

Information Exchange and Hub & Spoke Cartels

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This time last year

A fashionable infringement

- **Finland**
 - *Grocery retailers* (2008)
- **France**
 - *Palais Parisiens* (2006)
- **Germany**
 - *Drugstore products* (2008)
 - *Luxury cosmetics* (2008)
- **Netherlands**
 - *T-Mobile* (2009)
- **Spain**
 - *Asnef-Equifax* (2007)
- **UK**
 - *Private schools* (2006)
 - *Dairy products**
 - *Tobacco**
 - *Brands**
- **EU**
 - *Bananas* (2008)*

“A cartel usually requires the exchange of information on prices and markets ...

At the other end of the spectrum, dissemination by a trade association of anonymized, historical statistical data may be unobjectionable.

Between those two extremes, difficult issues arise”

Bellamy & Child (6th Ed)

- **EU Horizontal Guidelines published**
- **Hub & spoke aspects in cases have narrowed or collapsed**
 - *Tobacco*
 - *Dairy*
 - *Brands*
- **New cases have emerged**
 - *UK Banks*
 - *UK Motor Insurance*
 - *German FMCG*

Horizontal Guidelines

- **Real progress**
- **Clarifies**
 - practical and theoretical basis of Commission's approach
 - when information exchange will constitute a per se infringement
 - factors relevant to an effects analysis
- **Number of open questions remain**

- **Two categories of information exchange**
 - as part of a wider horizontal agreement
 - free-standing information exchange
- **First to be assessed in context of wider agreement**
- **Second addressed in Guidelines**

- **Main concern is that information exchange leads to collusion**
 - specifically tacit collusion
- **Secondary concern in relation to foreclosure**
 - exclusive exchange of very strategic data
 - exclusion a significant competitive disadvantage
- **Clear recognition of potential pro-competitive benefits**

- **Narrow ‘object box’ for pure information exchange**
- **Covers only exchanges of**
 - individualized data
 - re future intentions
 - relating to
 - prices, or
 - quantities

- **Nature of market**
 - concentrated, transparent, stable, “non-complex” and symmetric
- **Nature of information**
 - strategic, individualized, recent, publicly available, market coverage
- **Nature of exchange**
 - frequency, in public or in private
- **Similar to merger analysis of coordinated effects**

Some outstanding questions

How narrow is the object box?

- “An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings” (*T-Mobile*)
- Quantity data may include data on market share, territories or sales to customer groups (fn 56)
- Price data may include
 - prices paid for inputs – ie cost data (*T-Mobile*)
 - “price setting factors” (*Bananas*)
- Can current data disclose future intentions?

- **Guidelines take a broad view**
 - “information exchange can constitute a concerted practice if it reduces strategic uncertainty ...
Consequently, sharing of strategic data between competitors amounts to concertation”
- **Case law**
 - tacit agreement requires “an invitation” to fulfill an anticompetitive goal jointly leading to a “concurrence of wills” (*Bayer Adalat*)
 - a concerted practice requires action on the market – but this may be presumed (*Anic*)

- **Sufficient if**
 - one competitor makes a unilateral disclosure of strategic information, and
 - that disclosure is “accepted”
- **Presumed acceptance absent “clear statement” that information unwelcome**
- **Impact of *Anic* presumption?**

- ***Woodpulp***
 - public announcements of price increases not collusive
- **Guidelines**
 - “a concerted practice cannot be excluded for example in a situation where [a public announcement] was followed by public announcements by other competitors”
- **NB firmness of public commitments**

- **Scope for broad interpretation**
 - particularly if effects analysis applied in ‘check list’ manner
- **Analysis of pro-competitive effects likely to be important**
 - source of reassurance in case of uncertainty
 - “on a truly competitive market transparency between traders is in principle likely to lead to the intensification of competition” (*Tractor Exchange*)

