

# Information exchange: ABC infringements

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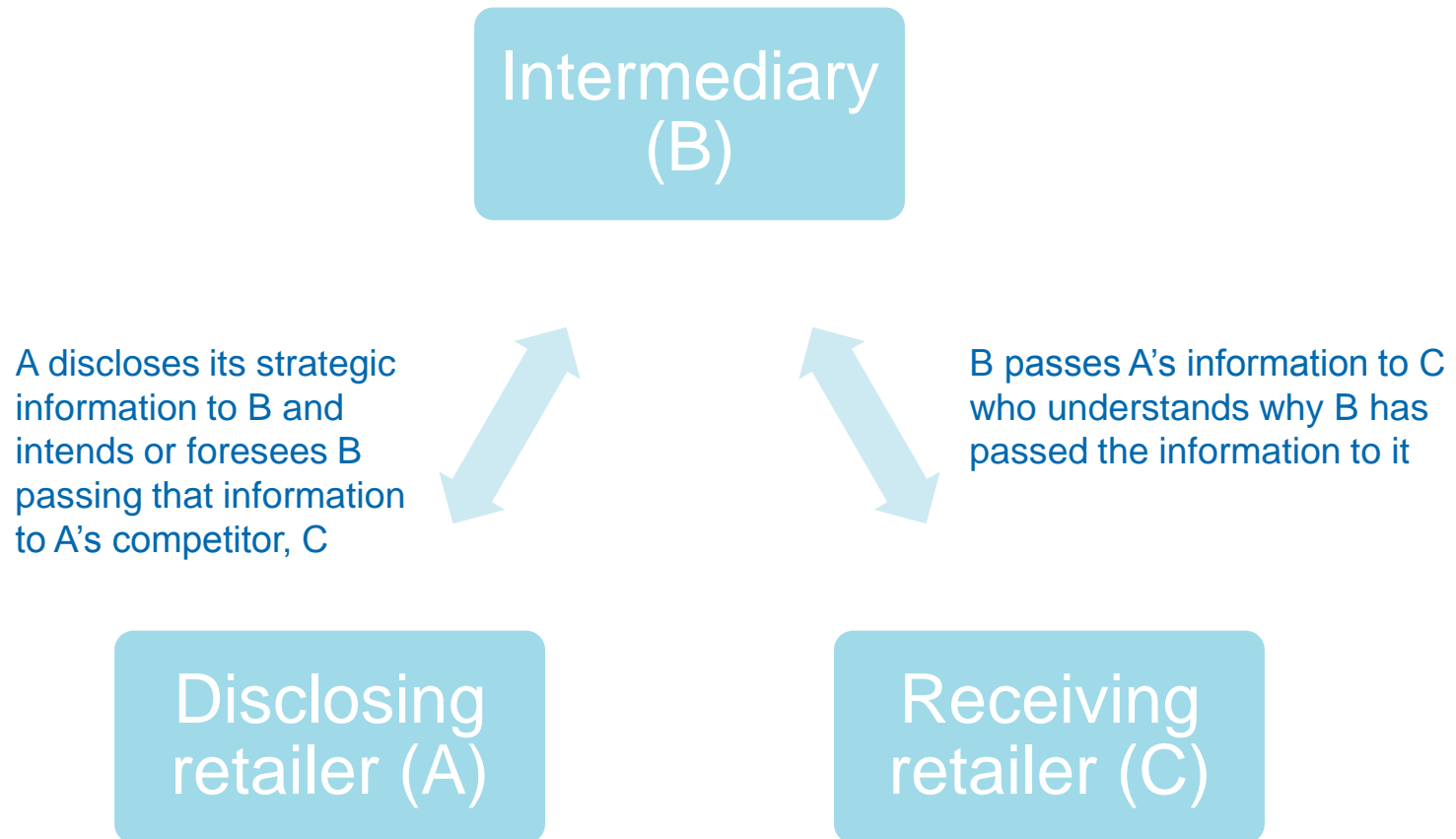
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*Views expressed are personal and not necessarily those of the CMA*

# Outline

- Overview of an ABC infringement
- Previous cases
- Establishing an ABC infringement
- Enforcement considerations
- Observations

