

# Recent Developments in Exchanges of Information:

June 2014,

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June 2014

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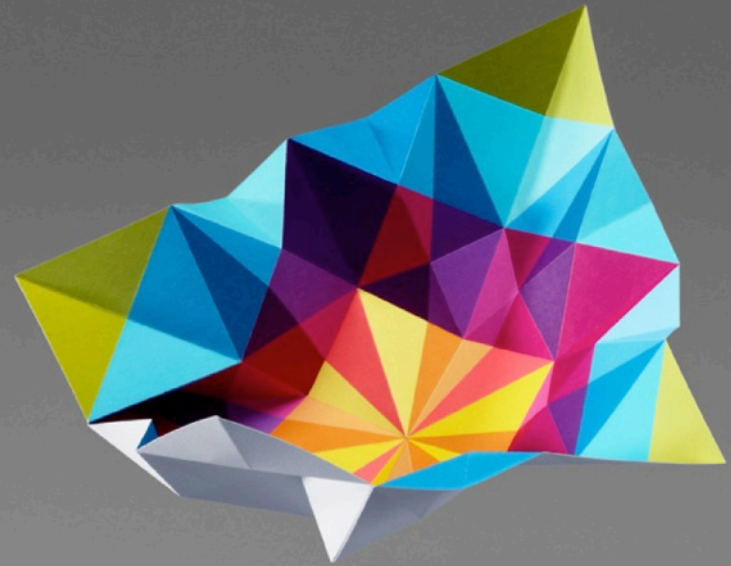
# Overview

A brief summary of pros and cons of exchanges of information and where competition law draws the line.

Interesting recent developments and questions:

- Public announcements
- Vertical communications (A2B2C cases)
- Communications where customers are also competitors

# 1. Quick recap



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# Overview of economics

Generally, more information improves the functioning of markets

- Asymmetric information often at the route of market failures.
- Better information on how the market will evolve generally allows firms to allocate their goods more efficiently.

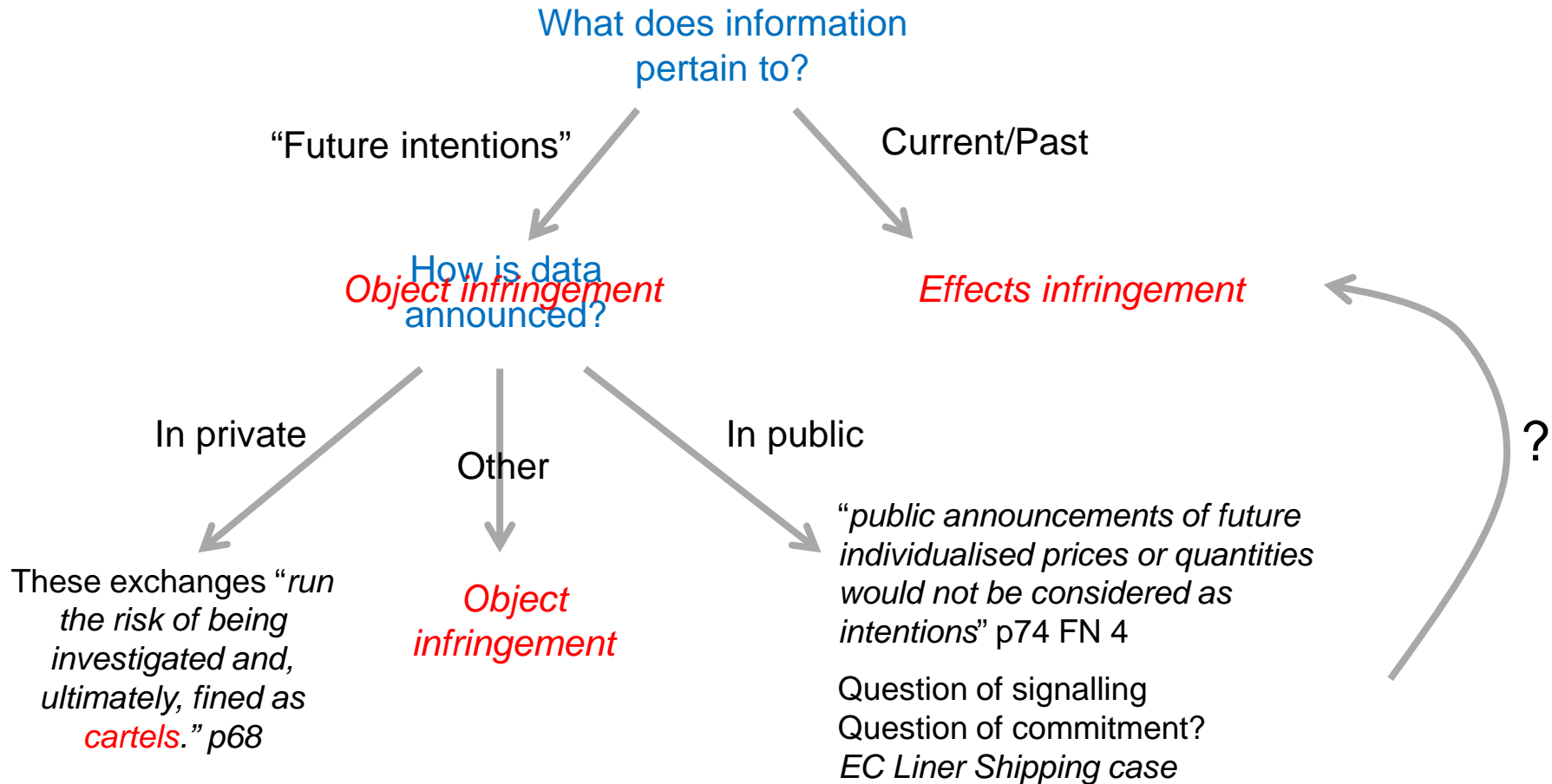
Except... when it facilitates coordination between competitors.

