hub-and-Spoke Cartel Cases

Moderator: **Mr Jacques Steenberg**, President, Belgian Competition Authority

Speakers:

Ms Sabine Zigel, Senior Competition Expert, OECD

Mr Jan Blockx, Researcher, University of Antwerp & **Mr Johan Ysewyn**, Partner, Covington & Burling

Ms Júlia Namie Maia Pinto Ishihara, Technical Assistant, Brazilian Competition Authority

Ms Maria de la Luz Domper, Judge- Chilean Competition Authority

Mr Cees Dekker, Attorney at law/Partner, Nysingh

Ms Mariana Dias & Ms Sara Carvalho de Sousa, Legal Officers, Portuguese Competition Authority

Mr Adrien Giraud, Lawyer, Latham & Watkins

Ms Sarah Subremon, Partner, Bureau Brandeis

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OECD ROUNDTABLE DISCUSSION ON HUB-AND- SPOKE ARRANGEMENTS

ICN Cartel Working Group Webinar
1 March 2021

Sabine Ziegelski
Senior Competition Expert
Competition Division, Directorate for Financial and
Enterprise Affairs



OECD Roundtable on Hub-and-Spoke Arrangements 2019

- Detailed background paper
- 21 country contributions – with summary
- Detailed summary of discussion
- Executive summary of discussion



All to be found here:

<http://www.oecd.org/daf/competition/hub-and-spoke-arrangements.htm>



Key findings

- Carefully differentiate pro- from anti-competitive
- Concentrated markets and aligned incentives
- Legal test is ambitious
- Hub-liability is essential but can be challenging
- Can/should RPM cases replace full blown hub-and-spoke investigations?
- Digital world can facilitate hub-and-spoke, but enforcement tools are sufficient

Reference: executive summary

[https://one.oecd.org/document/DAF/COMP/M\(2019\)2/ANN4/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/M(2019)2/ANN4/FINAL/en/pdf)



Soon to come:



Hub-and-Spoke Cartels

OECD Workshop for Competition Officials
in co-operation with Competition Council of the Republic of Latvia

We are hoping for fall 2021 – no zoom, we will meet in Riga (eventually)!

<http://www.oecd.org/daf/competition/oecd-ccl-workshop-on-hub-and-spoke-cartels.htm>



Belgian hub and spoke cartels

*Jan Blockx, University of Antwerp
Johan Ysewyn, Covington & Burling LLP*

- Belgian competition council decision of 7 April 2011 in case CONC-I/O-08/0010B – chocolate products
- Belgian competition authority decision of 22 June 2015 in case CONC-I/O-06/0038 – drugstore, perfume and hygiene products

Belgian hub and spoke cartels – Chocolate case (2011)



Belgian hub and spoke cartels – DPH Retail case (2015)

Drugstore, Perfumery and Hygiene

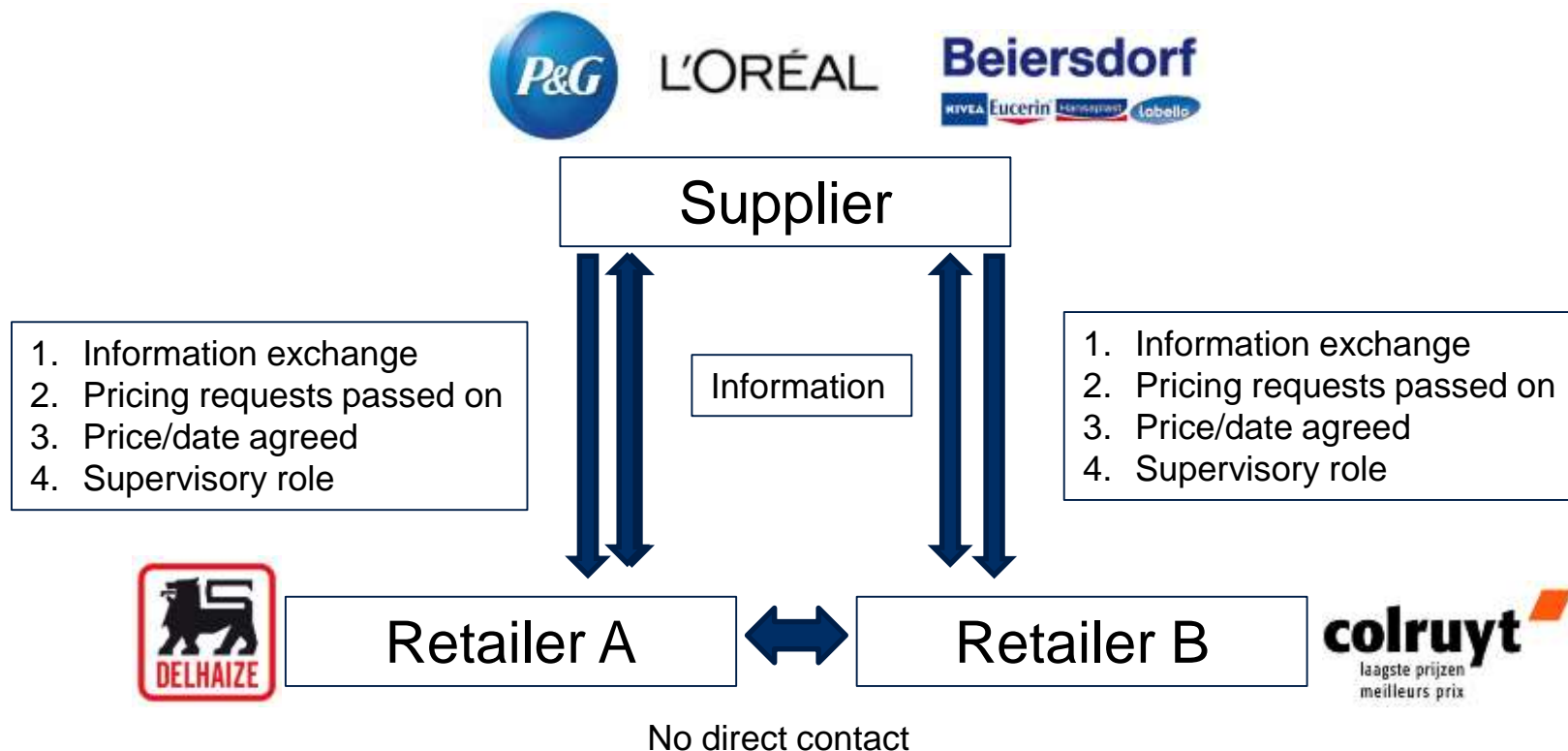
2006 : Immunity applicant – Colgate-Palmolive

