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Hub-And-Spoke Arrangement under the Competition Act 2010

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ABSTRACT

This paper aims to briefly discuss what is hub and spoke arrangement and inasmuch it is can be said to infringe competition law regime. Hub and spoke remain prevalent as of now due to its complexity and significant anti-competitive effect posed by such arrangement. Plus,there is no solid measure in addressing this arrangement and the intertwined relationship between the entities makes it difficult for attribution of liability. Malaysian competition law regime is relatively new in the game by comparing to EU and UK competition law regimes. Even the aforementioned jurisdictions have not provided a clear guide to address hub and spoke arrangement. Throughout MyCC's decisions, it appears that hub and spoke arrangement has its foundation in Malaysia. Further, the hub or in form of trade associations and upstream players, in the context of MyCC's decision, always escaped from financial penalty regardless of active participation. The imposition of a symbolic fine seems to be unfavorable to MyCC when it comes to fining those who indirectly participate. This paper illustrates how the hub and spoke arrangement can instil anti-competitive conduct specifically in time with the rapid growth of digitalisation which discreetly becomes the hub. Thus, this paper provides two start-ups in considering for hub and spoke cases with reference to EU and UK approaches. Then, this paper wishes to caution that, EU and UK competition law regimes are different from the Malaysian which do not warrant for direct transplantation of aforesaid jurisdictions to Malaysian Competition Act 2010 due to some substantial differences. Having said all, this paper aims to clarify the question that Competition Act 2010 pursuant to section 4 provides a separate tier of agreement as it can only be either horizontal or vertical agreement.

Keywords: Competition law, Hub and spoke, Horizontal Cartel, Vertical Cartel, Undertaking.

INTRODUCTION

Cartel is a group of independent companies which join together to fix prices, to limit production or to share markets or customers between them. Instead of competing with each other, cartel members rely on one another's agreed course of action, which reduces their incentives to provide new or better products and services at competitive prices or conditions.[1]

Cartels can be categorized into two broad groups, horizontal cartels, and vertical cartels.[2] Horizontal cartels are referring to the anti-competitive conduct within the same tier of industrial players, whereas the vertical cartels will be referring to anti-competitive conduct within one supply chain and may involve different tiers.

However, in a situation where at least one of the markets is concentrated, it might be hard for the parties to come together to reach an agreement amongst themselves. This eventually led to the hub and spoke arrangement which will involve multi-tier industrial players. This situation can be seen, for instance, within the airline network market where the industrial players will rely on the operation of airport to coordinate as studied by Aguirregabiria & Ho (2010).

Hub-and-Spoke arrangements are "triangular schemes that involve economic players operating at different levels of the supply chain, thus containing both horizontal and vertical elements."[3] In such an arrangement, the parties will act as either a hub or a spoke. The hub will be facilitating the arrangement and conveying information between parties, whereas the spoke will be relying on that information and making business adjustments to maximize their welfare. This arrangement will then reduce uncertainty over the pricing intentions of competing suppliers and may be seen as a horizontal price-fixing cartel (Lorenz, 2013). However, Sahuguet and Walckiers (2013) argued that in general, vertical arrangement may be relatively less harmful in comparison with horizontal arrangement.

Speaking of Malaysian context, in the annals of Competition Act 2010, Hub and spoke arrangement is not specifically mentioned in the aforementioned Act.[4] Only times will tell how the inception of the hub and spoke will be expressly applied in the Malaysian context since MyCC had referred to EU principles and doctrines extensively in deciding cases before them. As of writing this paper, the decision from the Finding of Infringement under Section 40 of the Competition Act 2010 – Infringement of Section 4(1) and Section 4(2)(a) of the Competition Act 2010 by Container Depot Operators (hereinafter will be referred as Container Depot Operators case) resemble a tad of how hub and spoke arrangement could happen (Nasarudin Abdul Rahman & Haniff Ahamat, 2021). This draws the facts that, Container Depot Operators colluded among them and also the third party Conterchain Sdn Bhd as platform to facilitate price fixing through their system in managing the inflow and outflow of empty containers.

TYPES OF HUB AND SPOKE ARRANGEMENTS

Hub and spoke arrangements can take form in numerous ways. One way of categorizing the arrangement is by differentiating the type of parties involved or more specifically, the hub in the arrangement.