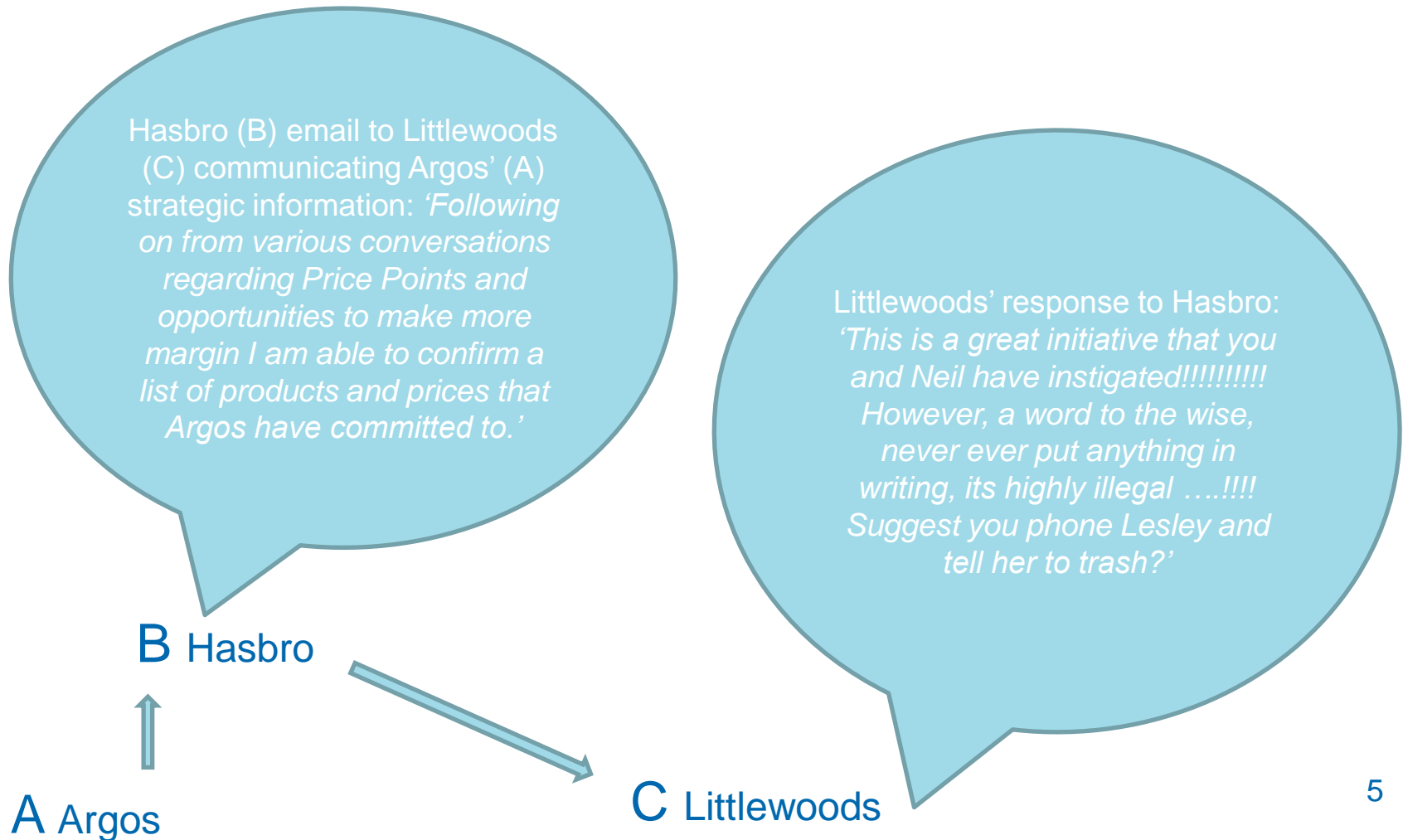
# Overview of an ABC infringement



# Previous cases (1)

- Commission warns that competition law may be infringed by a disclosure of strategic information “indirectly through a common agency”, however no EU case law or specific guidance
- UK has a strong and successful enforcement record on ABC infringements and has established a framework for assessment
- UK cases involve disclosure of future retail pricing intentions BUT the framework for assessment is relevant to the disclosure of ALL strategic information, not just to cases relating to pricing
- Toys (2006):
  - Hasbro (a toy manufacturer) acted as the ‘B’ for the exchange of strategic information (future retail pricing intentions) between two of its retailer customers (Argos and Littlewoods). Led to the co-ordination of catalogue prices
  - Upheld on appeal

