

# The intent dilemma in hub and spoke offences



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Hub and spoke cartels or H&S arrangements consist of a common intermediary indirectly enabling the coordination of competitors. The hub is central to allowing the coordination of competing entities or spokes. Such sophisticated arrangements have developed over the years, leading to close scrutiny by antitrust regulators across the globe.

Until recently, H&S arrangements were not explicitly recognised under the Competition Act, 2002 (act). However, the Competition (Amendment) Act, 2023 (2023 amendment) has now brought them within the act. A proviso has been added to section 3(3) of the act, which provides that an enterprise or association of enterprises, though not engaged in identical trade, shall also be presumed to be part of the horizontal anti-competitive agreement if it participates or intends to participate in the furtherance of such agreement. H&S arrangements may fall foul of Section 3(3) if the following conditions are met.

There must first exist a horizontal agreement amongst the spokes. That is, the rim agreement. Thereafter, proof has to be shown that the hub participated or to participate in furtherance of such agreement. Section 3(3) raises a rebuttable presumption of appreciable adverse effect on competition (AAEC). Factual proof of a rim agreement is required. However, for a hub to be liable, mere intent to participate in furtherance of the agreement's objective is sufficient, whether or not it has taken any step to engage actively in the cartel behaviour. What constitutes an intention to participate is untested and may be widely interpreted to mean mere knowledge of or inaction to stop a rim agreement.

In *Samir Agrawal v Competition Commission of India* (the Ola/Uber case), the CCI found that allegations of an H&S arrangement were not proved. There was insufficient evidence of an agreement between the competing drivers to set prices through the online platform, with a further agreement between the drivers and the platform allowing the platform to coordinate driver prices. The Competition Law Review Committee's 2019 report recommended that, because of the deleterious effects of cartels, proof of knowledge or intent should not be required. There would instead be a presumption that such hubs cause an AAEC. This recommendation was not taken

up. However, the 2023 amendment restored the original wording of the clause by creating a disjunctive test of a hub either intending to or actually participating in the agreement being sufficient to raise a presumption of AAEC.

That mere intention may, by itself, establish liability in H&S arrangements is problematic. Before, competition law required an agreement or concerted practice between parties, supported by direct or circumstantial evidence to prove cartel conduct.

If interpreted broadly, the new provision may hold hubs liable for passive information exchange rather than deliberate action. This may prove complex because hubs such as digital platforms handle sensitive data from many business partners without necessarily exercising influence in their independent commercial decisions. An e-commerce platform that aggregates and displays prices set independently by various sellers may be accused of facilitating price coordination merely because it possesses or displays such information.

It is unlikely that a mere exchange of sensitive information by the hub with each of its spokes in the ordinary course of business will attract liability. However, this may not be the case if it can be proved that the spokes used the information to coordinate their conduct, and, despite knowing of collusive conduct, the hub failed to take any action to prevent or publicise it. To disprove allegations of an intent to participate in the furtherance of a cartel agreement, the hub must have recorded its explicit disapproval of such collusion.

Businesses acting as hubs will have to follow strict competition compliance standards to avoid becoming unintentionally involved in H&S arrangements. Sharing of sensitive information between the hub and individual competing spokes should be carefully managed to prevent such information leaking. The recognition of H&S arrangements is a radical shift in India's cartel regulation. Although welcome, it is unclear what will be considered an "intent to participate" and what the CCI will set as evidentiary standards.

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