- Pricing information may facilitate a focal pricing point.
- Quantity information may facilitate ability to identify deviations.

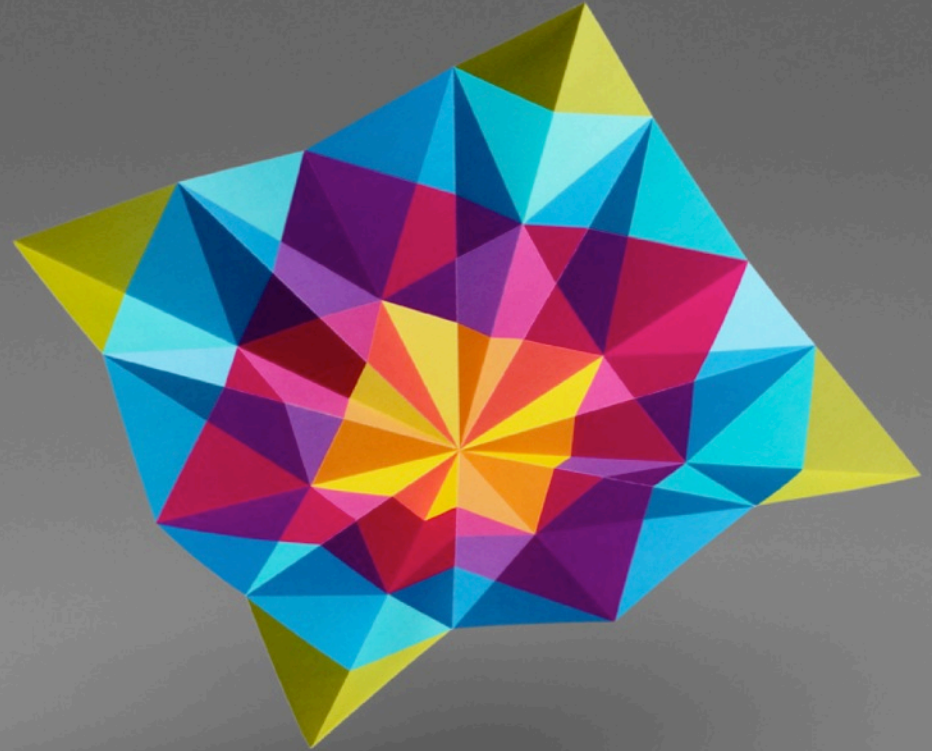
NOTE that reductions in uncertainty absent a coordination concern cannot be presumed to be harmful.

