Hub and Spoke: An Analysis of the Existing International Scenario and the Draft Competition Amendment Bill 2020

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Abstract

Recently, there has been a lot of public debate about amendments to the Competition Act, 2002 and due to the dynamic changes in various industries questions have been raised about the competency of Competition Commission of India to provide solutions to issues emerging in the field. Due to this The Ministry of Corporate Affairs has drafted Competition (Amendment) Bill, 2020 and kept it open for public comments. Amongst various changes, it also addresses a new issue of Hub and Spoke Agreements. Traditionally the anticompetitive agreements have been divided into two types, horizontal and vertical agreements; however, hub and spoke agreements have some characteristics of both them but do not strictly fall under either of the categories. This paper analyses the hub and spoke agreements, its economic effects and the market at large. The proposed amendment is scrutinized by discussing its advantages and disadvantages, and a comparative analysis with other countries like USA, United Kingdom, Germany, Poland, Russia and the EU is drawn. Lastly, the paper suggests few pragmatic measures to resolve the expected complications especially w.r.t. the amendment's implementation.

Keywords: Horizontal Agreements, Vertical Agreements, Hub and Scope Agreements, Draft Competition Amendment Bill, 2020 and, Economic Effects.

I. Introduction of the Concept

Hub and Spoke ("H&S") agreements are a combination of two anti-competitive agreements, a set of vertical agreements, all having a common party (the "hub") and a different party for each agreement (the "spokes"). The spokes are competitors operating at the same level, whereas the hub is at a different level at the production chain. The second anti-competitive agreement is among the spokes, under which they transfer information to each other or collude in any other manner via a hub, which removes the need for direct communication. However, mere proof of direct communication does not diminish the hub's role in the arrangement. The term 'hub and spoke' is derived from the analogy of a wheel, where the participants in the same level of the production cycle are spoke of the wheel, the participant which is either the common supplier or the retailer is the hub of the wheel and the agreement is the rim of the wheel, thus making it a functioning mechanism.

a. Difference between Horizontal Agreement and H&S

A horizontal agreement has not been defined exhaustively in the Competition Act, 2002 **("the Act")**, but a broad understanding can be drawn of it as an agreement among enterprises engaged in similar or same businesses. It includes cartels, and other agreements to determine prices, limit production, share the market, bid rigging[2].A cartel has been defined as an agreement among competitors to eliminate competition[3], it can be achieved by regulating the production,

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[2]The Competition Act, §.3(3), (No. 12 of 2003).
[3] D.L. Kaseman and J.H. Mayo, Government and Business: The Economics of Antitrust and Regulation (Fort Worth: The Dryden Press, 1995*)* 152.

distribution, price or sale of the commodity[4] or by any other manner to achieve monopoly[5].
All the members of a horizontal agreement are at the same level in the production chain which is not the case in the H&S agreement, where the hub is necessarily at a different level than that of spokes.

Another difference is that often such agreements aim to obtain a monopoly in the market, which is rare in H&S agreements due to the different markets H&Ss function in. Furthermore, it is often in the retailer's interest that the competition in the producers' market thrives as a result of which it will get the best commodity at the most competitive price. Thus, achieving a monopoly by either hub or spoke may be counterproductive in the long run.

b. Difference between Vertical Agreements and H&S

A vertical agreement is an agreement among enterprises at different stages of the production chain that causes Appreciable Adverse Effect on Competition ("AAEC").The most obvious distinction between a vertical and an H&S agreement is that not all the members are not operating on the same level of production, the spokes are also each other's competitors. This is the primary reason why horizontal agreements are by default anti-competitive whereas AAEC has to be established for vertical agreements. However, since H&S is a combination of both the determination of which standard of proof is applicable is a point on which many jurists have different opinions.

c. Characteristics of an H&S Agreement

Commonly the H&S arrangements have three characteristics; the first characteristic is the horizontal agreement amongst the spokes, similar to a cartel. To prove its existence, the evidence is required of the cartel members' coordinated behaviour and the communication amongst them. The H&S arrangement eliminates the need for direct communication among the spokes, making tracing such an exchange of information more difficult.

The second characteristic of such arrangement is the vertical agreements between the hub and individual spokes, these agreements result in an exchange of information which in the ordinary course of business is legal and may even be pro-competitive, but in H&S arrangements, the aim of such communication is that hub forwards such information to other spokes which aids coordinated anti-competitive actions.
And the last characteristic is economic benefits the parties seek to achieve through the H&S agreement.

d. Types of H&S Agreements

Pure H&S Agreement: In pure H&S agreement the hub acts as a medium of communication between the competitors. It only enables the cartel formation and is not a part of the same in any other capacity. Conduct of the parties, the market, etc will determine any restriction or adverse effect on the competition

[4]The Competition Act, §.2(c), (No. 12 of 2003).
[5]UOI v. Hindustan Development Corporation, AIR 988 (SC: 1994).

Mixed H&S Agreement: In a mixed H&S agreement the hub not only enables horizontal restraints but also imposes vertical restraints. For example, the hub in addition to exchanging information may also impose vertical restraints such as Resale Price Maintenance ("RPM"), tie-in arrangements etc. in order to facilitate the horizontal agreement or for its own benefit. It not only facilitates collusion but also takes part in the same.

