

HUB AND SPOKE CONSPIRACIES

Pázmány Péter Catholic University – Budapest

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1. What are H&S conspiracies?

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1. What are H&S conspiracies?

A H&S conspiracy is a form of cartel containing elements of **both vertical and horizontal** competition restraints.

They usually comprise two or more competitors (most commonly, retailers), who all have business with the same **non-competing party** (most commonly, a supplier), and use this third party as an **accessory** to their unlawful conduct.

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1. What are H&S conspiracies?

It is easier to understand the structure if we dissect the **bicycle wheel analogy** that stands behind the name of this specific form of cartel.

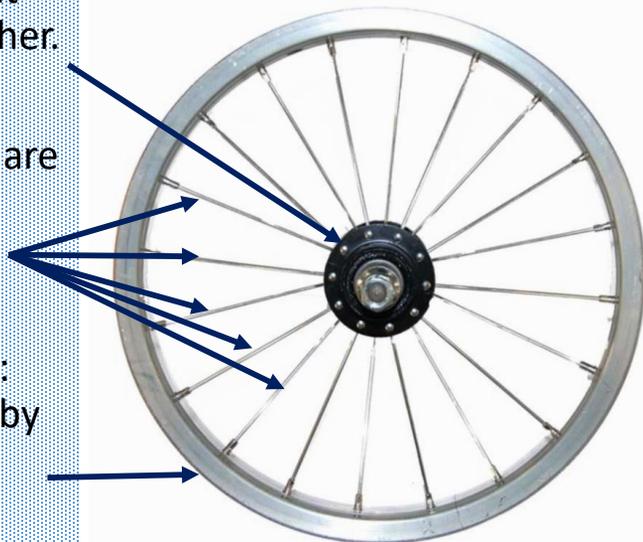
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The **HUB** is the central link that keeps all other elements together.

The **SPOKES** are the parts that are able to hold the rim, because they're United by the hub.

The **RIM** is what really matters: the final structure maintained by the spokes, that will allow the users to enjoy the final result.



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1. What are H&S conspiracies?

Starting from the end, the **final goal** that the conspirers want to achieve is the **illegal agreement** through which they will, in most cases, **fix the price** of a given product: that will correspond to the **rim**.

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The **conspirers** correspond to the **spokes**:

Separated economic entities, who try to achieve the common business objective of **maximizing their profits** at the expense of other competitors, other non-competing undertakings or the final consumers, by means of the said agreement.

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The “***extra ingredient***” of a H&S cartel is therefore the **HUB**:

A **third party**, whose interest in the formal agreement is not always very clear, and who will serve as the connection between the spokes.

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But **what interest do the *spokes* have** in including a third party, thus increasing the **complexity** of the cartel, and even the **risk** that one of its members applies for leniency?

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The intervention of this third party, who is apparently a **stranger** as to the cartel's main objective, will allow the conspirers to **avoid any direct contact** that could more easily be **monitorized** and **sanctioned**.

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If it is already difficult for NCAs and the European Commission to investigate undertakings who are suspect of cartel conspiracies, **this difficulty will increase exponentially** if all contacts are dealt through an undertaking that is **not directly interested** in the final result.

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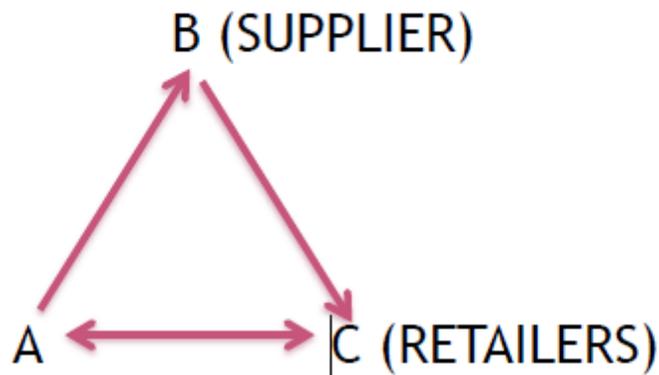
1. What are H&S conspiracies?

So, the competitors will achieve the final goal of horizontal coordination through **a set of vertical agreements** – or at least, a set of vertical **discussions**, or vertical **exchanges of information** – that are carried on **solely with the hub**, and **never among themselves**.

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1.1. What are H&S conspiracies?



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1. What are H&S conspiracies?

H&S cartels are thus a form of **coordinated practice**, that stands **perfectly within the sense** that has been clarified in several ECJ decisions.

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1. What are H&S conspiracies?

- i. **ICI (1972):** *“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.**”*

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- ii. **Suker Unie (“Sugar cartel” case, 1975)**
 The necessary independence of each undertaking’s strategy *“strictly preclude any **direct or indirect contact between such 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.”*

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1. What are H&S conspiracies?

iii. Ahlström (“wood pulp” case, 1988)

A concerted practice will only be proven where there are **no alternative “plausible explanations”** for the parallel conduct between the alleged parties in the agreement.

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1. What are H&S conspiracies?

It’s not always easy to separate these cases from those where the “hub” is a ***mere facilitator of the cartel***, by acting as a **moderator** between participants and encouraging the finding of **compromises**, sometimes in exchange of a **remuneration**, other times because of the **pressure** from its partners.

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Such cases do not present the same complexity: they are **traditional** cartels, with the sole detail that the parties had **some help** of another entity/undertaking who was not a direct competitor. **Treuhand case (2015): facilitators are also liable** for participating in cartels, even when they are not in the same market where the cartel operates.