- Can be beneficial as often as harmful – OFT Motor Insurance (2012).
- Conspicuous absence of such theory in Horizontal guidelines.

# Legal certainty and the Horizontal Guidelines



## 2. Public Announcements



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# Public Announcements

Concern that public announcements become a way of 'signalling' private strategic competitive intentions.

- ATP case
- EC Liner case (see next slide)
- Dutch mobile case (2014)
- U-Haul (2010) and Valassis (2006) S5 cases in the US.

Be very careful about making public announcements that are:

- on a key strategic competitive variable.
- can be, and are, changed without implementation.
- have 'conditional' statements within them.

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# Public Announcements: EC Liner Shipping

## Ongoing investigation

- Centres on individual firms' regular public announcements of pricing intentions through releases on their websites and specialist trade press.
- Announcements are made several times a year, several weeks in advance of implementation and detail amount of increase and implementation date,

## Concerns/Efficiency?

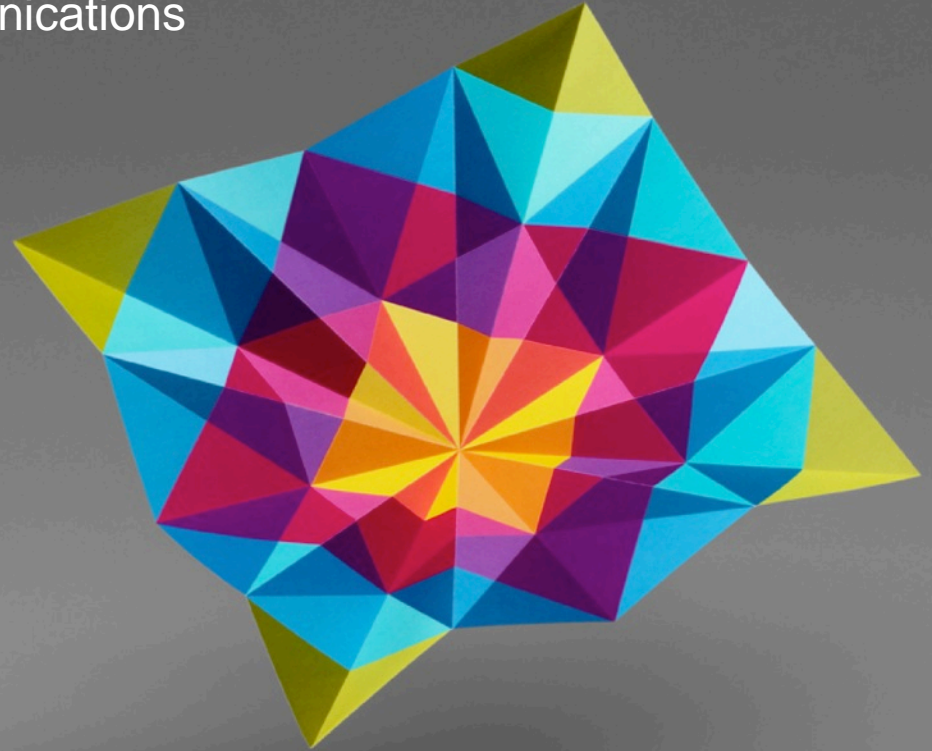
- Signalling – announcements may let firms communicate a focal point.
- BUT.. efficiency rationale – let customers know when prices are increasing so they can plan their shipments more efficiently.

## Questions relevant to 'future intention':

- Were liners committed to implementing their prices on announcement or could they reverse their announcements with little cost?
- What will standard of proof be? Can EC simply presume that there was price signalling or will the EC have to show a pattern of signalling through the data?

