

Russian Federation¹
Roundtable on “Hub-and-Spoke Arrangements”
OECD Competition Committee
December 4, 2019

Summary

The complexity of relations among the participants of this collusion creates objective difficulties in legal qualification of such relationships and their effective proof in antimonopoly proceedings.

Russian law does not allow a single qualification of a “hub-and-spoke” arrangement.

Firstly, such arrangement cannot be qualified as cartel. Part 1 of Article 11 of Russian Competition Law qualifies as cartel only agreements between competing business entities, that is, between business entities selling or purchasing goods on the same market. A “hub” and “spokes” operate on different markets, respectively, their single arrangement cannot be qualified as cartel, even if it leads to the consequences that constitute a cartel, in particular, price fixing or refusal to contract with certain entities.

Secondly, the whole arrangement cannot be qualified as vertical, though an agreement between a “hub” and “spokes” falls under respective definition. The relationship between the “spokes” is horizontal, and, thus, not captured by this qualification.

One of the possible options is to qualify this arrangement as “other” agreement that leads or may lead to restriction of competition (Part 4 of Article 11) that does not limit its participants only to competitors or supplier/distributor. However, such agreements are subject to “rule of reason” and are not prohibited per se, that will require proof of their impact on competition.

The other option is separate qualification of horizontal relations and vertical relations. In this case, horizontal relations may be treated as cartel, and vertical relations – either as “vertical” agreement or as coordination of economic activity.

Qualification of arrangement between a “hub” and “spokes” as unlawful vertical agreement is possible not in all scenarios. Such arrangements assessed separately from the horizontal relations can be either lawful from antitrust point of view or permissible due to, e.g., low market shares of their participants. In addition, “spokes” can in certain cases be in indirect contractual relationship with the “hub”.

Qualification of the arrangement as coordination of economic activity is more suitable as it can capture all relations between the “hub” and the “spokes” and does

¹ The document was prepared jointly with the Association of Antimonopoly experts

not fall under specific exceptions for vertical agreements. In addition, coordination of economic activity requires existence of the same consequences of the arrangement as that of cartel that does not require assessment of impact on competition to prove the violation and can be done in complex with analysis of horizontal relationship.

There is also the possibility to qualify these actions simultaneously under Part 1 of Article 11 of the Law on the Protection of Competition, that is the conclusion of a cartel, and Part 4 of Article 11 of the Law on Protection of Competition - the conclusion of another agreement.

Concerning the issue of the investigation of hub-and-spoke agreements, as at present almost all economic processes have moved or are moving into the digital space, the ways of interaction between business entities are changing. In this regard, the methodology for investigating anticompetitive agreements and other actions aimed at restricting competition is changing. Such methodology shall include review of websites, extraction and review of electronic communication and potential involvement of e-discovery tools, including those allowing restoration of deleted correspondence, review of software used in a particular case, its technical tests and engagement of technical specialists. Some of these methods were already used by the FAS Russia in investigation of anticompetitive behavior.

Hub-and-Spoke Arrangements

The hub-and-spoke arrangement is a combination of agreement between competitors (being the “spokes”) (such agreement may be referred to as the “rim”) and agreements of each “spoke” with a single “hub” that is either a common supplier or a customer. Usually arrangements with the “hub” are vertical agreements. The main feature of the hub-and-spoke arrangement is that communication between the “spokes” is indirect and is being done through the “hub” that then shares information with the other participants.

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Noteworthy examples in respect to coordination of economic activity were three cases against smartphone & tablets importers considered by the Federal Antimonopoly Service in 2017-2019. In all these three cases, an importer (being a sole authorized representative of foreign manufacturer in Russia) set “recommended retail prices” for its equipment and imposed them on retail resellers. Control over compliance with the “recommended retail prices” was achieved through monitoring of prices performed by importers. If price monitoring

revealed that any of the resellers set prices lower than recommended, their competitors informed the importer about the violation and requested it to make “violating” resellers align the prices or such reseller threatened to lower the prices as well. The importer exercised its influence over resellers and made them comply with “recommended retail prices” under a threat of suspension of supplies, and supplies to “non-compliant” resellers were in fact suspended. The Federal Antimonopoly Service managed to prove unlawful economic coordination performed by all the three importers. However, in these cases FAS did not somehow penalize resellers.