In general, the hub in a hub-and-spoke arrangement will be the upstream suppliers. As a hub, the suppliers will be facilitating the arrangement for the downstream distributors or retail sellers and take benefits from the arrangement via higher selling prices and constant sales of their goods.[5]

Besides, the hub can also be a trade association or other parties. The trade association here will become the platform to convey information and ensure compliance of all the industrial players via the issuance of guidelines or circulars. Since the trade association will be participated by industrial players from the same industry, it will be very easy for them to establish such an arrangement via the association.[6]

Apart from these traditional types of hubs, artificial intelligence and algorithm can also potentially be used as a hub to facilitate the arrangement between the parties. In particular, the algorithms are increasingly being used by market players to adapt to market changes, for instance, price adjustments based on pricing software. However, it remained arguable whether such as action can constitute an anti-competitive as the Indian Competition Authority in a similar context ruled the action of Ola Cabs and Uber in using third party software as not a hub and spoke agreement.[7]

Online platform operators may also act as a hub, and they may even take the role of both a facilitator and enforcer of anticompetitive practices, via the coordination of suppliers and retailers operating via its platform.[8] For instance, some secondary market or online platform allows the comparison of price amongst different industrial players, and this might potentially lead to the concerted practice and thus reduce competition in the market.

Apart from the distinction of hub or the parties faciliatating the arrangement, another way of categorizing hub and spoke arrangement is by differentiating the terms of the content.

These hubs and spoke arrangements often include relevant vertical elements such as RPM.[9] Typically, under such arrangement, the hub will be the supplier which will collate and distribute pricing information to the spoke distributors. Distinct from the traditional horizontal price-fixing cartel, the channeling of price-fixing intention in this situation will be through the hubs without any contact with the downstream industrial player, which usually is retailer or processor. Consequently, it will reduce uncertainty over the pricing intentions of rival distributors and lessen the competition in the market. One example will be the

decision of MyCC in finding of infringement by Container Depot Operators[10] where there is a vertical agreement involving two tiers of industrial players entered to raise charges against the user and MyCC found there was an infringement section 4(1) and section 4(2)(a) by the parties. The case will be analysed in more details in the next section.

It is worth mentioning that the pricing here does not necessarily require the actual prices, but the fixing of the discount rate, margin rate may also be caught under competition law. This can be seen in Argos Ltd, Littlewoods Ltd v. OFT, [11] where there are two bilateral vertical agreements or concerted practices between Hasbro, a toys manufacturer and two distributors, Argos and Littlewoods, and of a trilateral agreement, "with a horizontal component", between Hasbro, Argos, and Littlewoods with the aim to fix retail margins for certain Hasbro products. Similar example will be the decision of MyCC in finding of infringement against General Insurance Association of Malaysia and its 22 members[12] (hereinafter will be referred as PIAM case), where the subject matter is the fixing of the discount rate by the motor insurance industrial players.

In general, this will be caught under the retail price management under vertical hardcore infringement or even concerted practice as a horizontal price-fixing cartel. However, the proving of such an arrangement will be harder, due to the indirect nature of the contacts between the spokes. [13]

Besides, the hub-and-spoke arrangement may also take place in terms of other information transfers. For instance, there can be the channelling of market information, or even market-sharing intention, via the hub suppliers with the objective of reducing the competition in the market. This information can be related to the business strategy or market situation, and the sharing of it will usually be injurious to the competition in the market. This is because the industrial player can make informed decisions based on the decision and apply some business strategy to avoid competition.

The information transfers can be seen in Musique Diffusion Française,[14] where three exclusive distributors of Pioneer electronic equipment are involved in arrangement with Pioneer Electronic to prevent imports in France and therefore to maintain a higher level of prices. Meetings were held where the downstream supplier complaint about the existence of parallel imports to the upstream industrial player, Pioneer. Besides, Pioneer was also actively involved in inciting the discovery of parallel imports and restraining them.

POSITION OF HUB AND SPOKE ARRANGEMENTS IN FOREIGN JURISDICTIONS

It is undoubtedly that the EU competition regime is one of the referrals to many jurisdictions for its long-standing historical footprint and comprehensive regime, including in Malaysia (Shiung, 2017). Regardless of the United States Antitrust regime being the oldest competition law regime, its transplantation to the Malaysian context is always not been easily transilient due to the substantial nature of their approach in dealing with competition law regime. All in all, what can be said is that the United States approach is far stricter in relative comparison with Malaysian as infringement of US competition law regime or pricesly known as antitrust law may be punished with imprisonment.