2007 : Dawnraids at four retailers

2015 : Settlement – no involvement of the Competition College

Highest cartel fine imposed in Belgium – EUR 174 million

Belgian hub and spoke cartels – DPH Retail case (2015)



Belgian hub and spoke cartels – DPH Retail case (2015)

Legal theory :

- Retailers : Horizontal infringement
- Suppliers : Facilitators (AC Treuhand)

Strand – different from Replica Kits : single cartel arrangement of the retailers supported by the suppliers, as facilitators

Key criterion :

- awareness – who knew what?
- contribution to the overall scheme
- incentives : “heart of the infringement is not at the level of the suppliers – practice sought to increase consumer prices at the retail level”

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Brazilian experience with hub-and-spoke cartels

The Digital Board Case

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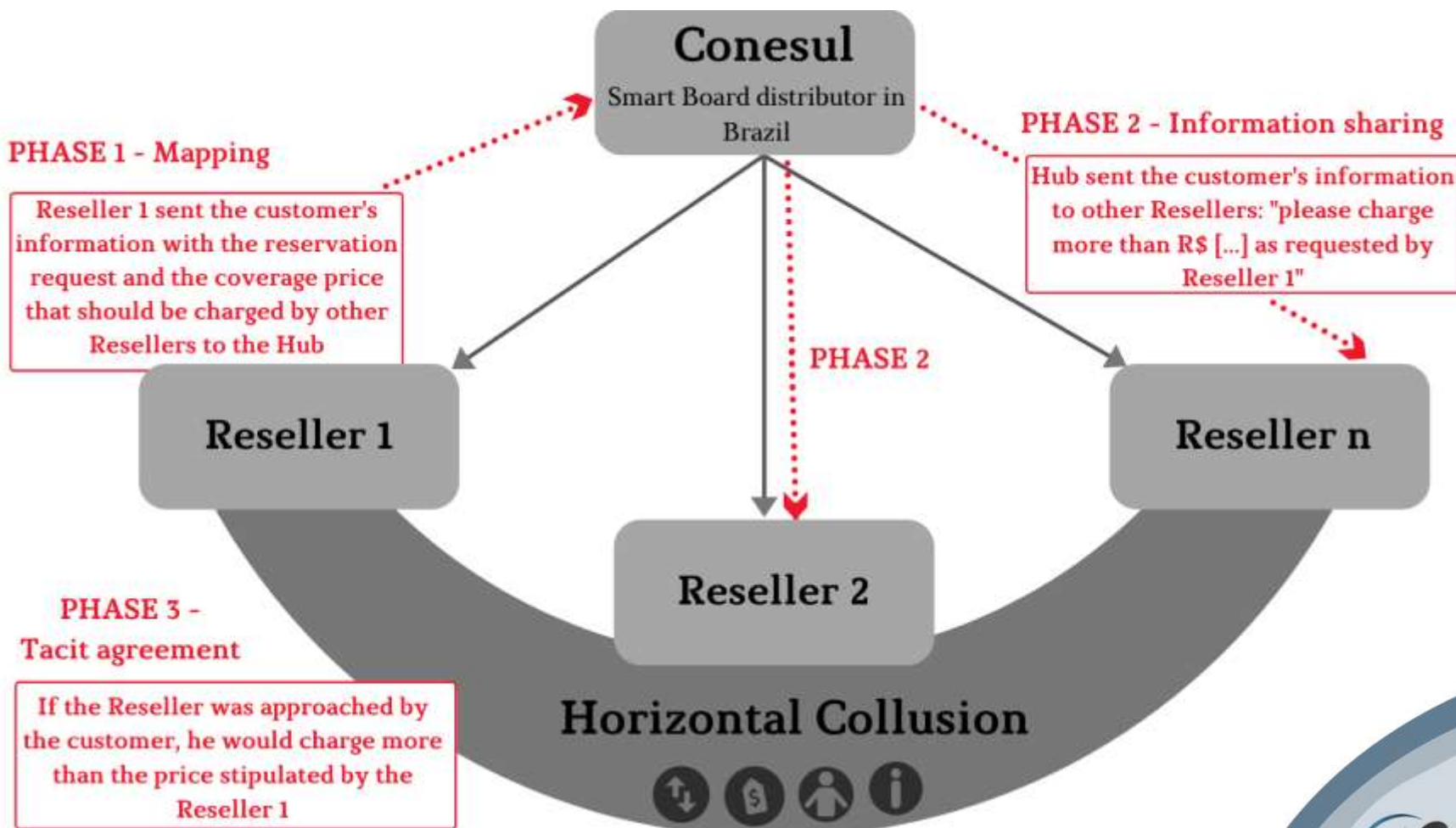