II. Economic Analysis of H&S Arrangement

An analysis of the economic aspects of the H&S arrangement can be drawn by keeping in mind two basic principles. First is the foundational principle of economics, the direct proportionality between the demand and price, and the inverse relation between the supply and price. The second principle is the positive impact that competition has on the market, including a boost in productivity, increased efficiency, fair competitive prices, fostering international competitiveness and innovations, and promoting economic growth and dynamic markets. The possibility of monopoly can be counterproductive to H&Ss' economic interests on different levels of the production chain, as a monopoly at any level will adversely affect the traders at other levels. For example, A is a supplier of a commodity 'R' and is acting as a hub for B, C and D who are the producers of R. If as a result of such an arrangement, the market of production of R becomes an oligopoly and with the spokes becoming the only viable producers, they will, in the long run, increase their selling prices to increase their profits and A will have to accede to their conditions due to a lack of alternatives. Similarly, if the market of supplier of R becomes a monopoly and A becomes the only producer, the spokes will also need to submit to its demands.

a. Economic Incentives

Therefore it is imperative to understand the economic incentives for such arrangements, OECD provides for four scenarios and the economic incentives available to H&S in each such scenario[6]: The supplier responds to requests of retailers: Assuming the retailer isn't dominant in the market, the supplier can either reduce the prices on the request of retailers, which will lead to an endless downward spiral of increasing losses or it could facilitate standard or coordinated prices among the retailers by an H&S arrangement. This will although, decrease the total sales, due to higher prices but increase the earnings of both the supplier and the retailers than with uncoordinated lower prices.

The supplier faces cost increases: Another possibility is where due to increased production cost, the supplier has to increase the prices, and in a retailer competitive market, the only way suppliers can increase the prices (with least opposition from the retailers) is by ensuring a general price increase. This would be more probable in a market structure where the supplier has considerable market power; the UK dairy case discussed later is an example of such a situation.
Supplier collusion: Here, the suppliers collude to fix the final retailing price rather than the wholesale prices charged to the retailers due to their more predictable nature. In turn, the retailers' profits are also increased for their participation; an example of this can be the Apple e-book case discussed later.

[6]Organization for Economic Co-operation and Development (OECD), Roundtable on Hub-and-Spoke Arrangements – Background Note, 25 November 2019, DAF/COMP (2019)14, (May 2, 2020: 13:10), https://one.oecd.org/document/DAF/COMP (2019)14/en/pdf.

A powerful retailer promotes collusion on the supplier level: A powerful retailer may benefit from a conclusion of the suppliers for increasing its market power, to ensure its market strategy isfollowed by other retailers, to drive competitors out or to prevent new competitors to enter in the market.

b. Larger Economic Effect on the Market

As mentioned above there are various incentives and benefits to the parties of an H&S agreement, but such an agreement will inevitably have anti-competitive effects. According to the theory of harm, such agreements will not only hamper economic development but also affect free trade functioning in the market. Such coordinated practices will necessarily lead to an increase in retail prices of the products/services, which will be against the interests of the consumers. As a result, the demand may reduce and the consumers may look for alternatives, which in turn will negatively impact the industry of the H&Ss. Sale volumes and the quality of the product may also deteriorate, other non-price parameters may also get affected. In extreme scenarios, it may ultimately lead to foreclosure of competition and the downfall of the said industry.

III. US Antitrust Law and H&S Conspiracies

a. Legislation

Three legislations are dealing with the American Antitrust regime namely, the Clayton Act, the Sherman Act and the Federal Trade Commission Act ("**FTC Act**").H&S has been held punishable under the following sections under various cases by the Commission and the Appellate Courts.
Section 1 of Sherman Act[7] prevents all contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or foreign nations.[8]Section 5 of FTC Act[9]prohibits 'unfair methods of competition'; including conduct that violates Section 5 or any other antitrust laws. Criteria followed in pursuing such violations are, substantial harm caused to competition, no precompetitive justification, and robust economic evidence of the anti-competitive effects.[10]The enforcement body, Anti-Division of the US Department of Justice can pursue criminal charges only if the parties intended to enter into an agreement to restrain the trade, otherwise civil enforcement actions are pursued.

b. Important Cases

The H&S agreements have been a part of American anti-trust jurisprudence for the last eighty years.
Interstate Circuit v. US[11]: The distributors (and owners) of the copyrights of a feature film entered into an agreement with the eight first-run theatres. The agreement mandated the owners do not share the show timing with any other feature film and while granting the licenses to second-run theatres in Texas and New Mexico, mandate a minimum admission fee along with

[7] Sherman Anti-trust Act 1890, §.1,
[8] Sherman Anti-trust Act 1890.
[9] Federal Trade Commission Act 1914, §.5.
[10]Maureen Ohlhausen, Section 5 of FTC Act: Principles of Navigation, (May 1, 2020: 12:10)
[11]Interstate Circuit v. U.S., 306 U.S. 208 (SC: 1939).

exclusive show timings. The effect of such agreement was twofold, first, to protect the distributors from the competition with other feature films being run at the same show timing and second, to protect the first-run theatres from the second-run theatres by maintaining high prices and requiring a minimum admission fee. All their actions seemed independent from each other since there was no evidence proving otherwise. However, the Court dismissed the need for a simultaneous action and held there was a deemed knowledge of the other owners' participation. Thus, the Supreme Court concluded that the contract and the conspiracy among the distributors and theatres contravened Section 1 of the Sherman Act.

Theatre Enters. Inc. v. Paramount Film Distrib. Corp[12]: The case had identical facts, here, however, the Court held that parallel vertical agreements without any proof of an agreement among the competitors do not form an H&S agreement, and the agreement among the spokes is the key component of the offence.