Recalling from the position of EU itself, Amore (2016) claimed that hub and spoke formulation is not well established as they are yet to provide specific enforcement action against the hub and spoke infringement. To some extent, Perinetto (2019) argued that the EU development in curbing hub and spoke arrangement is yet to see a milestone decision to address this problem. However, there are cases that might be helpful in determining the liability of those who participate in the hub and

spoke arrangements. Regardless of EU and UK competition law regimes share similarities or approaches, when it comes to the hub and spoke, both jurisdictions treated such arrangements differently.

The approach taken by UK jurisdictions to detect hub and spoke arrangement is by applying the A-B-C test. The UK jurisdiction adopts A-B-C test that aims to purview interconnection between the hub and spoke. In conduit for A-B-C test, it requires the authority to infer the intention of the hub on the reason why certain sensitive information is being transferred to the competitors in the horizontal avenue supply chain. From the enforcer's standpoint, it is a daunting task to establish direct evidence since the pass of information might appeared for legitimate and lawful purposes.[15] As such, indirect evidence might be useful to infer the conduct of involved parties in contributing to anti-competitive arrangements.

To illustrate how A-B-C test is in work, it can be summarized in three elements. The first is in relation to the informational trail on pricing. It can be from one retailer to another retailer. Even though some are described as an exchange of information, in the context of the hub and spoke, information can be passed unilaterally by just one retailer (A) to another retailer (C). What makes this difficult is that the information trail is via a third party which is the hub (B). Second is the underlying motive behind the passing of information. The hub then passes the information to C, in a way C knows beforehand that the information was disclosed between A and B. This is rather a subjective question that should be determined on a case-to-case basis. The third is the imputation of knowledge on the information receiver C. If the competitor after receiving the information on the pricing which subsequently change their price in cohort, might be useful as to establish hub and spoke infringement.

The A-B-C test echoed the theory of harm (Odudu, 2011). Ergo, competitors may adjust their price after knowing the other competitors' future price, the upstream player may also benefit as they will have less competitive behaviour in the downstream. Both justifications provided will eventually lead to high prices incurred by the consumer.

A-B-C test is a well-celebrated approach originating from the case of Replica Football Kit.[16] The facts can be succinctly described on the involvement of sportswear retailers, inter alia JJB Sports plc (JJB), Allsports Limited (Allsports), and Sport Soccer in anti-competitive agreement on the retail price of replica football kit. The retailers, even though competitors, made a complaint against Umbro as a manufacturer for their plan to provide a discount on their recommended retail price for the replica kit due to extensive competitive price by Sport Soccer. Umbro agreed to their demand which then made bilateral communication with the retailers assuring that they will not have to marginalize their profit margin. Umbro acted as a hub had facilitated the future price of the retailers. Office of Fair Trading (OFT) found that the manufacturer and the retailers committed anti-competitive conduct by coordinating the price of Manchester United home Replica Shirt. OFT decision was later confirmed and affirmed by the UK Competition Appeal Tribunal and Court of Appeal.

Approach taken by the EU jurisdiction is somewhat different but distinguishable from the UK. In the AC Treuhand I case that can be considered as one of the early embark from the EU jurisdiction on the hub and spoke position.[17] In that case, AC Treuhand was the hub and the organic peroxides producers were the spokes as the former had possession of sensitive information of the producers such as their commercial activity, logistics, and administration. The arrangement between them was for price-fixing to preserve the market shares of the producers. On appeal, the Court of First Instance decided that the hub can be liable for the infringement

insofar they can in a way coordinate the price in the horizontal market regardless of they are not a player in such market. In determining whether or not the hub shall be liable, the court took the approach of looking at whether the hub knows such conduct or reasonably foresee that passing down the information may facilitate the anti-competitive conduct.