## Previous cases: *Toys* – extracts from emails



## Previous cases (2)

- Replica Kits (2006):
  - Umbro (a football kit manufacturer) acted as the 'B' or the intermediary for the exchange of strategic information (retail pricing intentions) between two retailers (JJB Sports and Sports Soccer) in respect of replica football shirts between its retailer customers during the Euro 2000 football championships
  - Upheld on appeal
- Dairy (2011):
  - Cheese 2002: Cheese processors acted as the 'B' for the disclosure and exchange of cheese retail pricing intentions between grocery retailers
  - Milk 2003: Fresh liquid milk processors acted as the 'B' for the disclosure and exchange of milk retail pricing intentions between grocery retailers
  - Cheese 2003: A cheese processor acted as the 'B' for the disclosure and exchange of retail pricing intentions between grocery retailers
  - Only one retailer (Tesco) appealed. Only partly successful. ABC still found

## Previous cases: *Dairy – Milk 2003* – extracts from emails

Arla (B) internal email 25 June 2003: *'Asda have agreed to move up fresh milk... on the basis that they will only do this if their competitors follow'*

Safeway email of 30 June 2003 to a processor (having been told its competitors would be increasing their retail prices) *"we will not be moving tomorrow but will follow quickly when we have seen a move"*

Internal Sainsbury's email 27 June 2003: *'The industry believes that Asda will be increasing milk retail by the equivalent of 2 pence per litre from 01/07. [Asda] have made it clear through their processors, ... that they expect the competition to follow within 48 hrs or they will revert back. From JS's perspective, I have given assurance to the industry that we will be watching prices from Monday of next week, and that we will "remain competitive in the market place" if we see a change.'*

# Establishing an ABC infringement (1)

- Four necessary elements:
  - Retailer (A) discloses its strategic information to an intermediary (B)
  - A intends or foresees that B will pass its information on to a competing retailer (C)
  - B passes A's information to C
  - C understands why it has received A's information from B



## Establishing an ABC infringement (2)

- Retailer A discloses its strategic information to an intermediary / common supplier B
  - Bilateral, vertical discussions may be necessary and, therefore, permissible, as part of normal commercial dialogue
  - It is the substance of the information disclosed rather than the form which is objectionable
- A intends or foresees that B will pass its information on to a competing retailer C
  - Demonstrate that A intended that B would use its strategic information to influence the market place by passing it on to competitors
  - Inadvertent or accidental disclosures are unlikely to constitute circumstances from which the requisite state of mind can be inferred