Facts of the case

- Hub: Conesul, distributor in Brazil of the Smart Board brand
- Spokes: resellers of interactive digital boards

Important details:

- Intra-brand competition - Resale policy
- No exclusivity clause
- Public tenders and private purchases



Standard of proof adopted

- Spokes were only complying with the distributor's policy?
- Standard for conviction recommendation:

- 1) Received emails from the hub - PHASE 2 - Information sharing
- 2) Sent at least one email related to PHASE 1 - Mapping

Rule of analysis adopted

- Infringement by object
- Horizontal collusion

Liability of the hub

- Infringement by object
- As culpable as the spokes

Thank you!

Júlia Namie M. P. Ishihara

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HUB-AND-SPOKE CARTEL CASES: SUPERMARKETS CASE (JUDGMENT 167/2019)

María de la Luz Domper
Judge at the TDLC

ICN CWG Webinar on Hub-and-Spoke
March 1st, 2021

BRIEF SUMMARY OF THE CASE

- In 2016 the National Economic Prosecutor (“FNE”) filed a complaint against three supermarket chains in Chile (Cencosud, SMU and Walmart).
- The FNE accused them of agreeing on a common minimum resale price for fresh poultry meat between 2008 and 2011.

ELEMENTS OF THE HUB-AND-SPOKE CONDUCT

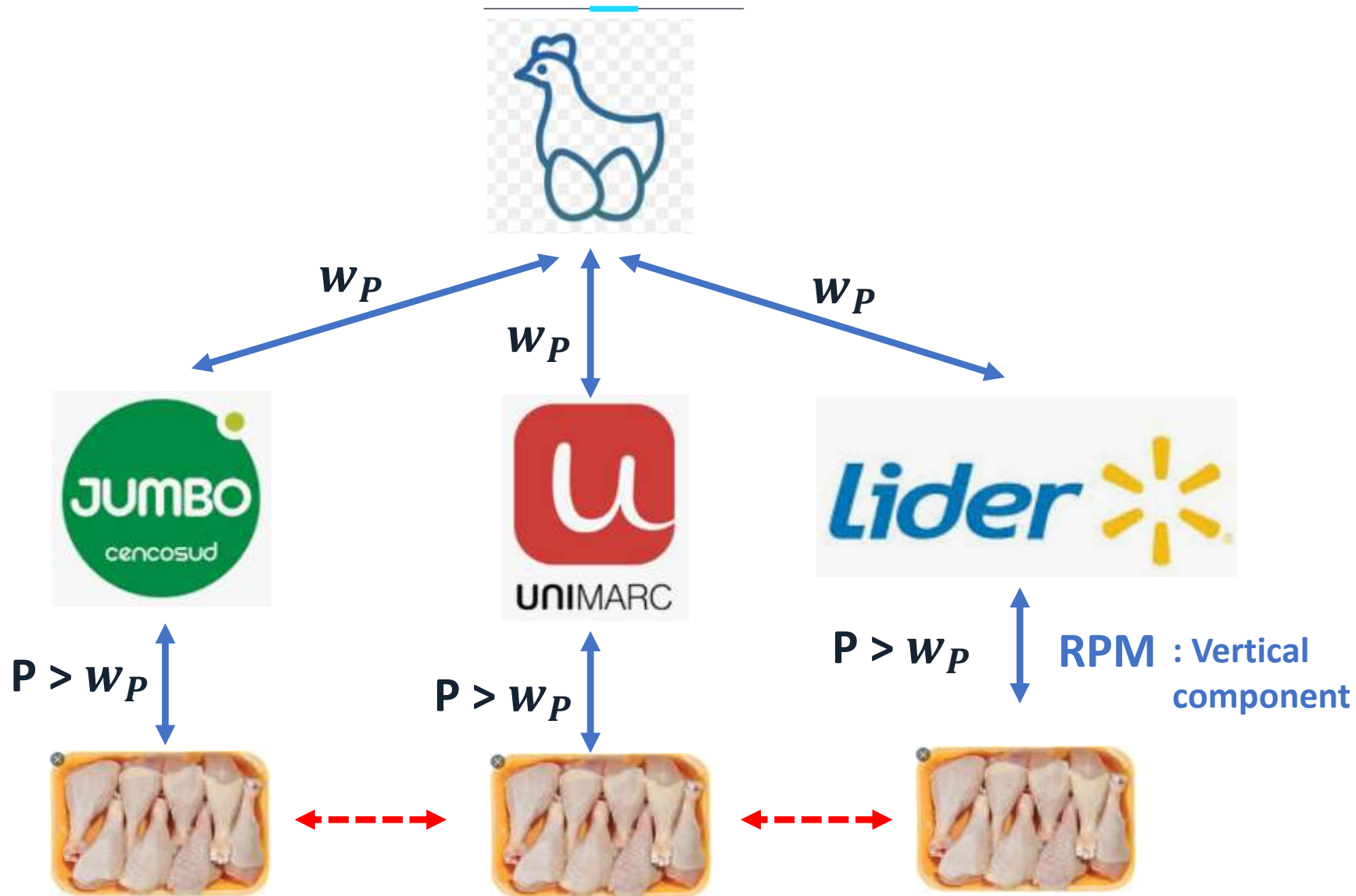
- According to the FNE, the practice had two core elements:

(1) A “vertical” component: Minimum resale price set by each upstream supplier through vertical agreements signed individually with each supermarket (the “rule”).

