TRADING NEGOTIATIONS BETWEEN RETAILERS AND SUPPLIERS: A FERTILE GROUND FOR ANTI-COMPETITIVE HORIZONTAL INFORMATION EXCHANGE?

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A. Introduction

In order to negotiate their contractual arrangements effectively, retailers may decide to divulge certain sensitive information to their respective suppliers. This information may include any of a wide number of data relating to their future commercial strategies; examples that readily come to mind are the prices at which the retailers will sell their goods and/or services in the future, their future promotional activities and their investment plans. In this context, an exchange of information is capable of being rationalised in the absence of a desire to disrupt or distort market forces. By exchanging such information, the retailer may wish, for example, to gain and/or maintain the commercial confidence of the supplier and to underline how advantageous it is for the supplier to (continue to) nurture and respect their commercial relationship. More specifically, the information exchange may be undertaken so as to facilitate discussion on the granting of discounts to the retailer, for example, which may of course ultimately benefit consumers. In short, the exchange may simply be a normal part of the process of negotiation between retailer and supplier. Unfortunately this is not the end of the matter as regards competition law: while the provision of information by a retailer to its supplier may often be motivated purely by the desire to conclude a favourable deal with the supplier, it does not necessarily follow that it will always be innocuous in terms of consumer welfare. Indeed, it is possible that the exchange of information may reduce competition on a given market to the detriment of consumers, most notably if the information originally supplied is eventually passed on to the competitor(s) of the actual retailer. Whether a reduction of competition would actually occur in practice depends on a number

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of factors, including, for example, the information at issue, the future actions of the relevant parties (retailer, supplier, competing retailer[1]) and the conditions pertaining in the market. The point here, however, is that the act of exchanging information is capable of having a welfare-reducing effect and that therefore it should not be exempt a priori from the operation of antitrust law, particularly if consumer welfare is to be the primary objective of this law.[2]

Such a cautious approach is followed through in European decisional practice and jurisprudence.[3] Indeed, at present there are a number of ongoing cases in Europe involving allegations of such anticompetitive information exchange. These cases allege unlawful conduct in a wide variety of different markets, and in particular those markets where final consumer goods are sold. Relevant products include cosmetics and toiletries (Italy),[4] cleaning products (France)[5] and chocolate (Germany)[6]. The UK, too, has its own ongoing information exchange cases. Two important examples come readily to mind: dairy products and tobacco. In relation to the former, the Office of Fair Trading (OFT) alleges that in 2002 and/or 2003 certain grocery retailers and dairy processors shared highly commercially sensitive information concerning the retail price of their respective diary products, contrary to the Chapter I prohibition of the Competition Act 1998.[7] In the latter case, the UK authority alleges an indirect exchange of proposed future retail prices for tobacco products between competitors, again contrary to Chapter I.[8]

Both of the UK information exchange cases bring to the fore a difficult but important issue in modern competition law, namely the issue of "hub-and-spoke-type" (explicit) collusion. This form of collusion can occur where parties

1 For the sake of clarity, when the term "competing retailer" is used in this article, it refers to the competitor of "the retailer" and not the competitor of "the supplier".

2 On this, see generally P Marsden and P Whelan, "The 'Consumer Welfare' Standard as a Form of Substantive Protection for Consumers under European Competition Law" in A Ezrachi and U Bernitz (eds), *Own Labels, Branded Goods and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press, 2009). For a criticism of the welfare-based argument for competition law, see O Black, *Conceptual Foundations of Antitrust* (Cambridge University Press, 2005), ch 2.

3 On the decisional practice and jurisprudence at EC level, see generally S Stroux, *US and EC Oligopoly Control* (Kluwer Law International, 2004), 143–63.

4 See www.cosmeticsdesign-europe.com/Financial/Italian-authorities-investigate-leading-cosmetics-firms (accessed on 26 April 2009).

5 See A Salomon, "Neuf Géants de l'Entretien Suspectés d'Entente", *Le Figaro*, 2 February 2008.

6 See www.swisster.ch/en/news/business/german-chocolate-price-fixing-probe-targets-nestle_116-121275 (accessed on 26 April 2009).

7 See www.oft.gov.uk/news/press/2007/134-07 (accessed on 26 April 2009). While early resolution agreements have been concluded with some of the parties, the proceedings are ongoing against Lactalis McLelland, Tesco and Morrisons; see www.oft.gov.uk/news/press/2007/170-07 (accessed on 26 April 2009).

8 See www.oft.gov.uk/news/press/2008/56-08 (accessed on 26 April 2009). Six companies involved in this case have concluded early resolution agreements with the OFT; see www.oft.gov.uk/news/press/2008/82-08 (accessed on 26 April 2009).

to a horizontal agreement or concerted practice conspire directly with one "hub" or main party, who may be either a supplier or a distributor.[9] In this context, the hub will act as "an intermediary that speaks individually to each of the competitors and then relays each competitor's agreement . . . to the other competitors in a series of one-to-one conversations".[10] What may be motivating the vertical relationships in this case, then, is the implementation of a horizontal restraint, and not simply the exchange of information for the purpose of enabling trading negotiations between retailer and supplier. If the restraint in question is unlawful,[11] the fact that the distortion on competition has a horizontal element (as opposed to a mere vertical element, as in the case of resale price maintenance)[12] ensures that a more serious infringement of the competition law rules is committed than would otherwise have been the case.[13]

So despite outward appearances, the flow of information between retailer and supplier in a "hub and spoke" arrangement can in certain circumstances be deemed to be horizontal in nature (ie from the retailer to her competitor).[14] This article recognises this fact in order to identify what information should not be passed on to suppliers by retailers and in what circumstances. In pursuing this aim, this article assumes that the law on direct competitor-to-competitor information exchange is instructive: by identifying the underlying concern with direct competitor-to-competitor exchanges, one can construct a legally consistent

9 I Lianos, "Collusion in Vertical Relations under Article 81 EC", Law and Governance in Europe Working Paper Series, 1/07, September 2007, available at: http://ssrn.com/abstract=1089681 (accessed on 26 April 2009), 31.

10 G Hay, "Horizontal Agreements: Concept and Proof" (2006) *Antitrust Bulletin* 877, 882. It should be noted that the motivating party behind a hub and spoke arrangement does not necessarily have to be either the retailer or the competing retailer; provided that the correct economic incentives existed, the instigator may in fact be a supplier/manufacturer. Indeed, by creating the hub and spoke arrangement in the first place, the supplier/manufacturer may be attempting to put in place a framework that allows it to pass on cost increases to both retailer and competing retailer without entailing opposition from either party. Alternatively, the hub and spoke arrangement may be created as a direct result of the complaints received by a manufacturer/supplier from a retailer who has the power to influence the actions of that manufacturer/supplier. For example, a retailer may complain to its supplier that its competitor has undercut it in the market and that it will take its business elsewhere unless the supplier convinces the competing retailer to raise its prices. The later situation appears to have arisen in one of the leading UK cases on this issue: *JJB Sports v Office of Fair Trading* [2006] EWCA Civ 1318.