United States v. General Motors Corporation[13]: Here the defendant attempted to justify the pro-competitive effect of the vertical agreement among the H&Ss, but the courts rejected it by stating that such effect is overridden by the per se illegality of the horizontal agreement among the spokes. Supreme Court upheld the mandatory requirement to prove a horizontal agreement among spokes, to form an H&S agreement, whether by circumstantial proof or direct proof in many cases[14], it has been said 'rimless wheels do not give rise to a hub and spoke conspiracy and are not actionable'[15]. These cases are treated as merely several cases against the same defendant and nothing more[16]Circumstantial evidence that proves the existence of a horizontal agreement is called *"*plus factors*"* some of these are, sudden changes in business practice[17] spokes actions contrary to self-interest[18], knowledge about the agreement with other spokes and thus expecting reciprocal actions[19].

Toy R Us case[20]: TRU was a dominant player in toy retailing industry, there were different toy retailing stores like traditional stores with a high-profit margin, the general discounters which had lower variety and the special discounted stores. TRU had monopolized the low price end toy stores having the lowest prices for the toys. However, the innovation of warehouse clubs like Costco and Pace TRU's position was challenged, these stores stocked a variety of toys, and by virtue of membership benefits sold toys at a much lower price than TRU.TRU then entered into vertical agreements with the toy manufacturing giants by changing its policy and including the following conditions:

1) The clubs could promote a product only when carried the entire line,

[12]Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (SC: 1954).
[13]United States v. General Motors Corporation, 384 U.S. 127 (SC: 1966).
[14]NYNEX Corp. v. Discon Inc., 525 U.S. 128, 136 (2nd Cir: 1998); Bus. Elects. Corp. v. Sharp Elecs. Corp., 485 U.S. 171, 734) (SC:1988); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (SC: 1984).
[15]In re Insurance Brokerage Antitrust Litigation, 618 F.3d 300, 336 (3d Cir. 2010);
Dickson v. Microsoft Corporation, 309 F.3d 193 (4th Cir.: 2002).
[16]Dickson v. Microsoft Corp., 309 F.3d 193 (4th Cir. 2002); Guitar Centre, 798 F. 3d 1186, 1192 n.3 (9th Cir. 2015); In re Insurance Brokerage Antitrust Litigation, 618 F.3d 300, 336 (3d Cir. 2010).
[17] interstate Circuit v. United States, 306 U.S. 208 (SC: 1939).
[18]Toys "R" Us, Inc v. FTC, 221 F. 3d 928 (7th Cir.: 2000).
[19]United States v. Apple, 791 F.3d 290 (2d Cir.: 2015).
[20]Toys "R" Us, Inc v. FTC, 221 F. 3d 928 (7th Cir.: 2000).

2) TRU had the first right to refuse all exclusives, clearances, and closeout items sold to the clubs.
3) There should be special packs containing old and basic products.
4) The prices were non-negotiable.

The TRU also communicated the enforcement to all the other manufacturers. The effect of these agreements was quite evident, in the year prior to the introduction of such new policy the clubs' share of all toy sales in the US increased from 1.5% in 1991 to 1.9% in 1992 and the year after the toy sales dropped to 1.6% even when the overall clubs' sales increased.

The Commission held that TRU involved in a variety of anti-competitive vertical agreements and led the manufacture's boycott of the warehouse clubs. In the appeal, TRU challenged that there was insufficient evidence for proving the horizontal agreement, it was found where before the TRU's policy change the manufactures were planning to increase their supply to the warehouse clubs post the policy they took measures to reduce it, which was contrary to their self-interest and thus a plus factor.

The next argument on behalf of TRU was lack of its market power due to lack of share in the manufacture's market. The Court of Appeals rejected the argument as the market power can be determined either by a dominant market share or by direct the effects of its actions as was seen for the boycott, thus the boycotting firm can be deemed to have market power[21].
The order prohibited TRU from entering into any vertical agreement with its suppliers due to its repetitive violation. Additionally, TRU was prohibited from seeking information from suppliers about their sales and from compelling suppliers to limit sales to any toy discounter.

United States v. Apple[22]: Amazon launched 'kindle' in 2007 and by 2009 it could be solely credited for 90% of all eBook sales. It followed a wholesale model, wherein the publishers recommended a digital list price and received a wholesale price for each ebook that Amazon sold. In exchange, Amazon determined the retail price on Kindle. However, later it departed from this model and for the new e-books and the New York Times bestsellers there was one staple price of $9.99 which was the price that is paid to the publishers.

The six leading publishing houses namely, HarperCollins, Hachette, Macmillan, Random House, Penguin and Simon & Schuster ("Big Six**"**) were troubled by such wholesale prices effect on the print book market. They met once a quarter to discuss their common challenges; they even adopted the practice of windowing[23].

Apple planned to introduce its iPad with an e-book marketplace, ibookstore if the five publishers of the Big Six agreed to adopt Apple's Agency Agreement ("AAA"). Under AAA the publishers would set the retailing prices of the e-books, of which 30% would be Apple's commission. The AAA had two more conditions, firstly, the prices will be realistic and secondly, the Big Six had to convert all their retailers of e-books to the agency model. Thus effectively solving the

[21]Northwest Stationers Wholesale Stationers v. Pac. Stationery, 472 U.S. 284 (SC: 1985).
[22]United States v. Apple, 791 F.3d 290, 322 (2d Cir. 2015).
[23] Windowing is withholding the eBooks till few months of the hardcover copies of the books being published, to increase the sale of the printed books.

competition Apple faced from Amazon without meeting the $9.99 pricing. Under this model, there were three price caps with a minimum of $12.99, which were finalized only after negotiations with the Big six.

