

Information exchange and the double agent: trading with competitors

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Information exchange – the benefits and risks

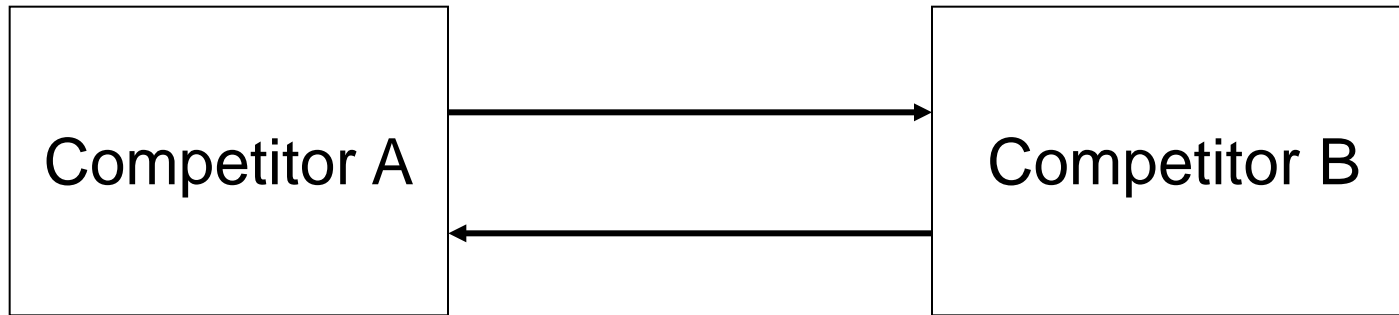
“In the normal course of business, undertakings exchange information on a variety of matters legitimately and with no risk to the competitive process. Indeed competition may be enhanced by the sharing of information, for example, on new technologies or market opportunities. There are therefore circumstances where there is no objection to the exchange even between competitors.”

BUT – some forms of information exchange are unambiguously harmful

The legal framework for assessing information exchange

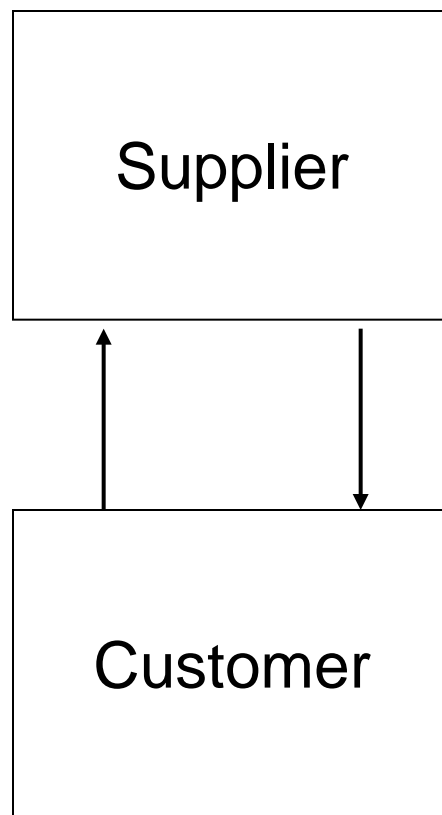
- n Case law and soft law designed to distinguish the benign from the harmful
- n More efficient and provides more legal certainty than attempting case-by-case review
- n Unsurprisingly, focus on “horizontal” exchanges of information between competitors and equivalent, “indirect” exchanges via “hub and spoke”