(2) An “indirect horizontal” component: voluntary compliance with the rule by each supermarket, conditioned to the observance of the same rule by the other supermarket chains. This was an implicit mutual understanding among the supermarkets that each of them would not increase prices. There were no direct communications between the supermarkets.



ELEMENTS OF THE HUB-AND-SPOKE CONDUCT



WWW.TDLC.CL

Indirect Horizontal component

EVIDENCE THAT PROVED THE CONDUCT

- The existence of the conduct was proved by emails exchanged between each supermarket and each producer requesting other supermarkets not to deviate from the rule.
- There were also threats of punishments if supermarkets deviated from the rule.

TDLC RULING: SENTENCIA 167/2019 (FEBRUARY 28TH, 2019)

- The three supermarket chains were found guilty.
- Each firm was condemned to fines that ranged from US\$ 3 to 5 million and to adopt an antitrust compliance program for at least five years.
- Walmart (Lider) benefited from a 15% fine reduction because it had an antitrust compliance program in place while the conduct was carried out, although it was considered highly deficient.
- The ruling was challenged before the Supreme Court. The Tribunal's decision was upheld and fines were increased.

SUPREME COURT RULING: SENTENCIA 9361-2019 (APRIL 8TH, 2020)

- The Supreme Court confirmed that the supermarkets had violated Chilean Competition Law.
- Fines were increased (doubled) and now they ranged from US\$ 5 to 8 million aprox.
- Regarding compliance programs, the Supreme Court stated their existence can not be used as an argument to exempt firms from fines.
- In this case compliance programs implemented by some of the firms do not attenuate fines because they were not effective to prevent the anticompetitive actions.

THANK YOU!

MDOMPER@TDLC.CL

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An example of multiple down-stream market hubs

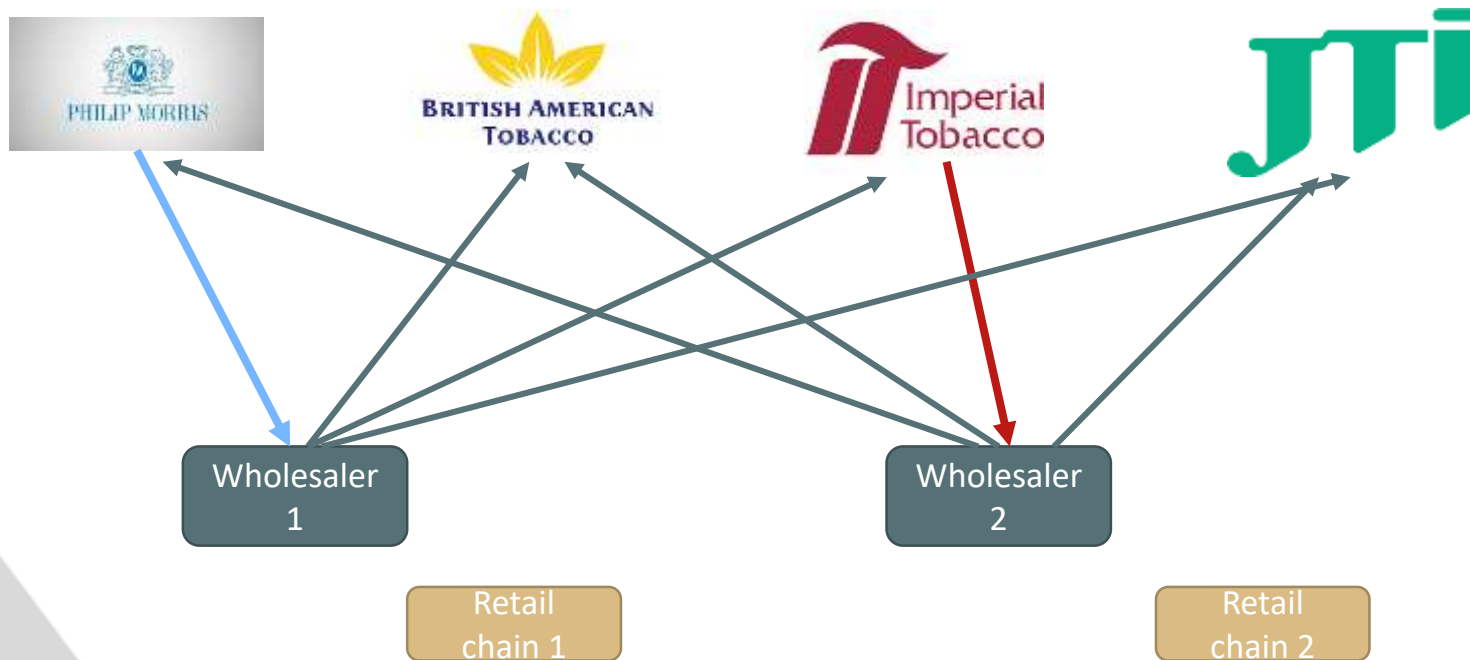
Cees Dekker | 1 March 2021

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Cigarettes manufacturers

Decision ACM 27 May 2020



Characteristics of the market

- Oligopoly (4 parties have combined marketshare of 95%)
- No new entrants
- Government regulation
 - excise-tax laws stipulate that manufacturers unilaterally set the consumer retail prices of their cigarettes (RPM)
 - ❖ No intrabrand competition
 - price must be placed on the cigarette pack with a tax stamp
 - restrictions on advertisement
- Necessary that manufacturers inform their buyers about planned changes in a timely manner