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US Movie exhibition case (1939): it's not clear if this is a case of *facilitation*, of *abuse of a dominant position* or if it really was the *first H&S case*.

Two different **movie exhibitors** (*Interstate Circuit* and *Texas Consolidated*) independently exerted **pressure over distributing companies**, urging them to impose a minimum fare upon smaller competing exhibitors that ran "second-run theatres", where the fares were much cheaper.

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If the distributors failed to do so, those exhibitors (who were dominant in many states of the USA in the “first-run theatre” market), they would **refuse** to buy **first-run movies** (which had a **much larger profit margin**) from them.

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So, this scheme would ultimately **benefit both the exhibitors and the distributors**, who would profit because the price-raise in second-run theatres would **increase the demand on first-run theatres**, and hence **their own profit**. This was achieved **at the expense of competing exhibitors** (who would lose clientele) and of the **movie-goers** (who would have to pay more for their tickets).

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Although there was **no proven communication whatsoever between distributors**, the **Supreme Court** stated that

*“it was enough that, **knowing that concerted action was contemplated and invited**, the distributors gave their **adherence** to the scheme and **participated** in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, ... and knowing it, all participated in the plan.”*

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2. RECENT CASES

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2 Recent cases

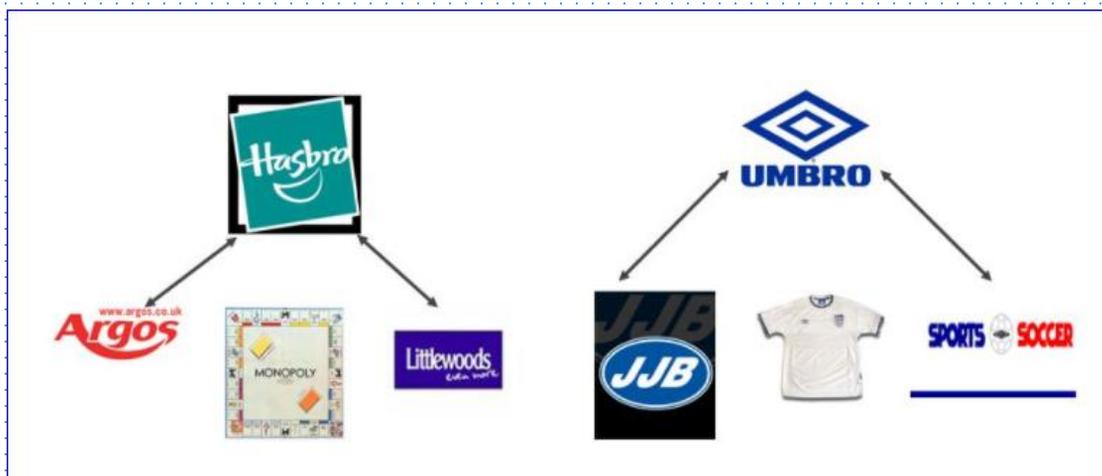
In the last 15/20 years there has been a surge of H&S cases in some EU jurisdictions.

This was especially noted in the UK, where the Office of Fair Trading, the Competition Appeal Tribunal and the Court of Appeal all agreed on sanctioning two H&S cartels back in 2003: the **“football replica kit”** and the **“toys and games”** cases.

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2 Recent cases



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2 Recent cases

The main questions that arise are:

- Can the verbal communications between the two retailers and the supplier, without the retailers ever communicating with each other, **give rise to a horizontal agreement?**
- **What standards of evidence should we apply to ascertain the existence of such a conspiracy?**

2 Recent cases

In these cases, the OFT and the CAT were satisfied that they could find a **“reasonable foreseeability”** in the parties behaviour: **A could reasonably foresee** that the information passed on to B would reach C; and **C could reasonably foresee** why that information was passed to him.

2 Recent cases

The reasoning behind the decisions rested, therefore, upon the basis of the parties' **constructive, and not actual, knowledge.**

The judge should establish **if it was reasonable to expect that a normal "A" or "C" should foresee** that the information would be passed, or why it was passed.

2 Recent cases

The Court of Appeal later **refined this criteria**, which it found to be **too broad**, as it could lead to *“extend to cases in which A did not, in fact, foresee that B would make use of the pricing information to influence market conditions, or in which C did not, in fact, appreciate that the information was being passed to him with A’s concurrence”*.

2 Recent cases

The criteria used by the CoA, and later upheld in the CAT's **Dairy Milk** decision (**2012**), stated that we will have a H&S conspiracy if all the five following circumstances were met:

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2 Recent cases

- i. **A discloses information to B** regarding, e.g., its future pricing intentions
- ii. **A may be taken to intend that B will pass that information to other retailers**, thus influencing market conditions;
- iii. **B actually passes the information to C**;
- iv. **C may be taken to know the circumstances that caused the information to be disclosed to him**, and
- v. **C actually uses it** in determining its own pricing conditions

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2 Recent cases

Regarding the **EU instances**, No H&S case has yet surfaced. There can be different explanations for this:

- The EU Commission is **satisfied** in applying the **vertical restrictions** regime, and extracting its consequences;
- The EU Commission didn't reckon it could **gather sufficient evidence** on the situations where there would arguably be an H&S case; or simply
- No real H&S case **has yet been presented**.

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2 Recent cases

Anyway, it will be interesting to know to which criteria the Commission and the ECJ will adhere:

- Those set by the UK Courts, or
- The ***reasonable foreseeability*** test, that the ECJ applied in the recent **Remonts case (2016)**: even though it was a **facilitation** case, and not one of H&S, it's quite possible that the same criteria would apply.

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Thank you for your attention!

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