In juxtaposition between these jurisdictions, the UK seems to have a more detailed test in holding the hub to be liable. Both jurisdictions impute knowledge on the hub whether they know with such act will butter the anti-competitive conduct. The distinction is crucial because some alleged hubs like trade associations may provide information to their members which compete in the horizontal market. Passing information per se cannot be said to infringe the competition law regime since some information is for a legitimate purpose. For instance, According to Herold (1977), trade associations that provide standards of the product to ensure its safety or statistical report to make it aware for its members pertaining to economic performance in their industry. But that cannot be treated in a leeway without proper purview from the authority.

POSITION OF LAW IN MALAYSIA

In Malaysia, the relevant provision will be section 4 of the Competition Act where MyCC will not just examine the actual common intentions of the parties to an agreement, but also assess the aims pursued by the agreement in the light of the agreement's economic context.[18]

To date, there are three cases in Malaysia relating to the hub-and-spoke agreement.

First, the Container Depot Operators case[19] where the upstream industrial player, Containerchain System later coordinated the implementation of the RM25 DGC and the RM5 rebates by the target downstream Container Depot Operators through the Containerchain system. MyCC found that there was a vertical agreement between Containerchain and the Container Depot Operators which infringed section 4(1) by way of concerted practices. It was found that there was an agreement between Container Depot Operators in the same tier thus, it was a horizontal agreement through various meetings and arrangements where the purpose of that agreement is to fix the price that they charged hauliers contrary to section 4(2)(a).

Apart from the upstream industrial player acting as a hub, there are also cases where trade associations act as a hub.

For instance, MyCC's finding against Cameron Highland Floriculturist Association[20] (hereinafter will be referred as CHFA case) may also serve as a good example to depict hub and spoke arrangement. In that case, it was the CHFA, in the context of the hub and spoke, being the hub for the cartel. CHFA is a registered trade association that gathered sensitive information about the business in relation to increasing production inputs cost. The trade association then made the decision to increase the price selling of its members. The outcome was, MyCC ordered CHFA to put a stop to the infringement.

Besides, the PIAM case[21] where PIAM as a trade association, facilitated the arrangement between the motor insurance industry player to fix the discount rate for the PARS workshop in regard to certain vehicles and the labour rate. There was horizontal agreement found in the case which violated section 4(2)(a) of the Competition Act 2010. MyCC doesn't expressly refer to the concept of Hub and Spoke arrangement but by the mode of the arrangement, it shall also fall under the concept of Hub and Spoke arrangement.

Thus, it can be seen that in Malaysia, the focus is not on the structure of the whole arrangement or the A-B-C structure as in Europe. What is of essence is the intention of parties in the arrangement and whether there is the object to disrupt the competition in the market. MyCC will then

categorize the arrangement into different pigeonholes, either the horizontal cartel under section 4(2)(a), vertical cartel under S4(1) of the act or both. The concerted practice may also be applied to impose liability on parties, especially in the case where there is no direct evidence such as agreement, meetings between parties.

CHALLENGES

The problem when it comes to the Malaysian context in dealing with the hub and spoke arrangement can be seen in the EU case, the AC Treuhand Cases. On the appeal, AC Treuhand put forth their argument contending that they cannot be made as a party to the cartel as they were not a contracting party. The Court of First Instance held that they undertook anti-competitive conduct of other parties which suffice to attribute liability against them. However, they were only regarded as co-proprietor and were fine with € 1000 as they were found not to be actively participated in the infringement.

The term agreement as provided under section 2 of the Competition Act 2010 include the decision of the trade association. One can argue that decision of a trade association is different from a trade association providing information. The decision of trade association, which will amount to an agreement might disguise trade association involvement as parties to the agreement because its entity itself can be stand alone as an agreement[22] between enterprises. Nonetheless, trade association might be caught under collusion regardless of impugned over a question of whether or not they are party to the agreement.

It is distinguishable with the EU and the UK approach as both adopt the jurisprudence of undertaking. The term for the undertaking is nowhere mentioned in the Competition Act 2010. As an alternative, the Act adopts the word enterprise as the addressee for the applicability of the Act. The key takeaway in testing the differences between enterprise and undertaking can be seen in the PIAM case as MyCC treated such words as akin to one and another which give the same meaning.[23] Thus, in all unchartered ambiguity, symbolic fine, which is yet to be used as a mechanism of deterrence for infringement of competition law might find the right time when it comes to the hub and spoke arrangement. Particularly, against the hub as it has no impediment in law to apply the symbolic fine.