Criteria (implicitly) applied by ACM

- Competitively-sensitive information (concerning future resale prices)
 - Not public information
- Manufacturers must have known that their own competitively-sensitive information would eventually end up with the others
- Information taken into account when taking decisions about pricing strategy

Notable aspects

- Not explicitly considered as hub and spoke
 - Wholesalers and retailers not considered 'facilitators'
- No fines imposed on wholesalers and retailers

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AdC Hub-and-Spoke Cartel Cases



Autoridade da Concorrência (AdC)

Sara Carvalho de Sousa
Mariana Dias

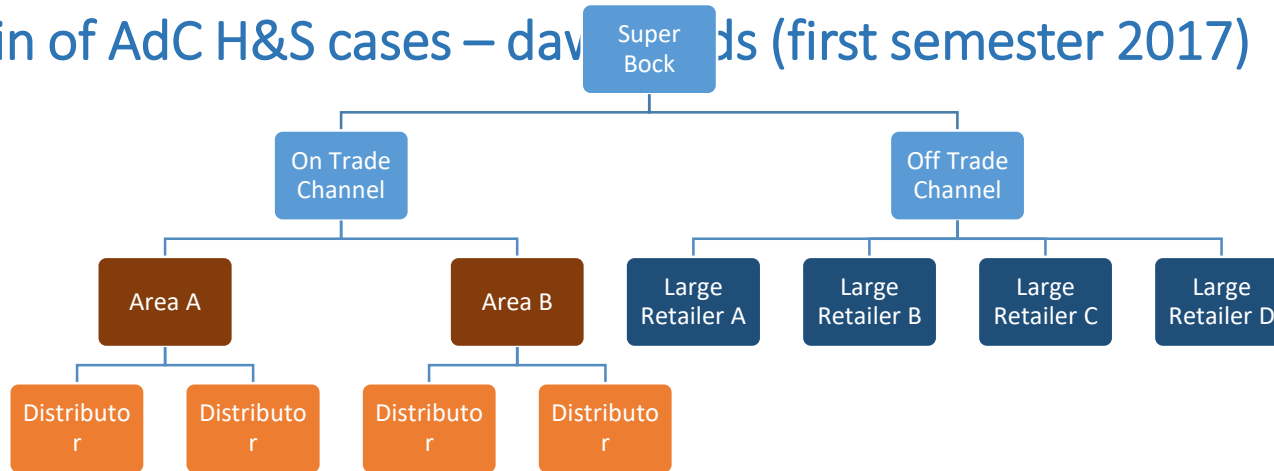
March 1st, 2021



Contents

1. Origin of AdC H&S cases
2. Overview of the cases
3. Summary of the cases
4. Analysis of evidence
5. Main arguments brought by the Undertakings
6. Challenges of investigation & prosecution
7. Legal Analysis
8. Main conclusions of the analysis

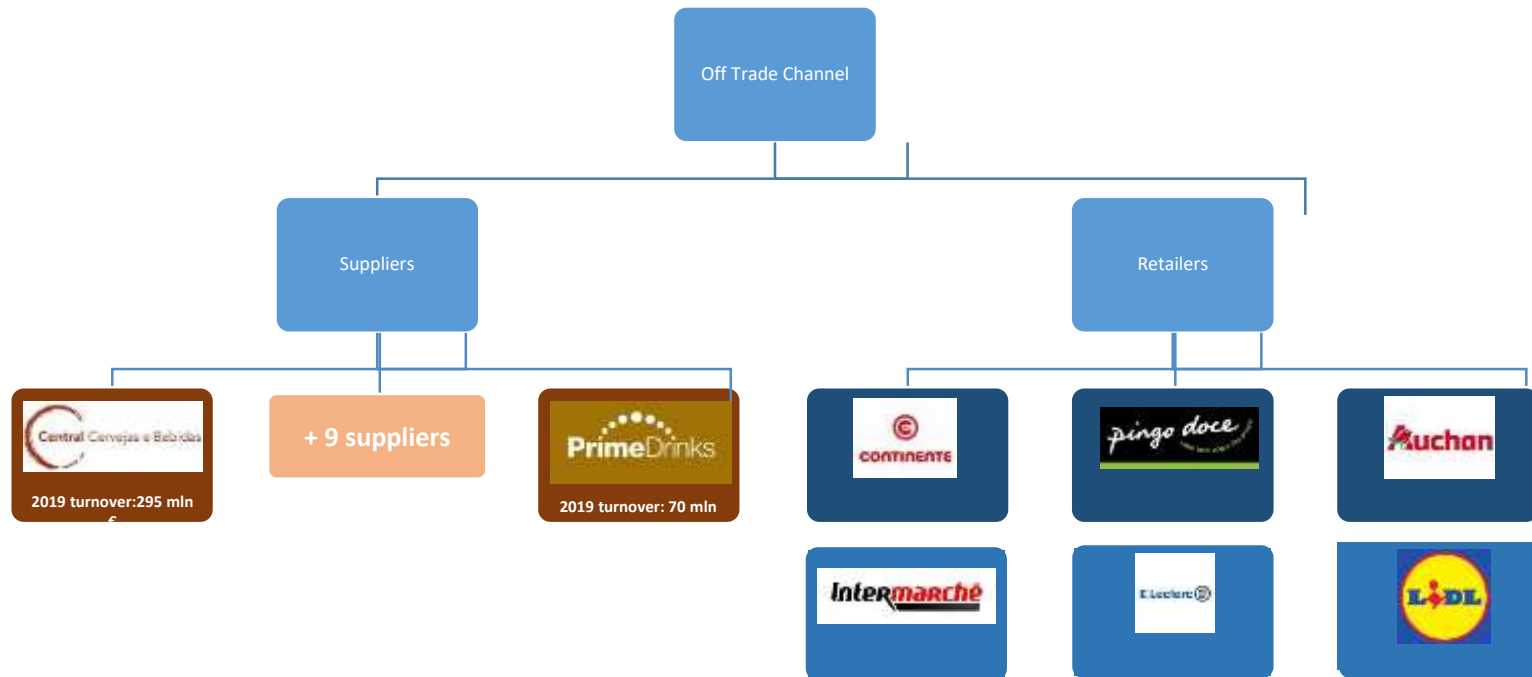
1. Origin of AdC H&S cases – dawn raids (first semester 2017)