Apple also had a Most Favouring Nation ("MFN") clause requiring the publishers to give Apple the best terms offered by them to any other e-book retailing store. By January 2010 five of the Big Six (except Random House) adopted the Agency Model.

The courts held that Apple orchestrated the horizontal agreement among the publishers and thus, the per se rule applied. As the horizontal agreements to increase prices are by default unreasonable, the involvement of a vertical market player does not reduce its anti-competitive effect. It rejected Apple's argument of precompetitive justifications for horizontal price-fixing as there was no productive relationship for the betterment of the market. Even after per se rule was applied by the Court, the court further allowed a "quick look inquiry" of the rule of reason, under which Apple's contention of market entry to enable itself and also other retailers to have access the market by eliminating Amazon's $9.99 price point was rejected, along with an effect of "de-concentrating" Amazon's position by an essentially giving power overpricing to the Publisher Defendants. Apple was also unable to prove any relation between the eventual decrease in eBook pricing and its agreement with the publishers.

In the opinion of Lohier, Circuit Judge, and of Jacobs, Circuit Judge stated that the rule of reason should be applied in H&S cases based on existing precedence.[24]Hon'ble Lohier J. found Apple liable under the rule of reason Hon'ble Dennis J. absolved it from any liability. The dissenting opinion of Hon'ble Dennis J, also stated that the Sherman Act was not violated by Apple, mere increase in the prices post-Apple's entry is not adequate to prove the anti-competitive behaviour. Apple's agency model is recognized as a legitimate tool to de-concentrate the e-book retailing market and removing entry barriers along with monopolization. Amazon's 90% monopoly and below cost retailing price had its anti-competitive effects like capturing the market, maintaining its monopoly and acting as a barrier to new entrants[25].

IV. Jurisprudential Analysis

From the extensive discussion, a clear development of the concept of H&S conspiracies can be witnessed, from the recognition of such agreements as parallel vertical agreements to the understanding of H&S as a horizontal agreement facilitated by various vertical agreements. The application of per se rule has been majorly accepted to these conspiracies however, the issue of the relevant market is still left unanswered. Another issue that is not dealt with is of the liability of the parties, whether the hub orchestrating the entire conspiracy is deemed to have a greater liability or whether the liability is contingent on the involvement of the parties, or the parties are liable under the conventional blanket liability same as of other anti-competitive agreements.

a. European Union's Approach to H&S Agreement

[24]PSKS, Inc. v. Leegin Creative 8 Leather Prods., Inc., 615 F.3d 412 (5th Cir. 2010).
[25]United States v. Apple, 791 F.3d 290, 322 (2d Cir. 2015) (2-1) (Jacobs J. , dissenting).

i. Legislation

Under the EU competition regime, the terms H&S have not been defined however they have been indirectly mentioned in its Horizontal[26] and Vertical guidelines[27] and have been interpreted to apply to the same.In Horizontal guidelines, Para 55 states that information can be exchanged in two ways namely (i) directly shared between competitors or (ii) shared indirectly through a common agency or a third party such as a market research organisation or through the companies' suppliers or retailers.The Vertical Guidelines also mention H&S agreements briefly. It envisages the hub to be an upstream supplier. Para 224 of the Guidelines talks about RPM also includes a scenario in which distributors who are strong may be able to persuade or even compel the supplier/s to fix their prices above the level of competition and in order to get collusive stability.

In EU Competition regime, it is a trend to recognize H&S agreements as concerted practices and not per se agreements. The concerted practice may be described as a way of coordination between undertakings which, without actually reaching the stage where it can be said to be an agreement, and knowingly substitutes practical cooperation between them for the risks of competition."[28] Such practices are punishable under Section 101 of the Treaty on the Functioning of the European Union ("TFEU"). It prevents three types of practices namely arrangements between undertakings or their associations and/or concerted practice which have anti-competitive effects. Therefore in order to satisfy infringement of Section 101 the following conditions needs to be proved:

1. An agreement or concerted practice must be present.
2. It should cause a restriction of competition.
3. It should not be exempted under Section 101(3) of TFEU.

ii. EU Judicial Approach

It is essential to point out that European Commission ("EC") has not taken up any enforcement action per se against any H&S agreements however there are some judgments in which indirect coordination between competitors through the third party has been penalized.

E-books case[29]: In this case, Apple approached Four Publishers with the intention of entering the e-book selling market. It proposed to sell e-books in the agency model. The objective behind this was to reduce retail competition with its competitors. Apple in its agreement added a retail price MFN clause which entailed that if any of the publishers offered a lesser price of the e-book, the publishers had to also reduce the price book in the ibookstore to balance the prices. In addition to this apple also imposed identical price grids with maximum retail price points beyond which the publishers could not charge in respect of new e-books. EC was of the view that these steps were taken by the parties in order to reduce competition in the European market and in turn compel

[26]Guidelines on the applicability of art. 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, OJ C 11, 14.1.2011, p. 1– 72, (May 10, 2020: 12:05), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN.

[27] On Vertical Restraints, OJ C 130, p. 1–46, (May 10, 2020: 10:20),https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF.