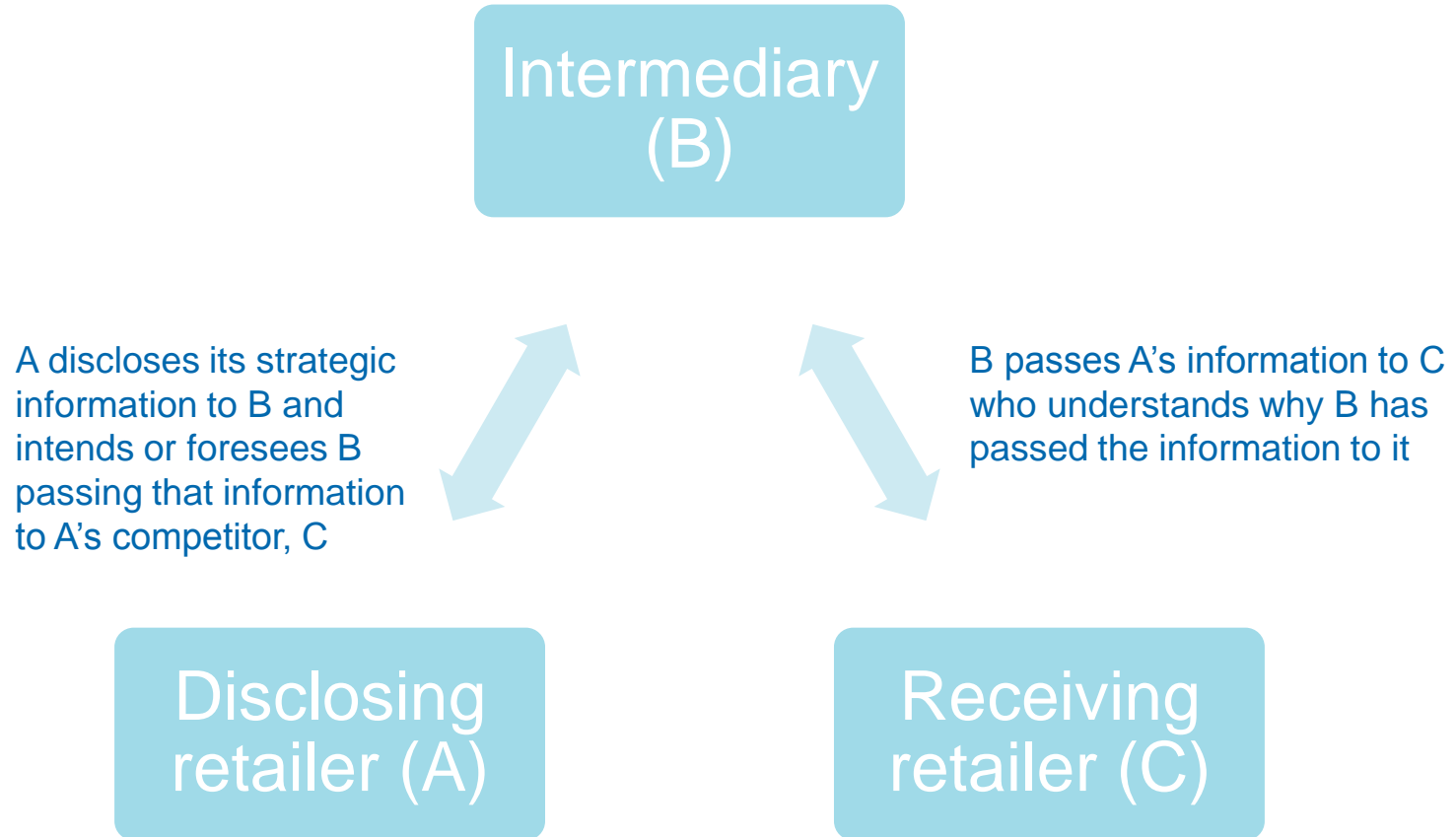
# Establishing an ABC infringement (3)

- B passes A's information to C
  - Relies on the disclosure from A to B and intention of A having been established
- C understands why it has received A's information from B
  - C must be shown to have appreciated the basis on which A provided the information to B, so that A, B and C can all be regarded as parties to a concerted practice (or agreement)
  - There is also no need for reciprocity – C does not need to subsequently disclose its intentions
  - Once received, C cannot fail to take the information into account unless it complains, rejects or exits the market (the *Anic* presumption)

# Enforcement considerations

- Indirect information exchanges can amount to an agreement OR concerted practice, giving rise to a restriction of competition by 'object'
- Despite not having to prove effect, ABC infringements can be evidentially burdensome. You still need to prove:
  - Two disclosures (from A to B; and from B to C).
  - Two parties (A and C) had illegal intent.
- Rare to obtain completely documented chains of evidence – retailers and their suppliers will often use the phone
- If there is no witness evidence gaps in the evidence chain need to be filled by inference
- Using inferences can be challenging as there is more limited scope for using presumptions (when compared to direct exchanges)

# Overview of an ABC infringement



# Observations

- Theory of harm – where ABC disclosures occur and all elements of the test are met – indirect disclosures will have the same impact as direct disclosures in terms of the reduction in horizontal competition, as, in particular:
  - Competitors know each others' future intentions
  - Both suppliers and retailers face reduced competitive pressures
  - Consumers pay more and sooner

Thank you for your attention