11 It is perhaps stating the obvious to note that not all "hub and spoke" arrangements will be unlawful: only anticompetitive hub and spoke agreements/concerted practices will violate Article 81(1) EC, ie those that have as their object or effect the prevention, restriction or distortion of competition.

12 Consideration of the concept of resale price maintenance is outside of the scope of this article. However, for an interesting perspective on this topic, see B Orbach, "Antitrust Vertical Myopia: The Allure of High Prices" (2008) 50 *Arizona Law Review* 261.

13 A Jones and B Sufrin, *EC Competition Law: Text, Cases and Materials* (Oxford University Press, 3rd edn, 2008), 170.

14 It should also be noted that a hub and spoke arrangement may also arise where a retailer acts as the hub for illicit exchanges between two manufacturers. For an example of a (US) case involving such a scheme, see *Toys 'R' Us, Inc.*, 126 FTC 415 (1998), affirmed 221 F 3d 928 (7th Cir 2000).

approach to retailer–supplier–competing retailer exchanges. A two-step approach is therefore taken. In the first instance, the article considers the current legal treatment of direct competitor-to-competitor information exchanges, thereby identifying the types of information that are suspect in this context. Following on from this, the article then examines how the addition of the vertical element (ie the hub) affects the legal assessment at issue; in doing so, it examines the circumstances in which an exchange of information through a "hub and spoke" arrangement can be deemed to be a de facto horizontal exchange. Taken together, then, both of these steps identify what information should not be passed on to suppliers by retailers and in what circumstances. Such knowledge would be of obvious benefit to market actors who wish to stay within the antitrust laws.

B. Understanding the Underlying Rationale: Providing Information Directly to Competitors

It is not unusual for competitors to exchange market information with one another. They may do so for a number of reasons. Most obviously, acquiring information on the market (eg its conditions, levels of demand, industrial capacities, investment opportunities and plans) enables undertakings to make strategic decisions that are both rational and effective. Indeed, trade associations regularly collect and circulate data to their members for just this purpose. When information is available on a given market, efficiency may be encouraged through the use of benchmarking, the process whereby firms evaluate their market performance by reference to the best practices of the industry in question.[15] Wider (public) benefits too can be secured by the exchange of information between competitors. According to Teece, for example, information sharing, particularly in relation to technological know-how, reduces market concentration by increasing the number of undertakings that are capable of becoming market operators.[16] Furthermore, transparency about product availability and prices helps to ensure that consumers make the right choices in the market, and is indeed required under the theoretical model of perfect competition.[17] According to the UK Office of Fair Trading,

> "[i]n the normal course of business, undertakings exchange information on a variety of matters legitimately and with no risk to the competitive process. Indeed, competition may be enhanced by the sharing of information, for example, on new

[15] On this, see J Carle and M Johnsson, "Benchmarking and EC Competition Law" (1998) 19 *European Competition Law Review* 74; and L Boulter and T Bendell, "Competition Risks in Benchmarking" (1999) 20 *European Competition Law Review* 434.

[16] D Teece, "Information Sharing, Innovation and Antitrust" (1993) 62 *Antitrust Law Journal* 465.

[17] R Whish, *Competition Law* (Oxford University Press, 6th edn, 2008), 525.

technologies or market opportunities. There are therefore circumstances where there is no objection to the exchange of information, even between competitors, and whether or not under the aegis of a trade association".[18]

In short, then, instead of simply being neutral in their market effects,[19] information exchanges may actually stimulate competition.

However, information exchanges between competitors are also capable of engendering welfare reducing effects; when located within the organising concept of an "agreement" or "concerted practice" they are therefore capable of violating Article 81(1) EC. Three particular instances involving suspect information exchange are obvious from European jurisprudence:[20] (i) where the information exchange is used to monitor a price-fixing cartel; (ii) where the information exchange represents a price-fixing arrangement in its own right; and (iii) where the information exchange is employed to create or stabilise an oligopoly situation.

In the first example, a cartel already exists and the exchange of information represents a method to ensure that the cartel continues to operate in the manner decided by its participants.[21] In order for a cartel to operate effectively, a number of factors are required, including the ability to monitor compliance and to punish any deviation from the plan adopted;[22] price reporting systems represent an obvious method to actively monitor compliance and thereby determine the necessity of punishment.[23] It is no surprise, then, that when information is exchanged for this purpose it is not deemed acceptable by the European competition authorities.[24] In fact, if established, such an arrangement (ie one supporting a more far-reaching agreement or concerted practice that is itself anticompetitive) involving information exchange would be deemed to be restrictive of competition by object, and therefore would not require an appraisal of its anticompetitive effects by the antitrust authorities.[25]

[18] OFT, "Agreements and Concerted Practices", OFT 401, December 2004, [3.18].

[19] For a competition law case involving harmless information exchange, see *Eudim* [1996] OJ C111/8.

[20] Cf V Korah, *An Introductory Guide to EC Competition Law and Practice* (Oxford, Hart Publishing, 2007), 297.

[21] See, eg *White Lead* [1979] OJ L21/16; *Peroxygen Products* [1985] OJ L35/1; and *Welded Steel Mesh* [1989] OJ L161/18.

[22] See G Stigler, "A Theory of Oligopoly" (1964) 72 *Journal of Political Economy* 44.

[23] See C Leslie, "Trust, Distrust, and Antitrust" (2004) 82 *Texas Law Review* 515, 575–76.

[24] See, eg *Building and Construction Industry in the Netherlands* [1992] OJ L92/1, affirmed in Case T-29/92 *SPO v Commission* [1995] ECR II-289. See also Case T-148/89 *Tréfilunion SA v Commission* [1995] ECR II-1063.

[25] See, eg Cases T-25, 26, 30–32, 34–39, 42–46, 48, 50–71, 87, 88, 103 and 104/95 *Cimenteries CBR SA v Commission* [2000] ECR II-491, [1531], affirmed in Cases C-204, 205, 211, 213, 217 and 219/00 P *Aalborg Portland A/S v Commission* [2004] ECR I-123; see also *IFTRA Glass* [1974] OJ L160/1. If the restriction is not deemed to be "by object", then an effect-based analysis would of course be required; see, eg Case C-238/05 *Asnef-Equifax v Ausbanc* [2006] ECR I-11125, [48].

The second example is likely to occur when competitors discuss among themselves their current and/or future prices. In such a case it is not actually necessary for the competitors in question to explicitly agree to fix their prices (eg by actually stating the "terms" of their price-fixing "agreement" orally or in writing[26]) in order for an anticompetitive price-fixing arrangement (the object of which is to restrict competition) to be concluded: the "mere fact" of providing price information is likely to be sufficient for the competition authorities to find a violation of Article 81(1) EC.[27] Three important points need to be stressed here in relation to the decisional practice and the jurisprudence. First, exchanges involving very sensitive information on pricing policies have been found to be anticompetitive without assessing market structures.[28] Secondly, the illegality of these types of information exchange is not influenced by the fact that the information in question could have been obtained from other, albeit less convenient, sources.[29] Thirdly, where price information is provided by only one party (ie where no reciprocity exists) in the context of private contact, a rebuttable presumption will apply, namely, that undertakings will take into account the information supplied when deciding on their future conduct in the market.[30] A single meeting between competitors is sufficient to establish this presumption.[31] Given this sort of legal framework, it would be advisable for undertakings: (i) to not provide price information to their competitors; and (ii) to completely avoid meetings where price information is provided by competitors.[32]

The third example identified above concerns the creation or stabilisation of oligopoly-type markets in order to facilitate tacit coordination. Information exchange may facilitate the future coordination of behaviour by undertakings without them having to actually conclude explicit agreements or engage in concerted practices.[33] Tacit collusion and conscious parallel behaviour by undertakings are more likely in a situation where, all other things remaining

[26] Such as "A will charge its customers $X and B will charge its customers $Y".