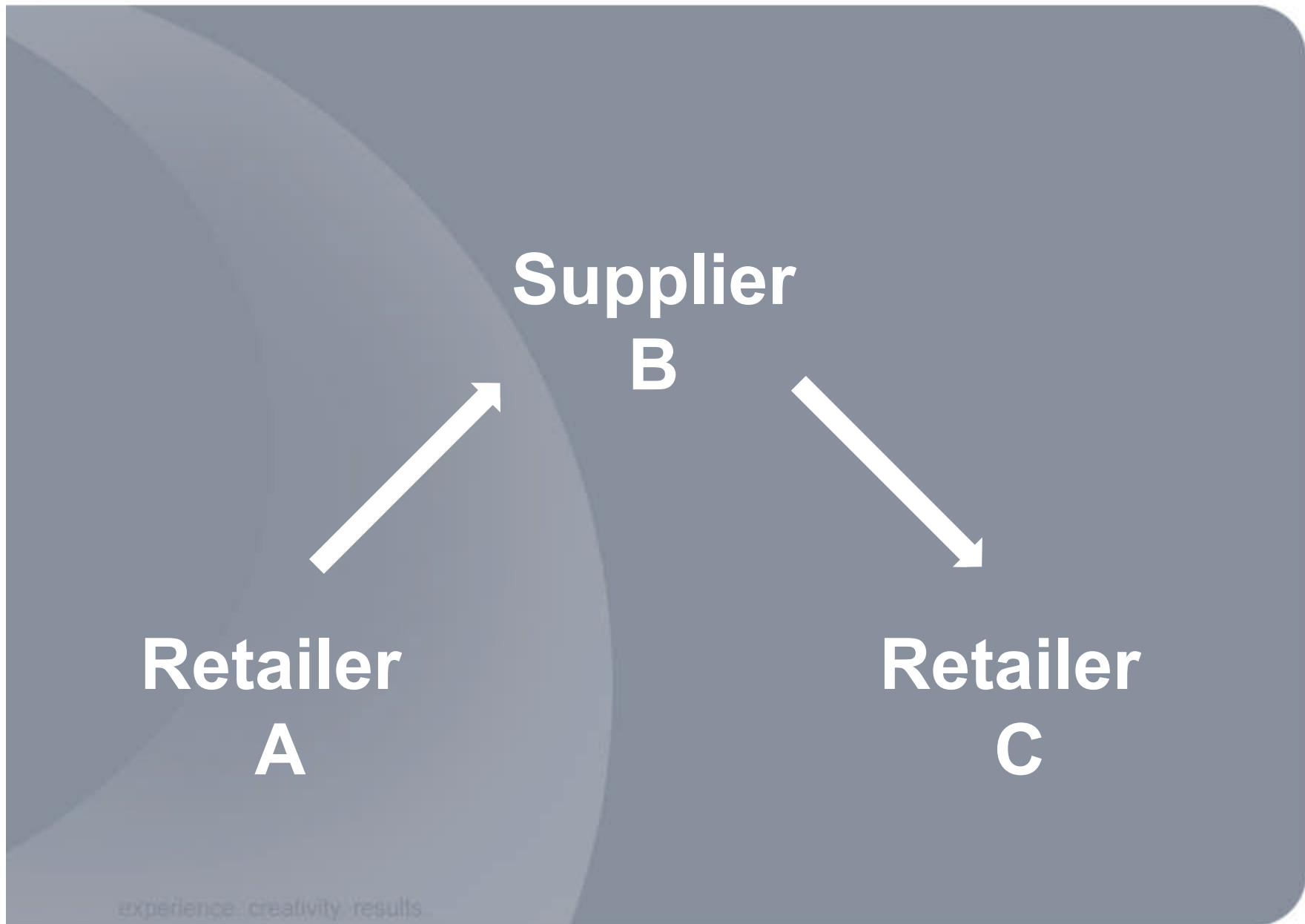
- **On-line tool created by 7 insurers and 2 IT companies (WhatIf? Private Motor)**
 - individualized data
 - including future prices
 - private exchange
 - updated monthly
- **Case to be settled without fines**
 - data to be aggregated (over at least 5 insurers) and to cover only current prices