Hub & Spoke – new search and seizure warrant needed

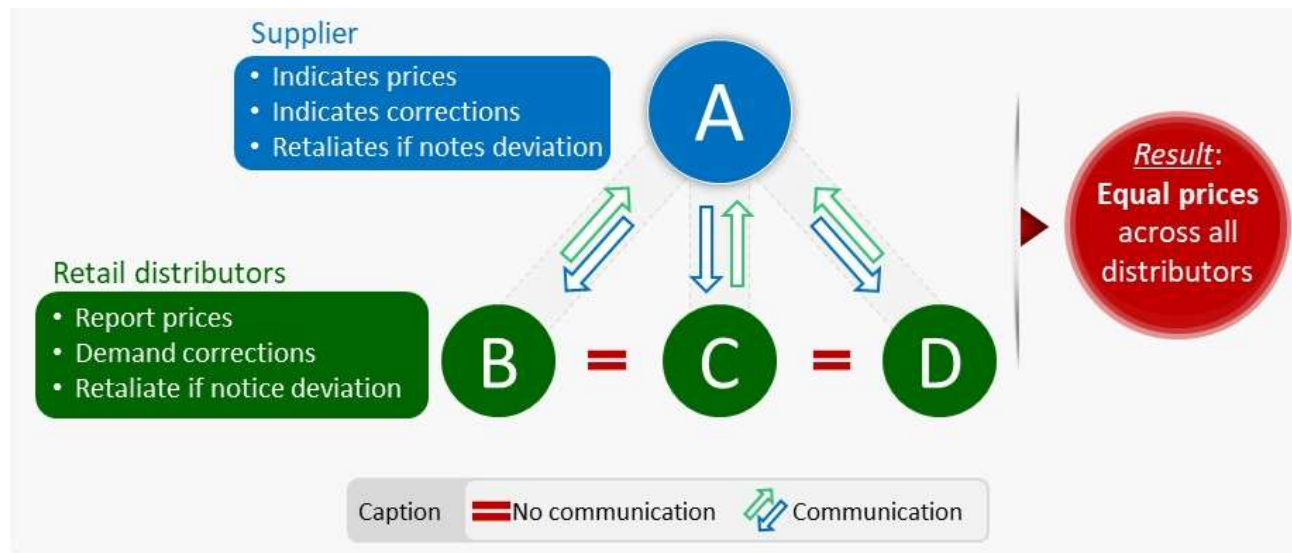
RPM – dawn raid initially authorized by the Public Prosecutor

Other dawn raids in the off-trade channel – First semester 2017

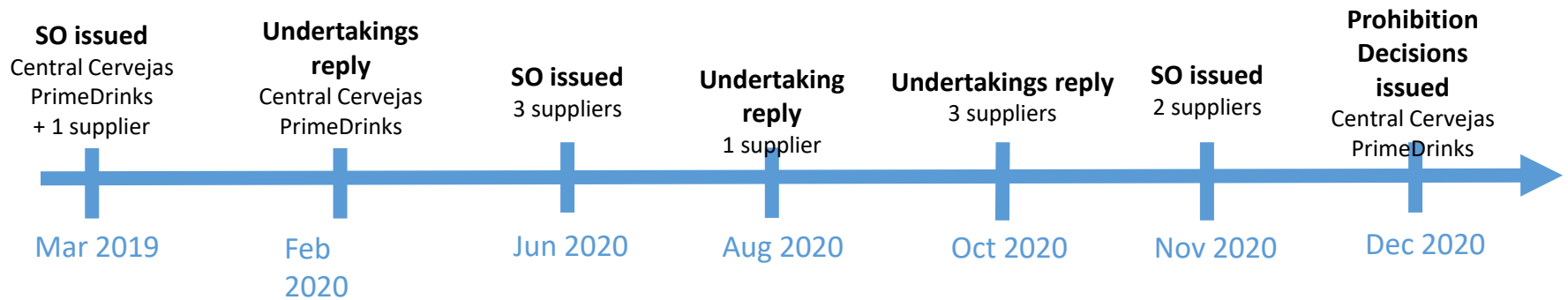


2. AdC H&S cases - overview













- 13 cases, each case against 1 supplier (Hub) and several retailers (Spokes)
- Sectors: food and beverages, cleaning products, cosmetics
- Duration: 2001 – 2017 (roughly)