[28]ICI v Commission, Case 48-69, Para 64, (EC: 1972)

[29] Case COMP/39847 - EBOOKS.

other retailers including Amazon to increase its retail prices. EC's view was that Apple orchestrated the whole operation by keeping the publishers informed about the negotiations with the others. The EC regarded the whole operation between the parties as concerted action as there was both indirect and direct exchange of information between Apple and the four publishers. However, the same was not regarded as H&S agreement which is probably due to the fact that in addition to having a common hub i.e. Apple, the publishers also had direct contacts with each other.

In Pioneer judgment[30], Philips judgment[31] and Asus judgment[32] Denon& Marantz judgment[33] etc. EC imposed fines on various parties for concerted practices under section 101(1) of TFEU. Even though they were found to be vertical agreement the EC included the possibility of involvement of suppliers.

ICAP judgment[34]: EC imposed a fine of € 14,960,000 to a broker based in the UK for enabling six cartels in the derivatives market by acting as a communication channel and distributing misleading communications.

AC Treuhand I[35]("AC"): EC found AC liable for facilitating cartel amongst three producers of organic peroxides market. The EC was of the view that AC conducted the meetings amongst the producers and hid the evidence and was fined € 1000. The Court held that the party cannot evade liability based on the argument that it had played only an accessory or passive part in the cartel. The fact that the undertaking did not take an active part in the market will not lead to escaping of liability. AC Treuhand also argued that EC infringed the principle of nullumcrimen, nullapoena sine lege[36] by imposing a penalty on an act previously not considered illegal. The court also rejected this contention on the grounds that there was already settled law in regards to the liability of undertakings which are complicit to the offence.

b. United Kingdom's Approach

Under the UK's Competition regime such practices are punished under Section 2(1) of Competition Act 1998 whose wordings are along the same lines as Section 101 of TFEU. Sports Replica kits case[37] OFT found certain retailers and suppliers of sportswear guilty of price-fixing. In this case, Sports Soccer, one of the new entrants was charging prices way below the recommended retail prices ("RRP"), which lead JJB, another retailer to approach Umbro, the producer of replica sports kits asking it to reduce its wholesale prices so that the profit margin can be maintained. Umbro thereafter approached other retailers and entered into agreements with them so that they would charge prices up or above the RRP and also provided information to them about the conduct of their competitors. An appeal was filed to the Competition Appellate Tribunal ("CAT") which upheld the decision and provided some significant insights about the

[30] Cases COMP/AT.40182-Pioneer.
[31] COMP/AT.40181-Philips.
[32] COMP/AT.40465- Asus.
[33]COMP/AT.40469-Denon &Marant.
[34] Case T-180/15.
[35] Case T-99/04.
[36] The Latin means that there must be no crime or punishment except in accordance with fixed, predetermined law
[37] Case CP/0871/01.

treatment of such practices. CAT, laid down that:

> "if (i) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one), (ii) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and (iii) C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practise having as its object the restriction or distortion of competition." [38]

UK test: This case led to the development of the three-limb test in the UK. It envisages a triangular relationship between the participants. It can be explained in the following way:

1. A discloses information to B (hub)
2. B discloses this information to A's competitor C
3. C uses this information and changes his behaviour in the market to its advantage.

In addition to this the court has also emphasized the subjective element i.e. the intention, which can be explained in the following way:

1. A discloses the information about its future conduct to B with the **intent/knowledge** that it will be communicated to his competitor i.e. C
2. C must know under what circumstances and the reason why the information has been received by it and uses such information to change its conduct.

The same is also regarded as the state of mind test which has been enumerated in the Dairy products case[39]. In this case, the Office of Fair Trading ("OFT") imposed a penalty on 9 supermarkets (spokes) for engaging in anti-competitive activities. They exchanged information not directly but through a dairy processor (hub), which in their opinion formed an H&S cartel. One of the supermarkets i.e. Tesco which was fined around £ 10.4 million filed an appeal in CAT. The court stated that in case of direct exchange of information there is no requirement to establish the state of mind of the party. However, where a third party i.e. B the supplier becomes the way through which information is exchanged between A and C it becomes important to establish the state of mind of the parties. In such a case there can be no presumption of the state of mind of the retailers.

c. Germany's Approach

On the same lines of Section 101 of TFEU, Section 1 of the German Competition Act i.e. Gesetzgegen Wettbewerbsbeschränkungen prohibits agreements and concerted practices which have an anti-competitive effect.

Beers case[40]: A penalty of 112 million euros was levied on the suppliers and retailers for entering into vertical agreements through which retail price level of beer was sought to be

[38]JJB Sports PLC v. OFT, 27, (2004: CAT).

[39] Case No. CA98/03/2011.

[40]Bundeskartellamt, Case summary of the decisions of 16 June 2015, 30 December 2015, 28 April 2016 and 2 December 2016, B10-20/15, (May 12, 2020: 13:00), http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B10-20-15.pdf?__blob=publicationFile&v=3.

maintained. The prices were monitored and maintained by the producer through meetings and other tools.