[27] Whish, *supra* n 17, 524–25; and R Whish, "Information Agreements" in *The Pros and Cons of Information Sharing* (Stockholm: Swedish Competition Authority, 2006), 37.

[28] See Stroux, *supra* n 3, 148.

[29] See, eg *Hasselblad* [1982] OJ L161/18. See also *VNP/COBELPA* [1977] OJ L242/10; and *Genuine Vegetable Parchment Association* [1978] OJ L70/54.

[30] See Case-49/92 *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125. Cf Cases T-25/95 etc *Cimenteries CBR v Commission* [2000] ECR II-491, [1849]–[1852].

[31] See Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Judgment of the European Court of Justice, 4 June 2009, unreported.

[32] Indeed, in those situations where prices are discussed but an undertaking stays silent, the silent undertaking is likely to be deemed to be a party to an anticompetitive agreement and/or concerted practice unless it takes steps to publicly distance itself from the unlawful conduct; see Whish, *supra* n 17, 101–02 and 525; Joined Cases T-202/98, T-204/98 and T-207/98 *Tate and Lyle v Commission* [2001] ECR II-2035, [42]–[68]; and D Bailey, "Publicly Distancing Oneself from a Cartel" (2008) 32 *World Competition* 177.

[33] Case C-194/99 *Thyssen Stahl AG v Commission* [2003] ECR I-10821, [82]–[83].

equal, precise and accurate information on the activities of one's competitors is available: such information enables the undertakings to respond quickly to the actions of their competitors.

According to the jurisprudence, information exchange falls within the scope of Article 81(1) EC if it reduces or removes "the degree of certainty as to the operation of the market in question with the result that competition between undertakings is restricted".[34] Indeed, in relation to the direct exchange of information between competitors, it has been held by the European Court of Justice (ECJ) that

> "any direct or indirect contact, [where the] object or effect thereof is 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 pursue or contemplate adopting on the market"

is contrary to the competition law rules.[35] Consequently, in this context at least, influence on the conduct of a competitor, through private (direct or indirect) contact, is sufficient for Article 81(1) EC to be activated.[36] The general principle underlying this approach is that each undertaking must determine independently their market policies and the conditions they offer to their customers.[37] While this principle should not be interpreted as preventing undertakings from adapting themselves to current or expected conduct of others, "it does, however, strictly preclude any *direct or indirect contact* between such traders, the object or effect of which is to *create conditions of competition* which do not correspond to the normal conditions of the market in question".[38] What is of particular importance here, then, is an assessment of the economic conditions on the relevant markets and of the specific characteristics of the information exchange system at issue.[39] Both the literature and the jurisprudence concur on the crucial issues that need to be analysed in these assessments, namely, the type of information exchanged and the structure of the relevant market.[40]

[34] Case C-238/05 *Asnef-Equifax v Ausbanc* [2006] ECR I-11125, [51]. According to the UK's OFT, "Trade Associations, Professions and Self-regulating Bodies", December 2004, OFT 408, [3.6], the exchange of information between competitors may "have an adverse effect on competition where it serves to reduce or remove uncertainties inherent in the process of competition".

[35] Case 40/73 *Cooperative Vereniging Suiker Unie and Others v Commission* [1975] ECR 1663, [174]. See also Case T-6/89 *ANIC v Commission* [1991] ECR II-1623, [200]–[201].

[36] See Stroux, *supra* n 3, 156–57.

[37] See Case C-7/95 P *John Deere Ltd v Commission* [1998] ECR I-03111, [86]; Joined Cases 40–48/73, 50/73, 54–56/73, 111/73, 113/73 and 114/73 *Suiker Unie v Commission* [1975] ECR 1663, [173]; and Case 172/80 *Züchner v Bayerische Vereinsbank* [1981] ECR 2021, [13].

[38] Case C-194/99 *Thyssen Stahl AG v Commission* [2003] ECR I-10821, [83] (emphasis added).

[39] Case C-238/05 *Asnef-Equifax v Ausbanc* [2006] ECR I-11125, [54]. For the OFT, "[w]hether or not the information exchange has an appreciable effect on competition will depend on the circumstances of each individual case: the market characteristics, the type of information and the way in which it is exchanged"; OFT 408, *supra* n 34, [3.6].

[40] See, eg Boulter and Bendell, *supra* n 15; E Biscolli, "Trade Associations and Information Exchange under US and EC Competition Law" (2000) 23(1) *World Competition* 29; and Jones and Sufrin, *supra*

Advice on the types of information that may be suspect in relation to Article 81(1) EC can be found in a specific piece of soft law adopted by the European Commission. In its Guidelines on Maritime Transport Services, the Commission notes that if commercially sensitive data (that is, data concerning "the parameters of competition, such as price, capacity or costs") is exchanged between competitors, it is more likely to fall foul of Article 81(1) EC than other exchanges of information.[41] Whether the data is aggregated or individual is also a significant criterion: the exchange of individual information is more problematic than the exchange of aggregated information, which, in principle, does not fall within the scope of Article 81(1) EC.[42] In this context, it is important to evaluate the level of aggregation. In particular, it should not be possible to disaggregate the information in a manner that allows undertakings to identify (whether directly or indirectly) the competitive strategies of their competitors.[43] Furthermore, both the frequency of the information exchange and the age of the data need to be considered.[44] In relation to the former criterion, it should be appreciated that frequent information exchange may facilitate retaliation and may ultimately disincentivise potential competition.[45] According to the case law, certain statistical data may actually be beneficial (ie pro-competitive), in particular if it enables market operators to evaluate levels of demand and output and/or the costs facing its competitors.[46] The case law, like the soft law of the Commission, also supports the exchange of information that is aggregated and/or historical.[47] By contrast, the Commission has shown its willingness to prohibit exchanges of individual data,[48] particularly where such data is regularly updated and circulated in a swift manner.[49] Even the provision of information by a trade association can be caught by Article 81(1) EC when "the simple exchange of aggregated information about the collective fortunes of

n 13, 903. See also European Commission, "VIIth Report on Competition Policy" (Brussels, 1977), §2 [7](1) and §2 [7](2). As noted above, the structure of the relevant market is not considered where the information exchanged is deemed to be very sensitive, ie when it concerns current and/or future prices; see Stroux, *supra* n 3, 148.

41 European Commission, "Guidelines on the Application of Article 81 of the EC Treaty to Maritime Transport Services", [2008] OJ C 245/02, [50].

42 *Ibid*, [52]. See also *Vegetable Parchment* [1978] OJ L70.