3. Summary of the cases



3. Summary of the cases – Prohibition Decisions issued in December 2020

Undertakings		Sector(s) / Markets	Period of infringement	Amount of evidence seized in dawn raids	Total fines imposed
Supplier	Retailers				
	    + One board member and one business unit director	Alcoholic and non-alcoholic beverages <ul style="list-style-type: none"> • beer • water (still/sparkling) • soda • Cider 	2008 - 2017	Ca. 850 documents	€172.688.000 2019 turnover: <ul style="list-style-type: none"> • 6,5% supplier • 4 to 7% retailers
	     	Alcoholic beverages <ul style="list-style-type: none"> ▪ wine (still, sparkling, port) ▪ spirits (gin, whisky, vodka, liquor...) 	2007 - 2017	Ca. 950 documents	€162.560.000 2019 turnover: <ul style="list-style-type: none"> • 6,5% supplier • 3 to 7% retailers

4. Strong evidence of H&S practice

EXAMPLE no. 1

Subject: Sales Prices Alignment - 24.01

From: [Supplier]

To: [Retailer A]

Attached you can find the recommended sales prices for the price alignment scheduled for tomorrow – 24.01. [...]

I appreciate your collaboration in the implementation of these prices in your stores, bearing in mind that the prices stability is essential to the maintenance of the trade margins.

[...]

From: [Retailer A]

To: [Supplier]

Is this alignment also applicable to [Retailer B]?

From: [Supplier]

To: [Retailer A]

Yes, with the exception of [Product 1] and [Product 2]. Nonetheless these will still be aligned during the present week.

EXAMPLE no. 2

Subject: Shopping [Product 1]

From: [Retailer A]

To: [Supplier]

[...]

Hereby I send [Product 1] **shopping report** of the 25th of May.

Considering the prices charged by some retailers, we verify that our stores are uncompetitive.

We appreciate your attention and correction of this situation in the market.

Alternatively, and in last case, we request promotional conditions to the benefit our clients

with the best prices.

Look forward for your feedback

[...]

#Product	Competitor	Date of Shopping	Price	Our Price
XXXXXXXX	[Retailer C]	25-05-2016	19.99	22.99

4. Strong evidence of H&S practice

EXAMPLE no. 3

RE: Comparison of [Retailer] receipts

From: [Supplier]
To: [Supplier]
CC: [Supplier], [Supplier Off-Trade Sales Director]

I'm being pressured by [Retailer A] with this promotion...this jeopardizes our price recommendations. [...]

	[Retailer B]	[Retailer A]
Chickpeas 420g	0,69€	0,79€

From: [Supplier]
To: [Supplier]
CC: [Supplier], [Supplier Off-Trade Sales Director]

[...] [Retailer A]'s email asks for the resolution of this problem until next Monday. Is it worth trying to correct this situation?

From: [Supplier]
To: [Supplier]
CC: [Supplier], [Supplier Off-Trade Sales Director]

[Supplier Off-Trade Sales Member] was able to change the prices. She will send the proof of receipt tomorrow.

EXAMPLE no. 4

RE: [Soft Drink Brand] at [Retailer B]

From: [Retailer A]
To: [Supplier]

[Retailer B] is at 1.79€.

#Product	Product Description	#Comp	Competitor	Date Shopping of	Price
XXXXXXXX	[Soft Drink Brand] 33CL	XXXXXX	[Retailer C]	05-01-2011	1,78
XXXXXXXX	[Soft Drink Brand] 33CL	XXXXXX	[Retailer C]	05-01-2011	1,79
XXXXXXXX	[Soft Drink Brand] 33CL	XXXXXX	[Retailer B]	05-01-2011	1,79
XXXXXXXX	[Soft Drink Brand] 33CL	XXXXXX	[Retailer B]	05-01-2011	1,79
XXXXXXXX	[Soft Drink Brand] 33CL	XXXXXX	[Retailer D]	05-01-2011	2,19

From: [Supplier]
To: [Supplier]
When will it be removed?

From: [Supplier]
To: [Supplier]
The supply cut should occur next week, this is our proposal and I feel they will accept it. [...]

5. Main arguments brought by the Undertakings

- Practice described is economically irrational in the Portuguese Food Retail Market
- Absence of direct communication among retailers
- Retailers are free to decide their own retail prices
- Monitoring / *Shopping* is a legal and legitimate market expertise tool
- Price information exchanges qualify as *genuinely public information*
- Signaling price deviations is a negotiation argument to obtain better sell-in conditions
- Retailers reactions are normal, rational and competitive replies to market activity
- Absence of proof of intent

6. Challenges of investigation & prosecution

- Absence of direct communication between retailers
- Secrecy:
 - Communication between parties based on short messages using simple language and abbreviations, phone calls and personal meetings
 - Explicit references/orders from company director to delete illegal emails/evidence

EXAMPLE no. 5

From: [Retailer A]

To: [Group of employees from Retailer A]

Good morning,

Considering all the news that have been published recently in the media regarding the investigations that AdC is conducting, or intends to conduct, related to the relationship between suppliers-retailers, **I shall warn you of the need to, if you haven't done so already, delete all emails (including this one) with communications that mention prices with suppliers and also between the teams.**

Especially those that do not comply with the standard-email we have implemented with the help of the Legal Department.