Clothing case[41]: There was an imposition of a penalty of 10.9 million Euros both the manufacturer and retailers of clothing brands where the manufacturer entered into a systematic understanding with the retailers about the prices of its products.

d. Other Jurisdictions

Poland: In PCW[42], Tikkurila[43]and Akzo Nobel[44] the Polish Competition Authority fined the paint manufacturers and DIY stores for entering into retail price-setting arrangements. They were punished for RPM. However, due to the fact that there was no direct communication between retailers and that the supplier was, in fact, providing information implies that there was an H&S arrangement between the parties.[45]

Belgium: In the Supermarkets case[46] the Competition Authority of Belgium levied a penalty of 174 million Euros on 11 suppliers and 7 retailers for exchanging retail prices of drugstore and hygiene products. Such an act was done by the retailers through the suppliers and no information was directly communicated.

e. Jurisprudential Analysis

Even though the above-mentioned cases do give us a sense of the attitude that competition authorities in Europe have towards H&S agreements the fact that such agreements have not been defined under the European Competition law gives rise to a certain vagueness in regards to the circumstances under which liability can be imposed and its extent. Especially in regards to the state of mind test, it is very difficult to establish these subjective elements which require a higher standard of proof as intention can rarely be established through documentary evidence which can lead to the hub going unpunished. It is also difficult to distinguish whether the actions taken by the parties is pro-competition or anti-competition as information is also exchanged during negotiations between the parties to aim to reduce the prices which may be completely legal and may lead to pro-competitive effects.

f. Indian Judicial Approach

Before the introduction of the Competition Amendment Bill, 2020 there was no provision dealing with H&S agreements under the Indian Competition regime. However, there are a few case laws which mention H&S agreement. Even though they might not give a concrete understanding about the treatment of H&S agreements under Competition law however it does give us an idea on how the Competition Commission of India ("CCI") views such agreements.

[41]Bundeskartellamt, Case summary of the decision of 21 July 2017, B2 - 62/16, (May 12, 2020:!6:21), https://one.oecd.org/document/DAF/COMP/WD(2019)104/en/pdf.
[42] DOK-1-400/7/05/MB/AS.
[43] DOK1-410/1/06/AS.
[44] DOK1-410/2/06/A.
[45] , Polish Antitrust Experience with Hub-and-Spoke Conspiracies, Centre for Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management, (2011)
[46] Case CONCI/O-06/0038.

The following cases may be considered as relevant:

I. **Fx Enterprise Solutions India Pvt. Ltd. and Anr. v. Hyundai Motor India Limited ("HMIL")[47]:** In the present case, both the first and second informant had dealership agreements with the Opposite Party ("OP") i.e. HMIL. Contentions of the Informants were as follows:

1. It was contended that OP had entered into exclusive dealership agreements with and had set up "Discount Control Mechanism" through which it fixed the range of discounts. They were also accused of entering into tie-in arrangements with its dealers
2. It was also contended that as per the Dealership Agreement the dealers were not allowed to take the dealerships of the competitors.
3. In respect of H&S agreement, it was contended that the OP had facilitated such agreements thus leading to price collusions. The informant defined the conduct as "where bilateral vertical agreements between supplier and dealers and horizontal agreements between dealers through the role played by a common supplier, results in price collusion."[48]

The CCI found the HIML guilty of only some practices namely RPM and tie-in arrangement but only in respect of Lubricants and Oils and imposed a penalty of 87 crores. Even though CCI did not give its opinion about H&S agreement and whether it had been facilitated by the OP this case still is significant as it is the first time where an enterprise had been accused of entering into H&S agreements.

II. Samir Agrawal v ANI Technologies Pvt. Ltd and Ors: In this case, Informant had submitted that algorithmic pricing used by cab aggregators i.e. Ola and Uber amount to price-fixing charge.Contentions of the informants were as follows:

1. It was contended that due to algorithmic pricing the drivers were not free to change prices at their own free will, not allowed to give discounts and had to accept the fare which resulted from the pricing algorithm having no discretion in the matter. In addition to that, it also restricted the riders from negotiating prices with the drivers.
2. Ola/Uber had entered into vertical agreements with its drivers so that it could impose minimum prices i.e. RPM and that they were using the personalized information they had about riders to their disadvantage.
3. It was also contended that the drivers who worked under the Cab aggregator's independent third-party service providers. They were not employees hence did not constitute as a single economic entity. Therefore it was contended that the collaboration between drivers organized by the Cab aggregators resulted in 'concerted action' and that Ola/Uber acted as 'Hub' to enable the spokes to coordinate and collude on prices.

CCI described H&S in the following manner,

> "hub and spoke arrangement refer to an exchange of sensitive information between competitors through a third party that facilitates the cartelistic behaviour of such competitors."[49]

The Commission concluded that the same doesn't apply to the case. The Commission stated that

[47]Fx Enterprise Solutions India Pvt. Ltd. and Anr. v. Hyundai Motor India Limited, Case Nos. 36 & 82, (CI: 2014).
[48]Fx Enterprise Solutions India Pvt. Ltd. and Anr. v. Hyundai Motor India Limited, Case Nos. 36 & 82, Para 7, (CCI: 2014).
[49]Samir Agrawal v ANI Technologies Pvt. Ltd and Ors. Case No. 37, Para 5, (CCI: 2018).

the fares are determined are through App by the algorithm on the basis of large data sets, commonly known as 'big data' which taking into consideration various information such as personal information of riders, time, festival, state of traffic etc. to determine the fares. Such an arrangement cannot be regarded as a traditional 'H&S agreement'.The Commission stated that H&S arrangements involve, generally, the spokes to use a 3rd party platform i.e. a hub for the exchange of information, there should be some kind of conspiracy, and the fact that drivers have agreed to algorithmically determine prices does not indicate any collusion between them. A hub-and-spoke cartel would necessarily require an agreement set prices or coordinate prices through the platform between all the drivers. The drivers entered into no such agreement. CCI also rejected the contentions about RPM and price discrimination.