43 European Commission, "Guidelines", *supra* n 41, [52].

44 *Ibid*, [55] and [54], respectively.

45 *Ibid*, [55].

46 See Case T-334/94 *Sarrio SA v Commission* [1998] ECR II-1439; and European Commission, "VIIth Report", *supra* n 40, §2 [5].

47 See, eg *CEPI/Cartonboard* [1996] OJ C310/3.

48 See *Europe Asia Trades Agreement* [1999] OJ L193/23, [153]–[155]; and European Commission, "XXIXth Report on Competition Policy" (Brussels, 1999), [156]–[157]. See also *Peroxygen Products* [1985] OJ L35/1.

49 See, eg *Steel Beams*, OJ [1994] L116/1, [263]–[272], affirmed in Cases T-141/94 etc *Thyssen Stahl AG v Commission* [1999] ECR II-347, [385]–[412] and in Case C-194/99 *Thyssen Stahl AG v Commission* [2003] ECR I-10821.

the industry is replaced by a supply of information about the trading of individual members of the associations".[50] Information exchanges relating to individual pricing intentions,[51] capacity increases,[52] investment plans[53] and individual sales figures[54] have all been deemed objectionable under EC competition law.

Market structure also has a role to play in the analysis. Indeed, while the exchange of information in markets that are competitive may actually be beneficial in terms of consumer welfare, such exchanges in markets where oligopolistic conduct is likely are potentially more harmful. Consequently, information exchange in these sorts of markets may attract the attention of the Commission. This type of approach has been expressly approved by that particular competition authority:

> "[i]n assessing information agreements the Commission also pays close attention to the structure of the relevant market. The tendency for firms to fall in line with the behaviour of their competitors is particularly strong in oligopolistic markets. The improved knowledge of market conditions aimed at by information agreements strengthens the connection between the undertakings, in that they are enabled to react very efficiently to one another's actions, and thus lessens the intensity of competition".[55]

This attitude to information exchange is followed through in Commission decisional practice, as is evidenced by, inter alia, the rulings in *International Energy Programme*,[56] *Non-Ferrous Semi-Manufacturers*,[57] *Wirtschaftsvereinigung Stahl*[58] and *Eudim*.[59] The relevant soft law adopted by the Commission also displays its concern for market conditions (such as concentration levels and the structures of supply and demand) when information exchange is at issue.[60]

A particular issue that arises in the jurisprudence that is relevant for a detailed analysis of "hub and spoke" arrangements concerns the concept of reciprocity. It is understood that reciprocity as regards price information is not an absolute prerequisite for unlawfulness. It is true that unilateral decisions that are adopted by an undertaking acting independently of its competitors do not ordinarily violate the European prohibition on restrictive practices.[61] Such unilateral decisions would include the sending of price information to the press for

[50] J Goyder and A Albors-Llorens, *Goyder's EC Competition Law* (Oxford University Press, 2009), 191.
[51] See, eg *IFTRA Rules on Glass Containers* [1974] OJ L160/1, [43].
[52] See, eg *Re Cimbell* [1972] OJ L303/24.
[53] See, eg *Zinc Producer Group* [1984] OJ L220/27.
[54] See, eg *UK Agricultural Tractor Registration Exchange* [1977] OJ L242/10.
[55] European Commission, "VIIth Report", *supra* n 40, §2 [7](2).
[56] [1983] OJ L376/30.
[57] See European Commission, "Vth Report on Competition Policy" (Brussels, 1975), [39].
[58] [1998] OJ L1/10, [39] and [44]–[46].
[59] [1996] OJ C111/8.
[60] See European Commission, "Guidelines", *supra* n 41, [47]–[49].
[61] See Jones and Sufrin, *supra* n 13, 178.

publication, for example. For Article 81(1) EC to apply, it is essential, of course, that the existence of an agreement, understanding or (direct or indirect) contact between competitors, ie a "concerted practice", be established concerning the information exchanged.[62] It may be difficult to argue that an "agreement"—that is, a "concurrence of wills"[63]—exists where one undertaking takes it upon itself to supply information, whether to the market itself, ie publicly, or to specific market actors, such as competitors. This is where the concept of "concerted practices" can come in. Indeed, the analysis of Odudu concerning the nature of a "concerted practice" is particularly useful in this context. For him, this concept has two interpretations: "[t]he first requires common intention, but relies on different evidence than that used to show agreement. The second does not require common intention, but instead focuses on whether conduct reduces uncertainty as to the future conduct of others."[64]

The first interpretation is rejected in favour of the second on the basis that EC jurisprudence[65] does not actually require an actual "plan" being worked out by the undertakings in question.[66] If accepted,[67] this analysis accommodates a lenient approach to reciprocity: to the extent that information may be exchanged without reciprocity and yet reduce uncertainty in the market, such an exchange could be conceptualised as a "concerted practice". It is important to note here, however, that the nature of the communication (ie whether it is public or private) will have a bearing on the analysis. Public announcements of future prices will be treated more favourably than private ones. With public communications, there will be a presumption of pro-competitiveness; therefore the standard that needs to be achieved in order for Article 81(1) EC to apply will be more difficult to fulfil than the case where the communication takes place in a private setting (ie solely between competitors).[68] Indeed, the communication of prices in a private setting—even where the information only flows in one direction—very likely violates Article 81(1) EC, as explained above.

[62] See Cases C-89, 104, 114, 116–117 and 125–29/85 *A Ahlström Osakeyhtiö v Commission* [1993] ECR I-1307.

[63] Case T-41/96, *Bayer AG v Commission* [2000] ECR II-3383, affirmed on appeal Cases C-2 and 3/01 P, [2004] ECR I-23. See also Case 41/69, *ACF Chemiefarma NV v Commission* [1970] ECR 661, [112]. On this, see O Black, "Agreement: Concurrence of Wills, or Offer and Acceptance?" (2008) 4(1) *European Competition Journal* 103.

[64] O Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press, 2006), 71.

[65] In particular, Cases 40–48, 50, 54–56, 111 and 113–14/73 *Re the European Sugar Cartel* [1975] ECR 1663, [173].

[66] See generally Odudu, *supra* n 64, ch 4.

[67] For a criticism of this choice, see T Calvani, "The Boundaries of EC Competition Law" (2006) 51(4) *The Antitrust Bulletin* 1023, 1027–30. See also O Black, *Agreements in Philosophy and Law* (Cambridge University Press, forthcoming).

[68] See Stroux, *supra* n 3, 162.

C. The Involvement of an Intermediary: "Hub and Spoke" Arrangements

The above analysis concerns the exchange of information from competitor to competitor. It details the types of information that should not be passed directly to competitors, as well as the circumstances in which such direct information exchange is likely to be suspect. In particular, it explains how unilateral competitor-to-competitor exchanges of information can be deemed to be unlawful provided that a broad interpretation of the concept of a "concerted practice" is adopted. It was also noted that the concept of an anticompetitive "hub and spoke" arrangement involving, in its first phase, the exchange of information between a retailer and its supplier achieves the same results as a (private) direct competitor-to-competitor information exchange. It is true, of course, that not all retailer-to-supplier information exchanges will operate in this manner: only those exchanges with a sufficient link to the competitor(s) in question can be deemed to have an inherent triangular nature. To be clear, then, while the exchange of information between retailer and supplier may indeed be conducted without creating a "hub and spoke" arrangement, in certain limited circumstances such an exchange can be conceptualised as an exchange of information that is horizontal in nature (ie between the retailer and her competitor). The challenge here is to identify the detail of those circumstances.