EXAMPLE no. 6

From: [Retailer A]

To: [Another group of employees from Retailer A]

Good afternoon,

FYI.

It seems to me as an excellent recommendation.

In order to avoid the disclosure of this email I suggest that you destroy it and pass on (reinforce) the message verbally.

You shall also be careful with all written documentation, whether it's emails' prints or meeting notes.

7. Legal analysis

- Portuguese National Law - Article 9 (1) of Law no. 19/2012 (Portuguese Competition Act):

“Agreements between undertakings, concerted practices and decisions by associations of undertakings which have as their object or effect the prevention, distortion or restriction of competition in the domestic market, in whole or in part, and to a considerable extent, are prohibited, in particular those which:

a) Directly or indirectly fix purchase or selling prices or any other trading conditions”

- EU Law - Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU)

- Criteria from ECJ AC Treuhand Case

“30. When, as in the present case, the infringement involves anticompetitive agreements and concerted practices, it is apparent from the Court’s case-law that the Commission must demonstrate, in order to be able to find that an undertaking participated in an infringement and was liable for all the various elements comprising the infringement (i) that the undertaking concerned intended to contribute by its own conduct to (ii) the common objectives pursued by all the participants and (iii) that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk”.

- National jurisprudence

“Pricing is part of the contractual freedom of the service provider and its customer, and there is no justification for a [price] imposition (by a third party, which is not part of the provider / buyer group) to the former and, consequently, also to the latter. Pricing should only result from the free play of the market, while respecting certain rules and principles, which are intended to regulate the operation of the market and not to introduce obstacles and introduce distortions” (Judgement of the Court of Appeal of Lisbon, January 29th 2014, Case No 18 / 12.OYUSTR.E1.L1 (Lactogal), p. 32)

8. Main conclusions of the analysis

- Analysis based on four types of behaviour:
 - Retail price definition (align future pricing intentions)
 - Control and monitoring retail prices in the market
 - Signalling retail price deviations
 - Coercion and/or retaliation against retail price deviations
- Supplier addresses retail price recommendations to retailers
- Retailers share with the supplier information regarding their future pricing intention
- Retailers adapt behavior to competitors future pricing intention shared by the supplier
- Supplier and retailers monitor and signal retail price deviations
- Supplier and retailers pressure and retaliate against retail price deviations
- Retailers correct retail price deviations and align with competitors
- Supplier and retailers exchange evidences of retail price alignment

Thank you for your attention!

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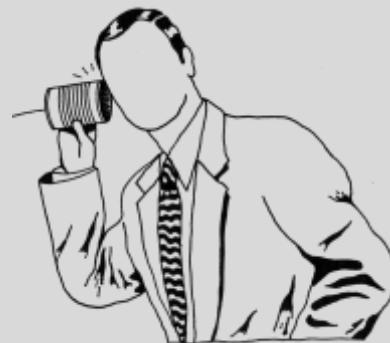




ICN CWG Webinar on Hub-and-Spoke Cartels

1st March 2021

Sarah Subrémon
Partner, bureau Brandeis Paris



I. Hub-and-Spoke Model

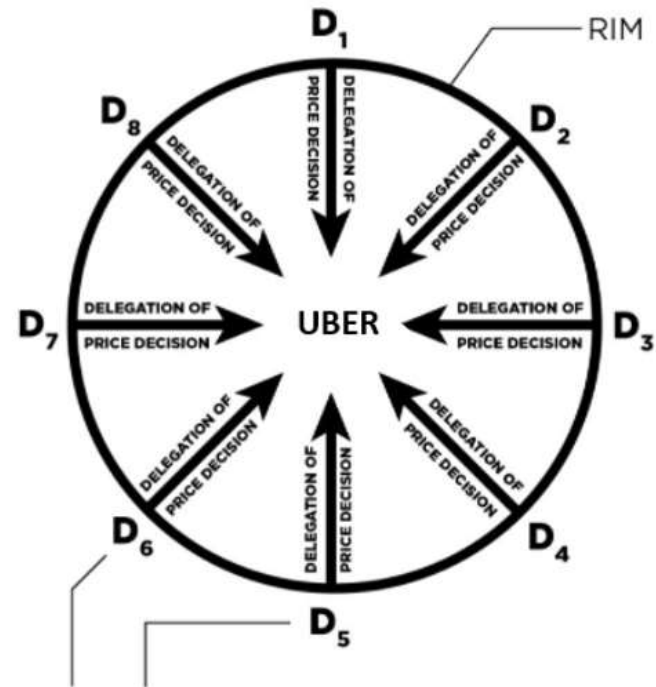
A. Main characteristics

1. A Hub (facilitator)
2. Spokes (horizontal players/competitors)
3. A Rim (a vertical agreement)

B. Specific conditions

1. The Hub or retailer(s) must :
 - have a significant degree of bargaining power
 - Exploit such power
 - Want to reduce competition at the downstream/retail level.
2. The Spokes or suppliers agree to engage in such conduct
3. No direct contact between competitors

C. Example: the Uber App



DRIVERS (SPOKES) Not required to agree/ speak with each other inter-se, as they are assured that this job is being done by **UBER** on their behalf (HUB)

II. Types of Hub & Spokes

A. Hybrid practices

A. Concerted practices : tacit or explicit agreement to share sensitive information

B. Broader anticompetitive scheme

1. Resale Price Maintenance
 2. Most-Favored-Nation clauses
 3. Price algorithm
-

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