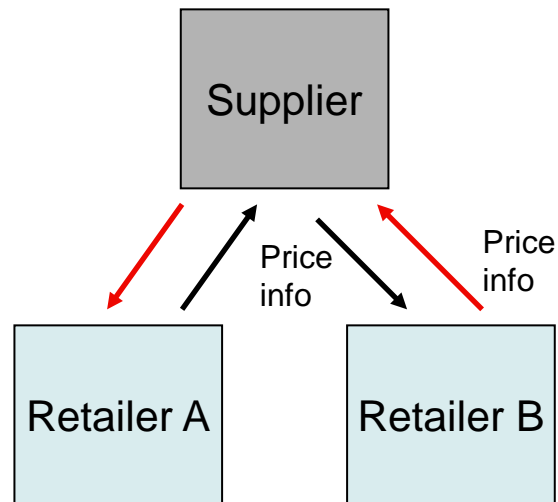


## 2. Manufacturer Retailer Communications

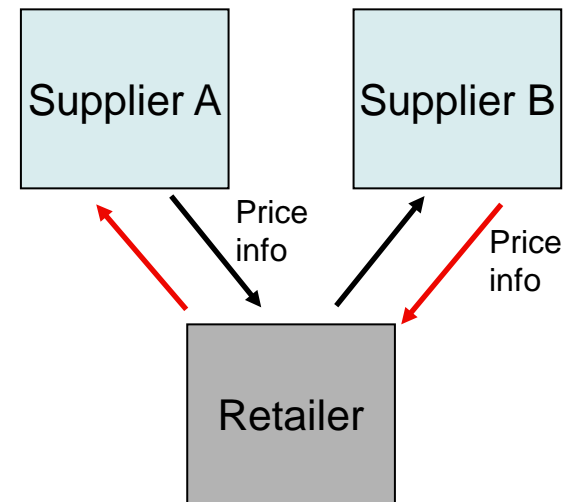


# Two possible cases of hub and spoke

Retailer to Supplier to Retailer

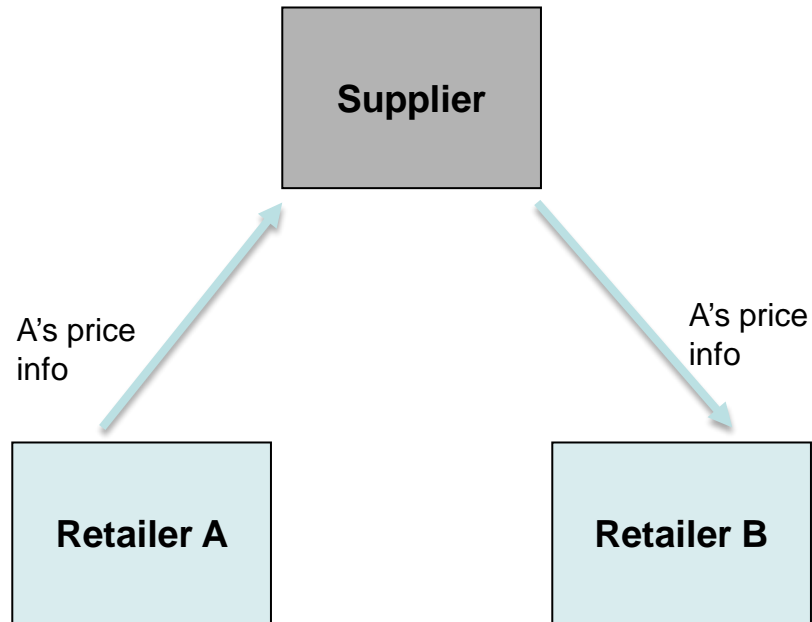


Supplier to Retailer to Supplier



# Retailer to Supplier to Retailer

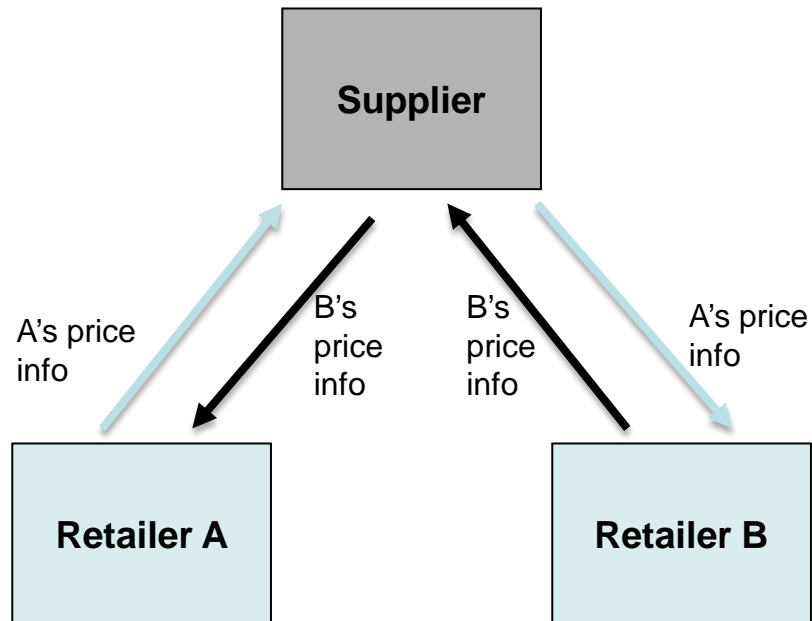
## Theory of harm



A tells the supplier what retail price it will be charging.

Supplier then passes on this information to retailer B

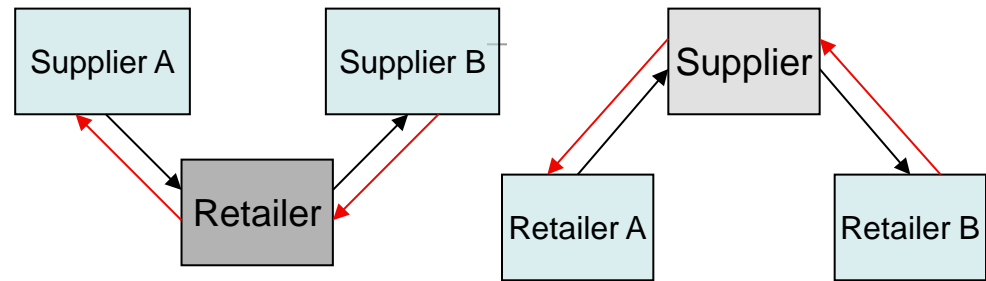
# Retailer to Supplier to Retailer Theory of harm



B then tells supplier its expected prices, and supplier passes this back to A

Flow of information may allow coordinated outcomes between retailers.

# A2B2C Efficiencies?



Note that discussions between retailers and suppliers on **wholesale prices** are common:

- Retailers may well want to play suppliers off of each other to get the lowest wholesale price.
- This will involve the retailer telling the supplier about its rival's price and will generally be pro-competitive.

**Notable that there are no cases within such a framework.**

Conversations between suppliers to a retailer about **retail prices** may be less common:

- However may still exist – for example manufacturers may have better information about the optimal retail price level (RRPs).
- However harder to find a good rationale to pass that information along to a rival retailer – this is where A2B2C cases have concentrated (Toys, Football Kits and Dairy).

# The UK test: Three limb test

## *Limb 1: A to B*

A discloses future pricing information to B in circumstances such that A can be assumed to intend, or does intend, that B will pass onto C

## *Limb 2: B to C*

B passes info to C in circumstances such that C may be taken to know context in which it was passed on, and/or information is passed on with A's understanding.