It is expedient at this point to note that, while the addition of the hub inevitably changes the specifics of the legal analysis that is required to be undertaken, it should not have an effect on the economic theory that underlines such an analysis. This is an important distinction. What is clear is that the addition of the hub ensures that the competition authority in question will have to investigate the actual dynamics of the alleged information exchange (ie retailer to supplier to competing retailer) before deciding whether in legal terms an exchange between competitors has occurred. In other words, it forces that authority to examine whether the modality of exchange actually constitutes an arrangement that falls within the legal definition of an "agreement" or "concerted practice" between competitors as defined under the relevant jurisprudence. What the addition of the hub does not necessitate, however, is a change in the underlying concern of the information exchange, ie whether it is anticompetitive or not. Let us assume that the arrangement in question can be interpreted by the competition authority as an arrangement involving competitors, ie that the exchange from retailer to supplier to competing retailer is equivalent in legal terms to an exchange between retailer and competing retailer. (To be sure, this is not to say that the arrangement is anticompetitive of course: the existence of an anticompetitiveness object or effect is a separate inquiry from that concerning the existence or otherwise of an agreement or

concerted practice between competitors.[69]) The next step in the analysis would then focus on the pro/anticompetitive nature of the information exchange. In determining the issue of anticompetitive object or effect in this context, it is logical to argue that the jurisprudence, the decisional practice and the soft law on direct competitor-to-competitor information exchange should apply concerning the nature of the information that cannot be exchanged as well as the market conditions under which such exchange would distort competition to the detriment of consumers: both types of arrangements (ie "competitor to competitor" and "retailer to supplier to competing retailer") are equivalent in nature: they are both de facto horizontal exchanges. With a "hub and spoke" arrangement involving retailer-supplier–competitor information exchange, then, exchanges of individual data and of information relating to individual pricing intentions, capacity increases, investment plans and individual sales figures would therefore all be suspect. Likewise, the conditions pertaining to the market in question (such as concentration levels and the structures of supply and demand) would also have to be analysed in order to assess whether distortion of competition has occurred.

The situation addressed directly above assumed that the arrangement in question (ie retailer to supplier to competing retailer) could be interpreted by the competition authority as an arrangement that in legal terms is equivalent to a direct competitor-to-competitor arrangement. At this point, this assumption needs to be addressed. Where the supplier acts simply as a go-between[70] connecting the retailer and the competing retailer—that is, where everyone (retailer, supplier and competitor) is fully aware that the supplier is simply acting as a conduit for the communication between the retailer and the supplier—there should be no additional analytical problem concerning this issue: contact, and therefore any resultant agreement or concerted practice, is quite clearly intended to be between the two competitors, and not simply between the retailer and the supplier or the supplier and the competing retailer. The supplier merely represents the means of communicating between competitors; she is the human equivalent of a telephone. In such a case, the existence of the supplier in the equation does not negative the essential horizontal nature of the arrangement. It should be noted that, if a horizontal infringement of Article 81 EC is found in such a case, the fact that the supplier is not a formal part of the horizontal arrangement at issue is irrelevant as regards liability for violating the European antitrust rules: as a facilitator of the agreement the supplier would still be subject

[69] See, eg Case C-199/92 P *Hüls AG v Commission (Polypropylene)* [1999] ECR I-4287, [158]–[167].

[70] In other words, where all the parties (retailer, supplier, competing retailer) intend that the supplier act simply as a messenger relaying messages directly from retailer to competing retailer and vice versa.

to a fine provided her actions were negligent or intentional as regards the conclusion of an anticompetitive arrangement.[71]

But this is the easiest case to deal with. Complexities enter the equation when the role of the supplier is less than clear. What if, for example, one or more of the parties involved were not actually aware of the role that the supplier, as hub or intermediary, was supposed to be playing in the arrangement? Could any of the parties be deemed to be in violation of the competition law rules in such a case? It is submitted, for the reasons that follow, that in theory the supplier itself does not have to have any real knowledge of its actual role as conduit in order for the exchange of information to be deemed to be "from retailer to competitor". Assume, for the sake of argument, that the supplier is unfortunate enough to be endowed with the proverbial "big mouth" and simply likes to repeat (or brag about) all the intricate details of its business negotiations with its (two) retailers. Assume further that the retailers in question have sufficient experience of these indiscretions to be fully aware that whatever is said to the supplier will be passed on in due course to their competitors. In this situation the fact that the supplier may be blissfully unaware of the facilitating role that it is playing is irrelevant: a flow of information between the retailers (through the supplier) can be established irrespective of the ignorance of the supplier. Awareness on behalf of the supplier is therefore unnecessary for the retailer–supplier–competing retailer arrangement to have a horizontal character. (Incidentally, ignorance of the facilitating role that the supplier would play in such a case would not necessarily absolve it from liability: negligence as regards anticompetitive behaviour is sufficient in order for a fine to be imposed on an undertaking.[72])

What is more difficult, however, is the case where actual, as opposed to constructive, awareness of the role of the supplier is not present in either the retailer or its competitor. Does horizontal information exchange occur in such circumstances? And if not, why not? To my knowledge, there is no jurisprudence at EC level that addresses this issue directly.[73] Recent national jurisprudence on this issue does exist, however, and is particularly helpful in answering this question. The combined judgment of the UK Court of Appeal in *Argos and*

[71] See Case T-99/04 *AC-Treuhand AG v Commission*, Judgment of the Court of First Instance, 8 July 2008. On this case, see P Whelan, "*Treuhand v Commission*" [2008] 15 *Bulletin of Legal Developments* 169.

[72] See Council of Ministers, Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, (2003) OJ L1/1, Art 23(2).

[73] Current EC jurisprudence does, however, recognise that concerted practices may have both a horizontal and vertical element to them; see Cases 100–103/80 *Musique Diffusion Française SA v Commission* [1983] ECR 1825, [75]–[76]; Case 86/82 *Hasselblad (GB) Ltd v Commission* [1984] ECR 883, [24]–[29]; and Case T-43/92, *Dunlop Slazenger International Ltd v Commission* [1994] ECR-II 441.