Hub-and-Spoke Exchanges

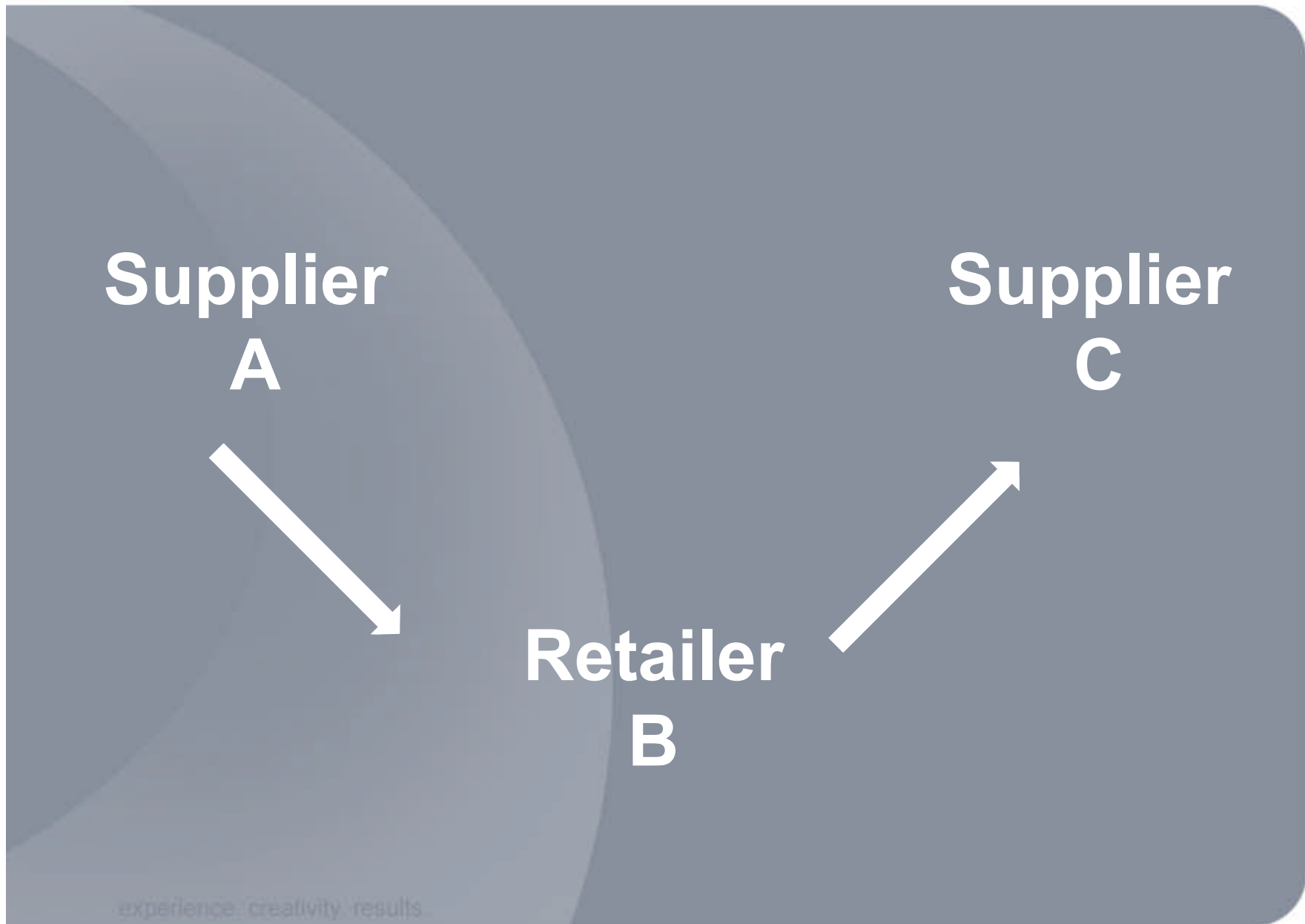
ABC Trilateral Concerted Practices

“IIC” Indirect Illegal Contacts

The Basic Picture - May be reciprocal



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- **Not all parties are in direct contact**
- **The ‘hub’ acts as an intermediary and often a legitimate business contact**
- **The ‘spokes’ are typically competitors e.g. suppliers on one side and buyers on the other in the UK cases (cf *Bananas*)**

- **Suppliers and retailers exchange information for legitimate, pro-competitive reasons**
 - while seeking advantage in price negotiations
 - as part of gathering market intelligence (to compete rather than coordinate)
- **Information may flow between competitors absent agreement/knowledge/coordination**
 - the hub (B) may act without the knowledge or consent of the spokes (A) or (C)
 - confidentiality is routinely ignored

- **An infringement will occur if**
 - A “may be taken to intend” OR “does in fact foresee” that its information will be passed from B to competitors such as C
 - C “may be taken to know the circumstances” of A’s disclosure, and
 - C uses the information in setting prices[No legal requirement that disclosure it is reciprocal]
- **An infringement may not occur if**
 - A did not in fact foresee B’s use of the information, and/or
 - C did not appreciate the basis on which A had provided the information

- Will objective intention/foresight suffice rather than subjective intention/foresight (e.g. A should have known even if A actually did not..)
- In hub and spoke exchanges, is remaining active on the market sufficient to establish presumption that [C] took account of information received ? (Presumption only established in direct competitor contacts case)

Dairy

- Government initiative to improve returns to farmers from retailers/dairy processors
- Retailers/processors deemed “colluding on prices for butter, milk and cheese during 2002 and 2003”
- In 2007 most parties settle with OFT and fines over £116m agreed
- Two retailers fought on but in 2008 another processor settles bringing total agreed fines to over £120m
- In 2010 Morrisons dropped and 3 of 4 allegations against market leader Tesco dropped with “no contest” on final one which it then also later challenged
- Total agreed fines down by at least around £50m: watch this space...

- ***Tobacco***
 - Hub and spoke allegations made in 2008 SO but dropped in final decision
 - Novel form of “price and parity RPM” equivalent in effect to horizontal manufacturer exchanges
 - Decision imposing fines up to £225m under appeal: watch this space...
- ***Brands***
 - Hub and spoke allegations concerning supermarkets and suppliers of over 100 brands
 - Over 2 years of investigation, dawn raids involving 100+ officials and millions of emails reviewed
 - Case closed on “prioritization” grounds

- **UK appetite for further hub and spoke cases may now be lower given experience meeting high burden of proof and uncertainty over legal test**
- **Key issue in UK cases is role of subjective knowledge/intention**
- **Clear risks where evidence of:**
 - price information exchanges leading to commitments to price at particular level
 - repetitive reciprocal exchanges (A to B to C and C to B to A)

- **Remind staff to emphasise confidentiality appropriately**
- **Proactive distancing in writing and retain record**
- **Focussed training for relevant staff**