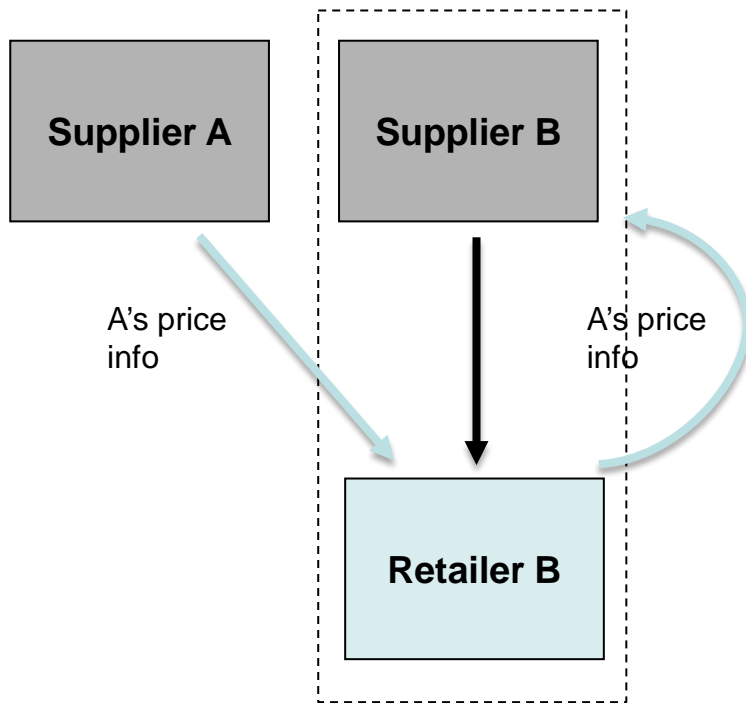
## *Limb 3: Use by C*

C uses the information in determining its own future pricing intentions

# What happens when customers are competitors?

## Some initial thoughts...

### Situation One:



More difficult to argue that Retailer B was doing it to negotiate the price of its upstream arm (B) down (i.e. less efficiency rationale).

But can we apply same A2B2C test?

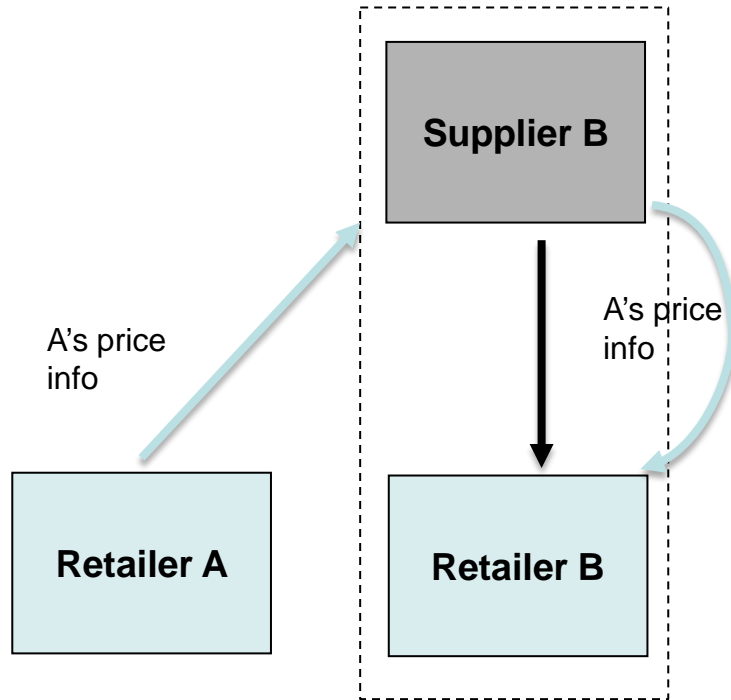
- Was A providing it to C knowing that it would go to upstream arm?
- Much more difficult to presume that A was passing it onto B knowing that it would be passed on to upstream arm as there is a clear objective justification for supplier A to provide its price.

Supplier A could relatively easily guard against this:

- Simply state that price is confidential and cannot be passed to upstream supplier arm.

# What happens when customers are competitors? Some initial thoughts...

## Situation Two:



Same justification for retailer A to pass onto supplier B (i.e. optimal sales price)... but difficult to provide an efficiency justification for B to pass this onto downstream B.

More likely to be problematic in such a situation – will be harder for A to argue that it has a clear objective justification to provide information.

Thus A will need to go further to distance itself from any discussions internally to B.

- A should request confidentiality to ensure that its price is not passed onto retailer B.
- Similarly it must refuse information from supplier B about retailer B's pricing.



**London**

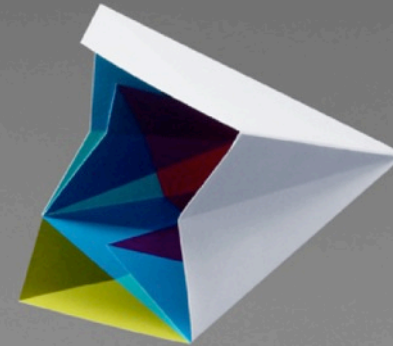
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