CONCLUSION

Hub and spoke remain prevalent though in disguise challenge for competition authority in Malaysia. Among many, is towards the digital economy in the face of online platforms as consumer market providers. Rapid digitalization and advance of computer technology affect market behavior through price set algorithmically, data collection which can compound to price-fixing, market sharing, and collusion (Ramaiah, 2019). There is yet no specific guideline to tackle this issue from the MyCC. In light of the seriousness of the infringement by the hub, to reinstate, MyCC may consider having their first step in addressing this intertwined arrangement by imposing a symbolic fine as per succinctly discussed in the PIAM case.[23] This is due to the reading of section 40(1) of Competition Act 2010 that confers power to MyCC to impose a financial penalty. Since the inception of Competition Act 2010 marks MyCC 10th Anniversary, competition law under the purview of MyCC is getting on the right track progressively to formulate and develop Malaysian competition law. MyCC has set precedent pro re nata of their seriousness against anti-competitive conduct. We shall see perhaps expect, comprehensive competition law regime development in Malaysia in the near future.

NOTES

[1] Cartels, Competition Police, European Commision, https://ec.europa.eu/competition-policy/cartels_en (Accessed on 30 October 2021)

[2] Competition Act 2010, Section 4(1).

[3] Directorate For Financial and Enterprise Affairs Competition Committee, "Hub-and-spoke arrangements – Note by the European Union" (2019) p 2-6.

[4] Competition Act 2010, Section 4.

[5] Infringement of Sections 4(1) and Section 4(2)(a) of the Competition Act 2010 4 Container Depot Operators & 1 Software Provider 700.2.005.2013.

[6] Infringement of Section 4(2)(a) of the Competition Act 2010 by the General Insurance Association of Malaysia and its 22 members., 700–2.1.3.2015.

[7] Samir Agrawal v. ANI Technologies and Ors 37 of 2018 decided on 06.12.2018.

[8] Directorate For Financial and Enterprise Affairs Competition Committee, "Hub-and-spoke arrangements – Note by the European Union" (2019) p 7.

[9] Directorate For Financial and Enterprise Affairs Competition Committee, "Hub-and-spoke arrangements – Note by the European Union" (2019) p 2.

[10] Infringement of Sections 4(1) and Section 4(2)(a) of the Competition Act 2010 4 Container Depot Operators & 1 Software Provider 700.2.005.2013.

[11] See Argos Ltd, Littlewoods Ltd v. OFT [2004] CAT 24.

[12] Finding of Infringement under Section 40 of the Competition Act 2010 – Infringement of Section 4(2)(a) of the Competition Act 2010 by the General Insurance Association of Malaysia and its 22 members, Para 136.

[13] Directorate For Financial and Enterprise Affairs Competition Committee, "Hub-and-spoke arrangements – Note by the European Union" (2019) p 9.

[14] Joined Cases 100–103/80, SA Musique Diffusion Française v. Commission, [1983] ECR 1825.

[15] EU Guidelines (2011) Para 95.

[16] Decision of the Office of Fair-Trading No. CA98/06/2003 – Price fixing of Replica Football Kit.

[17] Commission Decision of 10 December 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 — Organic peroxides).

[18] Malaysia Competition Commission ('MyCC') Guidelines on Chapter 1 Prohibitions (2012).

[19] Infringement of Sections 4(1) and Section 4(2)(a) of the Competition Act 2010 4 Container Depot Operators & 1 Software Provider 700.2.005.2013.

[20] Finding of Infringement under section 40 of the Competition Act 2010 – Infringement of Section 4(2)(a) of the Competition Act 2010 by Cameron Highlands Floriculturist Association, Para 1.19.

[21] Finding of Infringement under Section 40 of the Competition Act 2010 – Infringement of Section 4(2)(a) of the Competition Act 2010 by the General Insurance Association of Malaysia and its 22 members, Para 460.

[22] Polypropylene (1986) OJ L 230/1, Para 87.

[23] Finding of Infringement under Section 40 of the Competition Act 2010 – Infringement of Section 4(2)(a) of the Competition Act 2010 by the General Insurance Association of Malaysia and its 22 members, Para 136.

[24] Finding of Infringement under Section 40 of the Competition Act 2010 – Infringement of Section 4(2)(a) of the Competition Act 2010 by the General Insurance Association of Malaysia and its 22 members, Para 460.

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