Analysis of the Judgment:

Even though this is a significant case in respect of H&S agreement as it indicates that such agreements may be held as illegal under the Indian Competition regime. However, it has raised some serious questions.For example, it is a well-recognized fact that algorithms and use of other software can be used to limit competition. Such algorithms and software can be designed in such a way that may facilitate anti-competitive behaviours. Ezrachi and Stucke in their paper classified H&S arrangements as one of the four categories of agreements in which Artificial Intelligence can be used to conduct illegal activities. In research of e-commerce sector conducted by EC, it found that 30% of the manufacturers track online prices at which their goods are sold by retailers, 38% use price-tracking software and 67% of retailers used software to know the competitors' prices.[50]

In the LG case, the Russian Competition authority imposed fine on LG Electronics for coordination of economic activities of resellers by use of special software and price algorithms.[51] EC taking a similar approach had charged four electronics manufacturers namely 111 million Euros for fixing resale prices on their retailers by using pricing algorithms and other price tracking tools.[52] However, they necessitated the requirement of the traditional exchange of information to prove collusion in H&S agreements.[53]

The ambit of the word agreement, as defined u/s 2(b) of the Act is quite wide and includes an arrangement and an understanding. The drivers had the knowledge that the fares will be determined by the algorithm for all the competitors, and an understanding that these are non-negotiable prices that have to be accepted, such an understanding and concerted action qualifies as an agreement and the same can be held as an infringement of Section 3(3) (a) of the Act. Therefore, it can be said that the Commission failed to take such principles and precedents into account while deciding the present case.

[50]European Commission, Staff Working Document accompanying the Final Report on the Ecommerce Sector Inquiry, SWD (2017) 154 final of 10 May 2017.
[51]Organisation for Economic Co-operation and Development, Annual Report on Competition Policy Developments in the Russian Federation, DAF/COMP/AR (2019)51, 9 May 2019, (May 13, 2020: 10:32), https://one.oecd.org/document/DAF/COMP/AR(2019)51/en/pdf.
[52]Supra Note 30, 31, 32 and 33.
[53]Organisation for Economic Co-operation and Development, Roundtable on Hub-and-Spoke Arrangements – Background Note, 25 November 2019, DAF/COMP (2019)14, (May 2, 2020: 13:10), https://one.oecd.org/document/DAF/COMP(2019)14/en/pdf.

Proposed Competition Amendment

1. Amendment text

The draft amendment with respect to H&S arrangement requires the following proviso to be inserted in section 3 (3):

"Provided further that an enterprise or association of enterprises or person or association of persons though not engaged in identical or similar trade shall be presumed to be part of the agreement under this subsection if it actively participates in the furtherance of such an agreement.".[54]

The amendment addresses one of the key issues in competition law which has been at a rise in recent times but was unaddressed by the Act. The amendment, however, does not use the words 'H&S'.

2. Horizontal Agreement

By virtue of this amendment, horizontal agreement. The discretion left to the courts as in other jurisdiction which enables them to determine whether such an arrangement falls within the purview of horizontal anti-competitive agreement or vertical anti-competitive agreement is taken away from their Indian counterparts.

Such discretion may be necessary in cases where the involvement of the hub and the share of the profit earned by the hub is leading and dominant. As a result, the involvement of spokes is secondary and the relevant market to eliminate competition is that of the hub and no spokes. An example of such a scenario was the Apple- Amazon case and the TRU case discussed earlier.

3. Burden of Proof

And by virtue of the amendment it has been clarified that H&S is to be treated as a horizontal agreement, thus, the per se rule shall be applicable and the DG will not be required to prove the existence of AAEC in the relevant market.

As seen in the above-mentioned cases, vertical agreements between the H&S are easier to detect and prove and the proof of the existence of the horizontal agreement is the most complex part of the process. CCI by virtue of this amendment has treated H&S as a type of horizontal agreement thus the case depends on its entirety on the proof for the existence of a horizontal agreement and does not even allow the courts to infer such an agreement by their

4. Active Participation

Furthermore, 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, it effectively dismisses the need for parallel multiple vertical agreements between the H&Ss.

5. Proving an H&S Agreement

The effect of the amendment is that to prove a case of H&S by the DG before CCI the following will have to be proved in the given order only: A horizontal agreement between the spokes,

[54] The Draft Competition (Amendment) Bill 2020, Proviso to §.3(3), http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf.

(i) Active participation of hub to further such an agreementunder the various cases studied in the span of this paper, it has been observed the most challenging part of an H&S agreement is to prove that the spokes have entered into a horizontal agreement, even after accepting the existence of the vertical agreements between the H&Ss.By virtue of this amendment, this task has been made even more difficult for the DG as it will first have to prove the existence of the horizontal agreement, which are not directly in the present scenario and then prove the active participation of hub in such an agreement. The existence of parallel vertical agreements between the H&Ss has been devoid of its evidentiary value by virtue of treating it as 'active participation' and to be dealt with only subsequent to proving the existence of the horizontal agreement to determine its type and the liability of hub.