Littlewoods v Office of Fair Trading and *JJB Sports v Office of Fair Trading*,[74] for example, considers the concept of indirect concerted practices between competing retailers based on the exchange of confidential information between them via their common supplier and directly considers the conditions required for finding such indirect concerted practices. The appeals in these cases related to two decisions taken by the OFT in the latter half of 2003.[75] In both decisions the OFT held in effect that, as a result of indirect contact via an intermediary (respectively, a toys manufacturer and a manufacturer of sports shirts), the relevant competitors were aware of each other's intentions regarding their conduct in the relevant markets and that this conduct represented an overall agreement and/or concerted practice between the competing retailers and the intermediary. Both decisions were approved separately on appeal to the Competition Appeal Tribunal (CAT).[76] According to this tribunal, actual knowledge of the role of the intermediary by the retailer is not an absolute prerequisite for an infringement of the rule prohibiting direct or indirect conduct between competitors on prices to be found, ie for a concerted practice to be established. Indeed, for it,

> "if one retailer A privately discloses to supplier B its future pricing intentions in circumstances where it is *reasonably foreseeable* that B might make use of that information to influence market conditions, and B then passes that pricing information on to a competing retailer C, then . . . A, B and C are all to be regarded on those facts as parties to a concerted practice having as its object or effect the prevention, restriction or distortion of competition".[77]

By contrast, a violation would not be found where the retailer (i) revealed its future pricing intentions to the supplier for a legitimate purpose not related in any way to competition and (ii) could not reasonably have foreseen that such information would be used by the supplier to affect market conditions.[78] It appears, then, that for this judicial authority at least constructive knowledge of the role of the supplier in an alleged "hub and spoke" arrangement is sufficient: as long as the retailer could have reasonably foreseen that the information exchange between it and the supplier would be used by the latter to influence conduct in the market, the competition authority would not be precluded from holding that a concerted practice has occurred.[79] This rather broad approach to the prohibition on direct or indirect contact between competitors was questioned on appeal to the UK Court of Appeal, where it was alleged that the CAT "failed

[74] [2006] EWCA Civ 1318.

[75] CA 98/08/2003 *Agreements between Hasbro UK Ltd, Argos Ltd & Littlewoods Ltd Fixing the Price of Hasbro Toys and Games* [2004] 4 UKCLR 717; and CA 98/06/2003 *Price Fixing of Replica Football Kit* [2004] UKCLR 6.

[76] *Argos Ltd, Littlewoods Ltd v Office of Fair Trading* [2004] CAT 24; and *JJB Sports Plc* [2004] CAT 17.

[77] *JJB Sports Plc* [2004] CAT 17, [659] (emphasis added).

[78] *Ibid*, [660].

[79] See, eg *Argos Ltd, Littlewoods Ltd v Office of Fair Trading* [2004] CAT 24, [787].

to accord enough weight to the requirement of subjective consensus between all parties if an agreement or concerted practice between them is to be found".[80]

The Court of Appeal agreed with the CAT concerning the existence of indirect concerted practices in the relevant markets and ultimately upheld the OFT's decisions. The Court nonetheless expressed reservations concerning the CAT's analysis of the issue of the retailer's awareness of the role of a supplier in facilitating horizontal collusion. In the (admittedly, non-committal-sounding) words of the Court:

> "[t]he Tribunal may have gone too far if it intended [unlawfulness] 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."[81]

For this court, then, constructive knowledge of the role of the supplier is not sufficient to establish the existence of a concerted practice—actual knowledge is required, ie the retailer must "foresee" that the supplier will use the information to upset the competitive process. Such knowledge is required not only of the retailer but also of its competitor: the competitor of the retailer must "appreciate" that the retailer is using the supplier to forward the information at issue. So, although it was not strictly relevant to the actual outcome of these cases,[82] the Court of Appeal's judgment suggests that actual knowledge of the role being played by the supplier is required of both the retailer and its competitor in order for a concerted practice to be found. In contrast to the CAT, the Court of Appeal believed that in fact the following more restrictive approach should be adopted on this issue:

> "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 practice having as its object the restriction or distortion of competition."[83]

[80] *Argos and Littlewoods v Office of Fair Trading* and *JJB Sports v Office of Fair Trading*, *supra* n 74, [32].
[81] *Ibid*, [91].
[82] See *ibid*, [89] (concerning the football kit case) and [144] (concerning the toys case). The fact that the statements concerning actual knowledge are in effect *obiter dicta* goes some way to explaining the rather non-committal nature of the language used.
[83] *Ibid*, [141]. It should be noted that given what is said in paragraph 91 of this judgment, the term "taken to have known" only refers to a situation where actual knowledge exists concerning the role of the supplier.

Two different approaches, then, were adopted by the respective UK authorities in this case; one required actual knowledge of the role of the supplier, the other implied that constructive knowledge was sufficient.

It is submitted here that, irrespective of the potential for different outcomes that is inherent in the choice regarding approach, neither approach is unduly restrictive as regards the operation of discussions between retailers and suppliers. Indeed, the interpretations provided by the CAT and the Court of Appeal both allow legitimate (vertical) business discussions to be conducted relatively unfettered—therefore facilitating the conclusion of favourable deals between retailers and suppliers—and only justify intervention when competitors are knowingly using suppliers as a point of contact in furtherance of their collusive designs. Discussions having only a vertical nature[84] will not come within the scope of this prohibition. A retailer will be entitled to provide sensitive commercial information to its supplier in the course of these discussions in order to negotiate better terms—provided, of course, that they are "conducted on a bilateral basis".[85] Importantly, neither approach proscribes in any per se manner complaints from retailers to suppliers, even if such complaints concern the prices charged by competitors. Such complaints may well be legitimate, not to mention beneficial in terms of consumer welfare, particularly if "they are directed at getting better terms for the business between those two parties".[86] By contrast, retailer–supplier complaints which are advanced with the knowledge that they will be used by the supplier to influence the behaviour of competing retailers—as opposed to those advanced solely in order to effect the deals offered by the supplier to the complaining retailer—are not immune from the competition rules.

While neither approach, then, is unduly restrictive as regards the operation of discussions between retailers and suppliers, it is also true that both approaches provide considerable scope to capture questionable information requests from the retailer. The discussion directly above concerning the legitimacy or otherwise of retailer complaints is premised on the (voluntary) provision of information by a retailer to a supplier (ie that she is unhappy about the prices of her competitors and wishes, for example, to obtain further discounts from the supplier). For the sake of completeness—or, more appropriately, in order to cover more accurately the practical workings of the retailer-supplier dynamic—one must also consider the inverse situation, ie where the retailer requests (or even forces) information from, rather than provides information to, the supplier. Two situations come readily to mind where such requests may occur. In the first situation a retailer may simply be unhappy with the low level of her competitor's prices and may

[84] That is, those discussions that are conducted between retailer and supplier without any information passing from the retailer (through the supplier) to the competing retailer.

[85] *Argos and Littlewoods v Office of Fair Trading and JJB Sports v Office of Fair Trading*, *supra* n 74, [106].

[86] *Ibid.*

wish to know whether or how the supplier facilitates them. To come to a conclusion on this matter, the retailer may ask the supplier to provide it with any commercially sensitive information in its possession concerning the competing retailer. (If the retailer is serious with its request, it may even use its buyer power, ie threats of going elsewhere for supplies in future—assuming, of course, that such power exists—in order to ensure compliance by the supplier.) In this situation neither approach (ie of the CAT or of the Court of Appeal) necessarily renders the request unlawful—at least under a "hub and spoke" analysis; rather, the request, without more (ie without (actual/constructive) knowledge on the part of the competing retailer), is simply a bilateral, vertical activity. The supplier's granting of the request will not render the flow of information horizontal in nature in the absence of such knowledge. This is not to say that the supplier does not have the law behind her if she wishes to convince the retailer that she is precluded from supplying such information: most likely, the commercially sensitive information will be protected by confidentiality clauses. Looking forward, however, the retailer may attempt to convince the supplier to refuse to include such confidentiality clauses (at least those concerning disclosure to the retailer) in future contracts with the competing retailer. Assuming the retailer is successful in so convincing the supplier, there are two possible outcomes: (i) the supplier becomes unreliable for the competing retailer, who goes somewhere else for her supplies, somewhere where confidentiality extends to the provision of information to the retailer; or (ii) the competing retailer becomes aware of the fact that information is going to the retailer via the supplier. The first outcome is unproblematic: the potential "hub" that is the supplier no longer exists. The second outcome opens up the possibility of the existence of a horizontal information exchange; this is so as the competing retailer is offered the possibility of communicating with the retailer through the supplier.