The complexity of qualifying hub-and-spoke agreements entails a number of other consequences as well. For example, only a party to an anticompetitive agreement can use a leniency program (provided for in Note 1 to Article 14.32 of the Code of Administrative Offenses). Accordingly, such opportunity does not exist for a “hub” if its actions are qualified as unlawful coordination. At the same time, the responsibility for coordination is also significantly lower than the responsibility for concluding and implementing a cartel – it does not provide for a turnover fine and may not lead to criminal liability that may follow under Russian law only for cartel. This may lead to a disproportion of punishment for “spokes” and the “hub”.

Another complication connected with hub-and-spoke arrangement is the difficulty in establishing and proof of horizontal arrangements. The essence of this relationship implies that there are no direct communications between competitors as all interaction is being done through the “hub”. Respectively, competition authority needs to prove that such correspondence with involvement of an intermediary in fact constitutes anticompetitive agreement even without express contacts between its parties.

Though Russian law has not evolved a test similar to U.K. “A to B to C” test, the FAS Russia has successfully proved existence of unlawful information exchange in cases similar to “hub-and-spoke” arrangement. For example, in 2018, the FAS Russia issued a decision in the locking and sealing devices² case under the following circumstances. Since 2008, manufacturers of locking and sealing devices have entered into an anticompetitive agreement and participated in it. The purpose of the agreement was to establish and maintain prices, as well as to divide the product market by the volume of sales and the composition of buyers (consumers) of locking and sealing devices used in rail transportation. Industry Implementation Center CJSC coordinated the activities of manufacturers in order to establish prices for certain types of devices.

² Locking and sealing device is a single-use mechanical device that prevents unauthorized access and allows you to visualize the fact of intervention. The annual capitalization of the market in the Russian Federation is more than 10 billion rubles.

The cartel participants and the coordinator actively exchanged information using special software, which made it possible to control the life cycle of any devices from the moment of production, sale, and until utilization. This special software was located in the premises of Industry Implementation Center CJSC. All cartel participants had access to the program with the ability to enter data and monitor activities. Based on the results of the proceedings, the actions of sellers of locking and sealing devices were qualified as a cartel (Part 1 of Article 11 of the Competition Law), and the actions of Industry Implementation Center CJSC - as illegal coordination of economic activity (Part 5 of Article 11 of the Competition Law).

This case also reflects the fact that, given modern realities, the most relevant are the restrictions on competition associated with the digital element. In hub-and-spoke agreements, competing business entities and the “hub” can use various tools, for example, price algorithms and auction robots. Use of these technologies is not illegal *per se*, however, in certain cases they can give rise to antitrust concerns.

Last year, the FAS Russia issued a decision involving two competing business entities that entered into a cartel in order to maintain bid prices. The FAS Russia established that, in order to implement a predefined strategy of behavior, 2 companies set a reduction limit for auction robots - 0.5% in increments of 0.5% in electronic auctions in which they took part and submitted the same price offers. Though this cartel did not include a “hub” element, use of such technologies may also effectively promote “hub-and-spoke” arrangements and facilitate indirect communication between competitors.

Concerning the issue of the investigation of hub-and-spoke agreements, as at present almost all economic processes have moved or are moving into the digital space, the ways of interaction between business entities are changing. In this regard, the methodology for investigating anticompetitive agreements and other actions aimed at restricting competition is changing. Such methodology shall include review of websites, extraction and review of electronic communication and potential involvement of e-discovery tools, including those allowing restoration of deleted correspondence, review of software used in a particular case, its technical tests and engagement of technical specialists. Some of these methods were already used by the FAS Russia in investigation of anticompetitive behavior, for example, in abovementioned cases of smartphone and tablet resellers.

The transformation of the economy is one of the most pressing challenges, which gives rise to the need to develop new investigation methods and to the challenges associated with identifying the actions of individuals in the digital space.