6. Liability

In addition to that by virtue of treating it as a horizontal agreement the liability of hub will also be same as that of the spokes, i.e. a penalty not more than 10% of the average turnover for last three preceding financial years, unless it is a cartel where it can be the above-mentioned penalty or three times the profit for each year agreement continued, whichever is more[55]. The hub is also treated as a participant to the horizontal agreement and thus, the liability of all the parties H&Ss is alike.

V. Conclusion and Suggestions

To conclude the authors would like to state that the present bill seeks to expand the jurisdiction of CCI by bringing the concept of H&S agreement within its preview and widens the scope of horizontal agreements by including parties which are not engaged in similar or identical trade but contribute to the furtherance of such agreements.

H&S agreement does present a number of challenges including issues of evaluation of evidence, the standard of proof required, hybrid nature of the agreement which impacts the assessment and their legal impact, etc. Before the introduction of the Bill, if such agreements were found in contravention with the Act the liability would be limited to non-cartel offences however now the penalty of cartelisation would be applicable to H&S agreements even though it may be argued that acts only in furtherance of the same and should not be subjected to the same harsh treatment as cartels.

The Bill has some issues which the authors would like to address and provide the following suggestions for possible steps to be taken to resolve them.

A. Intention

The proviso lacks the inclusion of the intention of the parties. Since H&S agreements are a very particular type of agreement where there is no direct communication between the competitors it becomes very important to establish the intention behind which such an act. It is common in today's market that retailers legally exchange information to their suppliers for ease of transaction. If the supplier, without the knowledge of the retailer, shares such sensitive information to its competitors and the competitors uses or have the intention to use such information it will result in anti-competitive effects. In such a case the retailers should not be held responsible for the acts of the supplier due to lack of intention to collude. Therefore the

[55] The Competition Act, §.27, (No. 12 of 2003).

subjective element should also be included.

B. Definition of active participation

Furthermore, the term active participation needs to be defined by the legislation to avoid the ambiguity that arises from a lack of a skeletal definition providing for the intention of the legislation. The following elements must be included in the definition of active participation:

1) an act is done or abstained from doing by hub or its representative on his direction,
2) with the intention to aid the spokes in coordinating to perform acts prohibited u/s 3(3),or intentionally does any other act which if done by spokes would make them liable u/s 3(3)all the parties gain profit out of such an agreement

C. Mixed H&S Agreements

As discussed above a mixed hub and scope agreement does not violate section 3(3), and since the amendment only accounts for the situations where the hub facilitates the spokes in coming into a horizontal agreement, such mixed arrangements have been clearly ignored. The issue necessarily needs to be addressed as it may engage in other acts which are prohibited under the other provisions of the Act, they may lead to different anti-competitive effects, different penalties and different standards on which such agreements will be tested as being anti-competitive.

D. Definition of "Hub" and "Spoke"

The authors suggest hub and spokes should be defined under the Act which will enable a clearer interpretation of the concepts and the offence as a whole.

Hub is an enterprise or association of enterprises or person or association of persons that enter into multiple parallel vertical agreements with spokes to enable them to perform acts prohibited under the Act, by acting as a channel for communication, enforcement or other aiding actions.

Spokes are more than one enterprises or associations of enterprises or persons or associations of persons who are each other's competitors and that enter into vertical agreements with a hub to perform acts prohibited under the Act.

E. Introduction of H&S as Separate Offence

Thus, the authors would like to suggest the addition of H&S as a separate offence with a wider definition and suggest the following definition of H&S agreement to give more clarity to the concept under the Act:

Hub and Spoke agreement is an agreement, arrangement or concerted action reached between the hubs and spokes or their representatives thereof through various vertical agreements, causing or intending to cause restriction, prevention or distortion of competition in the market by performing acts prohibited under the Act.

F. Penalty of Hub

In Verizon Commc'ns Inc. v. Law Offices of Curtis[56] the hub who organized a horizontal conspiracy had been referred to as the "supreme evil of antitrust", and logically it's the participation of hub which enables all the other parties to participate in such an anti-competitive practice.

Thus, the authors suggest that in addition to the monetary liability the hub shall also be made subject to a ban of any exchange of sensitive information in its vertical transactions for a

[56]Verizon Commc'ns Inc. v. Law Offices of Curtis V. 14 Trinko, LLP, 540 U.S. 398, (SC:2004).

minimum period of two years. A similar ban on exchange of information for 5 years was imposed on Troy by the Commission and the US Court of Appeals.

G. Leniency

The provision of leniency is one of the most effective tools available to CCI to incentivize a party engaged in cartels to report the same, especially where incriminating evidence exists only against one of the members. In the case of H&S arrangements, hub arguably is the most exposed party, as it has the most apparent connections with all the spokes. Being the facilitator, the hub will probably have the majority of the information, thus the scope of the information provided by the hub to CCI will be profoundly more.

Hence, the authors suggest that not only the current leniency provisions should be extended to H&S agreements but also, special leniency provision shall be made for such agreements. Such provisions will allow the hub to have a larger percentage of waiver of a penalty than the one provided in the current chronological order u/s section 4 of CCI (Lesser Penalty) Regulations, 2009[57]. That is, even if the hub comes forward as a second or third informant the waiver of its penalty can be higher than 50 or 30% corresponding to the added value of the information provided by it.Lastly, the authors would like to state that it is a great step forward as the companies would have to make sure that not only their employees but also their business partners, both upstream and downstream are well-versed with the principles of competition law and will lead to better enforcement of such principle.

[57]The Competition Commission of India (Lesser Penalty) Regulations, §. 4, (Act No.4 of 2009).