The second situation concerning a request from a retailer may occur when a supplier wishes to implement a wholesale price increase on products sold to both the retailer and the competing retailer. In such a case the retailer will wish to pass on the price increase to its customers and may be reluctant to accept a price increase without assurances from the supplier that the competing retailer will also increase the final price of its products. In this context, following assurances from the supplier and an increase in its prices, the retailer may wish to obtain proof from the supplier that the competing retailer actually raised its prices as the supplier predicted she would. In particular, the retailer may ask for evidence, such as the till receipts of the competing retailer. It is submitted that there is indeed scope here for an anticompetitive "hub and spoke" arrangement to be concluded: all will depend on the specifics of the bilateral discussions (ie retailer–supplier; supplier–competing retailer) concerning the outcome of the price increase as well as the test (CAT/Court of Appeal) adopted. The question here, though, is whether the request for proof in itself would be unlawful. It is

submitted that there are two responses to that question. First, if a cartel is deemed to be in existence concerning the retailer and the competing retailer (ie if one assumes that the specifics of the bilateral discussions noted directly above led to the conclusion of a "hub and spoke" arrangement), the request should be conceptualised as an attempt to monitor the cartel, and the provision of information on foot of that request would also be deemed to be anticompetitive in its own right.[87] Secondly, in the absence of an underlying "hub and spoke" arrangement (eg where the competing retailer is not aware of the assurances given to the retailer by the supplier or that the retailer intends to increase her prices), the request from the retailer, without more (ie without (actual/constructive) knowledge on the part of the competing retailer, a requirement the specifics of which depend on the approach chosen), is simply a bilateral, vertical activity.

As above, sufficient scope for legitimate business discussions between retailer and supplier is provided by both approaches: complaints will be legitimate if they are directed at getting better terms for the business between those two parties and are conducted on a bilateral, vertical basis. Both approaches also provide considerable scope to capture questionable information requests from the retailer; they do this by employing inter alia the concept of knowledge of the competing retailer of the role of the supplier. To this extent, then, both approaches have something important in common. However, by definition, a significant difference exists concerning these approaches: the inclusiveness of the concept of "knowledge" regarding the role of the supplier in a "hub and spoke" arrangement. The choice as to the approach to adopt at EC level therefore has the potential to affect the outcome of a given ("hub and spoke") case. This is true as one approach (that of the CAT) is stricter than the other: it catches a wider range of activity. However, whether the choice will actually affect the outcome in a given case will, of course, depend on the facts presented.

In choosing one approach over another, one should take account of both policy and law. As regards policy, it has already been noted that both approaches allow sufficient scope for retailers to provide information to suppliers so as to conduct their businesses in a manner that furthers their interests—and, where savings are passed on downstream as a result, the interests of consumers—without disturbing market processes. In this sense, both approaches achieve a certain degree of protection for activity that enhances (or at least does not affect negatively) consumer welfare: (i) sensitive commercial information can be passed from retailers to suppliers; and (ii) complaints about competitors are not unlawful per se. That is not to say, however, that the level of protection for consumer welfare is equivalent. If one adopts the approach of the Court of Appeal, those information exchanges where the retailer has no actual knowledge of the role of the supplier (but does have constructive knowledge) are considered to be outside

[87] On this, see section B *supra*.

the scope of an agreement or concerted practice; consequently, the anticompetitive nature of those agreements/concerted practice cannot be analysed. Such an arrangement would thus be untouchable even if it had an effect on the welfare of consumers, eg through higher prices or lower quality. If one switched to the CAT's test, the arrangement in question (ie an information exchange where the retailer has only constructive knowledge of the role of the supplier) would have to be analysed for its object or effect concerning competition. If, in that case, a negative effect on competition—and therefore consumer welfare—were to be found, the arrangement would be prohibited. Hence, the CAT's approach arguably provides more scope to consider the consumer welfare consequences of a given arrangement. If one wished for the authorities to have as much help in maximising consumer welfare as the competition laws can provide, then the approach of the CAT would be more welcome than that of the Court of Appeal. Such an approach would of course impose more of a burden on retailers when conducting their negotiations with their suppliers, as they may be held to account for what they ought to have known rather than simply what they did know in fact. By choosing the CAT's approach over that of the Court of Appeal, one is in effect restricting the behaviour of retailers in order to ensure that more protection is provided for consumer welfare. This trade-off between facilitating the protection of consumer welfare and burdening retailers is a political choice, the outcome of which necessarily involves favouring one interest group (consumers) over another (retailers).

More important than policy, of course, is the law. In fact, it is the law, namely EC-level jurisprudence, that pushes one in favour of one approach in particular, that of the Court of Appeal. It is submitted that EC law is more likely to be respected by the approach of the Court of Appeal than that of the CAT, as it produced a judgment that sits more comfortably with EC jurisprudence on the concept of a "concerted practice". According to the ECJ in the *Dyestuffs* case, a concerted practice is defined as "co-ordination between undertakings which, without having reached the stage where an agreement, properly so called, has been concluded, *knowingly* substitutes practical co-operation between them for the risks of competition".[88] This dictum appears on its face to exclude from the scope of the definition of a "concerted practice" those substitutions (ie of cooperation for competition) that occur without the knowledge of the undertakings involved. Whether the term "knowingly" implies that knowledge must be actual, as opposed to constructive, is not definitively answered by the case law. What is clear, however, is that the term "knowingly" can certainly be

[88] Cases 48, 49 and 51–57/69 *ICI v Commission* [1972] ECR 619, [64] (emphasis added). On this generally, see A Albors-Lorens, "Horizontal Agreements and Concerted Practices in EC Competition Law: Unlawful and Legitimate Contact between Competitors" (2006) 51 *Antitrust Bulletin* 837.

