HUB AND SPOKE CARTEL

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1. What is Hub and Spoke Cartel ?

- A hub and spoke cartel can be defined as the indirect exchange of information between two independent undertakings which are horizontal competitors on the supplier or retailer level (“spokes”), through another undertaking operating at a different level of the production or distribution chain (“hub”). The hub facilitates the coordination of competition between the spokes without direct contacts between the spokes.

Components of Hub and Spoke cartel

Hub: A hub is the facilitator of indirect coordination between competitors. Each of the competitors has a vertical arrangement with the hub. Therefore, suppliers or retailers usually act as the hub.

Spokes: The spokes are the individual competitors engaged in identical or similar business. The number of spokes in the arrangement makes it impossible for the horizontal players to have coordination with each of the players in the market. Therefore, there is no direct communication between spokes in the cartel.

Rim: All the spokes have an agreement with the hub in a Hub and Spoke cartel which keeps every member of the cartel bound together to the hub. This agreement is the rim of the arrangement. A Hub and Spoke cartel cannot be established without identifying the rim. Without rim, an alleged hub and spoke cartel is merely a set of vertical relationships that may result in parallel conduct but which do not establish horizontal collusion.

- Hub-and-spoke arrangements differ from traditional horizontal cartels in the lack of direct communication between the horizontal competitors, although the negative market outcomes may be the same – both can result in a hard-core price-fixing cartel. In a huband-spoke arrangement, communication typically takes place via bilateral exchanges between the common hub (for example a common supplier) and the spokes (for example retailers of the same product), thus any information exchanges between the competing spokes occur only indirectly. These arrangements can take different forms, depending on whether the hub is active on the upstream supply or downstream retail level. At the same time, information exchanges between suppliers and retailers are a necessary and usually pro-competitive practice.

- Thus, unlike in horizontal cartels, the strategic nature of information exchanged cannot be the determining criterion for an unlawful hub-and-spoke arrangement, as non-competing vertically related firms normally exchange competitively sensitive information in their business relationships. This may go as far as exchanges about forward-looking pricing information. Therefore, competition authorities may need to find evidence of the parties' intention to restrict horizontal competition or other "plus factors". Competition agencies will also need to differentiate carefully between tough bargaining practices that can involve legitimate references to a competitor's offer, and attempts to coordinate the behaviour of horizontal competitors.

Hub and spoke cartels – in Competition Amendment Bill

- It was noted that there exist certain unique forms of agreements in which a third party, i.e. a ‘hub’ organizes or facilitates collusion between two or more competitors, i.e. the ‘spokes’. In such cartels, the hub communicates with one or more spokes and causes the sharing of information between the spokes. It was noted that while the spokes may be captured in the prohibition against cartels, there is some conjecture that the hub may escape liability under the contours of a Section 3(3) analysis of anti-competitive agreements.

- The ‘Bill’ proposes to broaden the scope of anti-competitive agreements by including any party facilitating an anti-competitive horizontal agreement under such agreements. As per clause 4 of the Bill, the following proviso shall be inserted in Section 3(3):

- *Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it actively participates in the furtherance of such agreement.*
- The inclusion of hub-and-spoke agreement within the Indian antitrust framework is a welcome move. However, various challenges exist in terms of its enforcement due to the digital economy and interaction among data-rich firms with the help of algorithms, subsequently leading to tacit collusion. Furthermore, a standard must be established in order to deal with hub and spoke agreement as it is a combination of horizontal and vertical agreements.

- The earlier regime focused on parties directly involved in horizontal collusion, and left room for third-party organisers and facilitators who could technically escape liability. The Bill proposes to expressly allow the CCI to examine the role of facilitators of cartels (such as consultants who are involved in complex cartel schemes) as well as inquire into 'hub and spoke' cartels.