Horizontal information exchanges



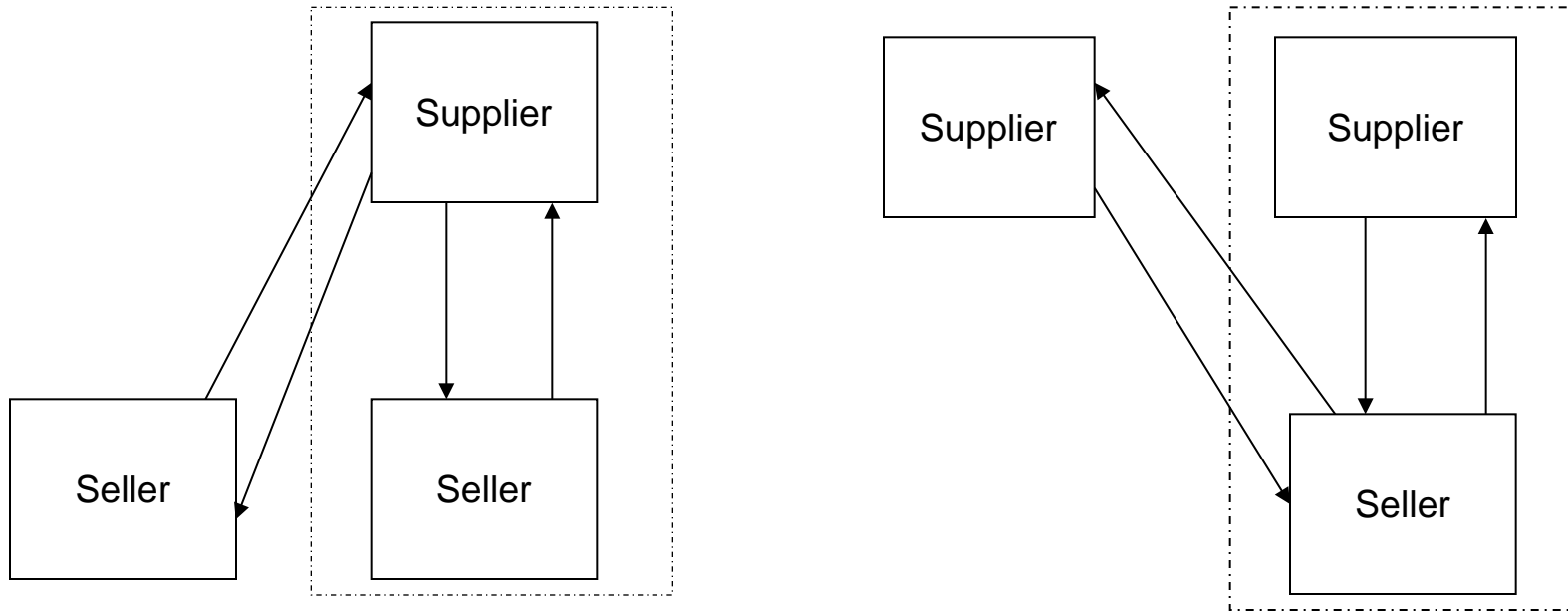
- n Object infringement where “future intentions”, forward looking, strategic information is exchanged non-publicly
- n Rationale “reducing strategic uncertainty” with effect of restricting competition. Economic context is relevant

Vertical information exchanges



- n Information exchange necessary and typically benign
- n VABE safe harbour applies (other than in relation to RPM)

Trading with your competitors: horizontal and vertical



Relatively commonplace:

- n Manufacturer with spare capacity
- n New supplier using competitor's distribution network
- n Financial services provider using competitor's products
- n Retailer selling private label products in competition with brands

Trading with your competitors: horizontal and vertical – what does the guidance say?

“to the extent vertical agreements...are concluded between competitors, the effects of the agreement on the market and the possible competition problems can be similar to horizontal agreements...”

BUT – different “economic context” than collusion cases

Trading with your competitors: horizontal and vertical – case by case assessments

- n EC – *Kesko/Tuko* merger – recognised the competitor/customer dynamic in private label
- n Competition Commission 2008 – identified potential theory of harm, but not empirical evidence of harm
- n EC – sponsored study on “the economic impact of modern retail on choice and innovation in the EU food sector” – looking at effects of prevalence of private label
- n Belgian Competition Authority – informal proposal of 90 day limit on advance product information for retailers

Conclusion

- n Vertical-horizontal exchanges risk distorting competition
- n But agreements are commonplace and often the exchange is desirable or necessary
- n Information barriers an option – but they come at a cost
- n There is a significant gap, where guidance from competition authorities would help