taken to include actual knowledge, and that the same cannot be said for knowledge that is constructive in nature. Deeming constructive knowledge to be sufficient in this context is therefore legally questionable. The Court of Appeal's subjective test requiring foreseeability in effect excludes anticompetitive substitutions of cooperation for competition that are based on constructive knowledge; according to this authority, one cannot knowingly substitute cooperation for competition in a "hub and spoke" context without: (i) the retailer foreseeing that the information it has passed to the supplier will be conveyed to its competitor; and (ii) the competing retailer appreciating the circumstances in which the information was disclosed. It is for reasons of legal consistency,[89] then, that the test articulated by the Court of Appeal is preferable to that of the CAT—at least when the law as opposed to policy is being considered. A similar point can be established concerning the requirement of implementation on behalf of the competing retailer. Under EC law, in order for the existence of a concerted practice to be found implementation should occur on the market.[90] In this regard, a concerted practice is different from an agreement, where no such requirement is imposed; such a practice in fact requires not only concertation between undertakings but also "subsequent conduct on the market, and a relationship of cause and effect between the two".[91] By adopting a more restrictive approach than that suggested by the relevant dictum of the CAT, the Court of Appeal ensures that such EC jurisprudence is respected: the competitor of the retailer has to actually "use" the information exchanged via the hub to determine its conduct on the market. However, this approach not only fits more comfortably with EC jurisprudence, it also reduces the likelihood of an undertaking being deemed to have engaged in a concerted practice "by accident", ie without its knowledge.[92] A final point should be made regarding reciprocity. It is true that the approach of the Court of Appeal implies a lenient approach to the concept of reciprocity and accepts the argument that, to the extent that information may be exchanged without reciprocity and yet reduce uncertainty in the market, such an exchange could be conceptualised as a "concerted practice".[93] However, assuming Odudu's considered analysis of the

[89] It should be noted that consistency with EC law is important even when only the UK national provisions on competition law are being enforced; see s 60 of the UK Competition Act 1998.

[90] See, eg Case C-199/92 P *Hüls AG v Commission (Polypropylene)* [1999] ECR I-4287.

[91] *Ibid*, [161].

[92] Cf R Carlton, "Boundaries in Indirect Concerted Practices and Cartel Leniency", Freshfields Bruckhaus Deringer, October 2006, 2.

[93] The Court did acknowledge, however, that a case would be

> "all the stronger where there is reciprocity: in the sense that C discloses to supplier B its future pricing intentions in circumstances where C may be taken to intend that B will make use of that information to influence market conditions by passing that information to (amongst others) A, and B does so" (*Argos and Littlewoods v Office of Fair Trading* and *JJB Sports v Office of Fair Trading*, *supra* n 74, [141]).

concept of concerted practice is correct[94] (ie that a concerted practice does not require common intention, but instead focuses on whether conduct reduces uncertainty as to the future conduct of others), there would be no inconsistency here with the jurisprudence from EC level. In other words, unilateral exchange of information through a "hub and spoke" arrangement would be capable of violating the EC competition law rules.

D. Conclusion

The exchange of information between a retailer and its supplier is essential in order for business negotiations to take place. The exchange of commercially sensitive information (such as future pricing intentions) in this context does not necessarily have a negative effect on consumer welfare and may in fact facilitate discussion on, for example, the possible future promotional activities of the retailer, activities that may ultimately benefit consumers. However, if these discussions between retailer and supplier are being used to allow information to flow from the retailer through its supplier to its competitor it is possible that competition will be harmed. The law on direct competitor-to-competitor information exchange is helpful in determining how one should deal with such "hub-and-spoke-type" arrangements: by identifying the underlying concern with direct competitor-to-competitor exchanges one can construct a legally consistent approach to retailer–supplier–competing retailer exchanges.

Three particular instances involving suspect direct competitor-to-competitor information exchange are obvious from European jurisprudence: (i) where the information exchange is used to monitor a price-fixing cartel; (ii) where the information exchange represents a price-fixing arrangement in its own right; and (iii) where the information exchange is employed to create or stabilise an oligopoly situation. Importantly, information exchange falls within the scope of Article 81(1) EC if it reduces or removes "the degree of certainty as to the operation of the market in question with the result that competition between undertakings is restricted".[95] The general principle underlying the approach of the EC courts is that each undertaking must determine independently their market policies and the conditions they offer to their customers. What is of particular importance here, then, is an assessment of the economic conditions on the relevant markets and of the specific characteristics of the information exchange system at issue. Both the literature and the jurisprudence concur on the crucial issues that need to be analysed in these assessments, namely, the type of information exchanged and the structure of the relevant market. The types of

[94] On this, see section B *supra*.
[95] Case C-238/05 *Asnef-Equifax v Ausbanc* [2006] ECR I-11125, [51].

information that should not be passed directly to competitors include individual pricing intentions, capacity increases, investment plans and individual sales figures; indeed, information exchanges involving these data have all been found to be objectionable under EC law. In particular, the Commission has shown its willingness to prohibit exchanges of individual (as opposed to aggregated) data, above all where such data is regularly updated and circulated in a swift manner.

The law on direct competitor-to-competitor exchanges is concerned with horizontal exchange of information; the analyses identified should only apply to "hub and spoke" arrangements if the arrangement in question provides an exchange of information that is equivalent in substance to a horizontal exchange between competitors. Equivalence in this context will be determined according to the circumstances surrounding the alleged exchange. Of particular importance in determining whether equivalence exists is the role of the supplier (as conveyor of information), as well as the retailer and competing retailer's understanding of her role. Where the supplier acts simply as a go-between connecting the retailer and the competing retailer there should be no additional analytical problem concerning this issue: the exchange of information is quite clearly intended to be between the two competitors, and not simply between the retailer and the supplier or the supplier and the competing retailer. However, the analysis becomes more complicated when awareness of the role of the supplier is not obvious. It was argued that awareness of the role of the supplier by the supplier is not essential: if a flow of information between the retailers (through the supplier) can be established by the retailer and the competing retailer irrespective of the ignorance of the supplier, the exchange will be horizontal. As regards awareness of the role of the supplier by the retailer and by the competing retailer, one must chose whether the standard should be constructive or actual knowledge. There is an absence of EC jurisprudence on this issue. The UK authorities have addressed the issue directly. Two approaches are evident: one provides that constructive knowledge is sufficient (the approach of the CAT); the other requires actual knowledge (the approach of the Court of Appeal). It was argued first that both approaches provide sufficient scope for legitimate business discussions to be conducted between retailers and suppliers: both allow sensitive commercial information to be passed from retailers to suppliers in the context of legitimate discussions and only justify intervention when competitors are knowingly using suppliers as a point of contact in furtherance of their collusive designs; and complaints about competitors are not per se unlawful. It was argued further, however, that the approaches' appeals in terms of policy and law differ: the stricter approach of the CAT is more likely to facilitate a competition policy that favours the maximum protection for consumer welfare, while the approach of the Court of Appeal is more likely to be consistent with EC-level jurisprudence on the concept of a "concerted practice". An informed choice as to the standard to adopt in determining whether a given "hub and

spoke" arrangement is in fact horizontal (ie whether actual or constructive knowledge of the role of the supplier should be employed) would therefore reflect both: (i) the relative value accorded to the consumer welfare standard; and (ii) the persuasiveness of the legal consistency argument advanced.

As a concluding observation, it is worth noting that, whichever approach is adopted, retailers will need to be very careful when providing information to their suppliers; indeed, they should take whatever precaution is reasonably necessary to satisfy themselves that the supplier will not pass on that information to third parties, such as competitors. The retailer's failure to protect itself in this regard may result in the information exchange being analysed as a direct competitor-to-competitor arrangement and in a fine being imposed if the economic analysis demonstrates the anticompetitiveness of that exchange.