- The amendment also uses the word ‘actively participates in furtherance of such an agreement shall be presumed to be a part of this agreement’ instead of the usual terminology used in the Act like ‘agreement entered into’. This terminology evidently shows that the hub’s conscious actions to aid such an agreement is sufficient to make it a party to the agreement.

CASE STUDY

Samir Agarwal v OLA, UBER (2018)

Allegations:

- The Informant had alleged that the algorithmic pricing adopted by the Opposite Parties (OPs/Ola-Uber) takes away the liberty of individual drivers to compete with each other and thus, amounts to price fixing by the OPs, in contravention of the provisions of Section 3 of the Act.

- It had been alleged that the OPs, i.e. Ola/Uber, act as ‘Hub’ where ‘spokes’ (competing drivers) collude on prices.

- The Informant had alleged that Ola's/Uber's pricing algorithm artificially manipulates supply and demand, which guarantees higher fares to drivers who would otherwise compete against one another on price and would not be able to command such high prices. It was alleged that the cooperation between drivers orchestrated by Ola/Uber results in 'concerted action' under Section 3(3)(a) read with Section 3(1) of the Competition Act,2002.
- The Informant had further alleged that Ola/Uber and its drivers were in a vertical relationship wherein Ola/Uber impose a minimum price level on the drivers, resulting in a contravention of Resale Price Maintenance under Section 3(4)(e) of the Act. The Informant has stated that Ola/Uber's algorithm determines the price, below which drivers cannot charge which results in a minimum fixed price.

- (3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—
- (a) directly or indirectly determines purchase or sale prices;
- The term “resale price maintenance”, as defined under Section 3(4) (e) includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

Findings of the Commission

- For a cartel to operate as a hub and spoke, there needs to be a conspiracy to fix prices, which requires existence of collusion in the first place. In the present case, the drivers may have acceded to the algorithmically determined prices by the platform (Ola/Uber), this cannot be said to be amounting to collusion between the drivers.
- The Commission observed that a hub-and-spoke cartel would require an agreement between all drivers to set prices through the platform, or an agreement for the platform to coordinate prices between them. There did not appear to be any such agreement between drivers inter-se to delegate this pricing power to the platform/Cab Aggregators. Thus, the Commission found the first allegation raised by the Informant unsubstantiated.

- On the allegation of resale price maintenance, the Commission observed that resale is fundamental to the conduct of resale price maintenance. In the context of app-based taxi services, the OPs do not sell any good/service to the drivers that the drivers resell to the riders.
- A single transaction takes place between the rider and Ola/Uber, who provides a composite service of the driver-rider matchmaking, the ride, GPS tracking etc. and price is generated only once. In absence of any resale of services, the allegation of resale price maintenance is not tenable.

Appeal before National Company Law Appellate Tribunal (NCLAT)

The informant appealed against CCI decision before NCLAT, which also dismissed the appeal mainly on the following grounds:

- No probability of collusion *inter* se the drivers through the platform of Ola/Uber as there was no exchange of information amongst the drivers and Ola/Uber. The taxi drivers connected with platforms had no inter se connectivity and lacked the possibility of sharing information with regard to the commuters and the earnings they made out of the rides provided.
- NCLAT also observed that no collusion was alleged between Ola & Uber through their algorithms implying that they were operating independent of each other. Such collusion had only been alleged on the part of drivers through the platform of Ola and Uber who purportedly used algorithms to fix prices which the drivers were bound to accept.

Challenges in investigating hub and spoke cartels

Enforcement against hub-and-spoke arrangements presents a number of challenges.

- The practice involves vertical information exchanges, which may often be legitimate business practices when seen individually.
- The indirect nature of the contacts between the spokes makes it more challenging to prove horizontal collusion.
- The need to show that the spokes were aware or could have reasonably foreseen that their commercially sensitive information would be passed on to other spokes, is often a tedious task for the enforcement agencies.
- Difficulty of meeting the evidentiary standard, especially proving exchanges of information indicating existence of cartel/collusive behaviour.

THANKS