

The logo for K&L GATES is displayed in white, uppercase letters on a teal rectangular background. The background of the entire slide features a hand interacting with a digital interface, overlaid with various icons such as a smartphone, a laptop, a Wi-Fi symbol, a dollar sign, a yen sign, a person icon, and a mail icon, all connected by glowing blue lines and circles, suggesting a global digital network.

K&L GATES

23 October 2019

Global Distribution Strategies in a Digital Era

Price Erosion Strategies, Platform Regulations, Algorithms,
Use of Data



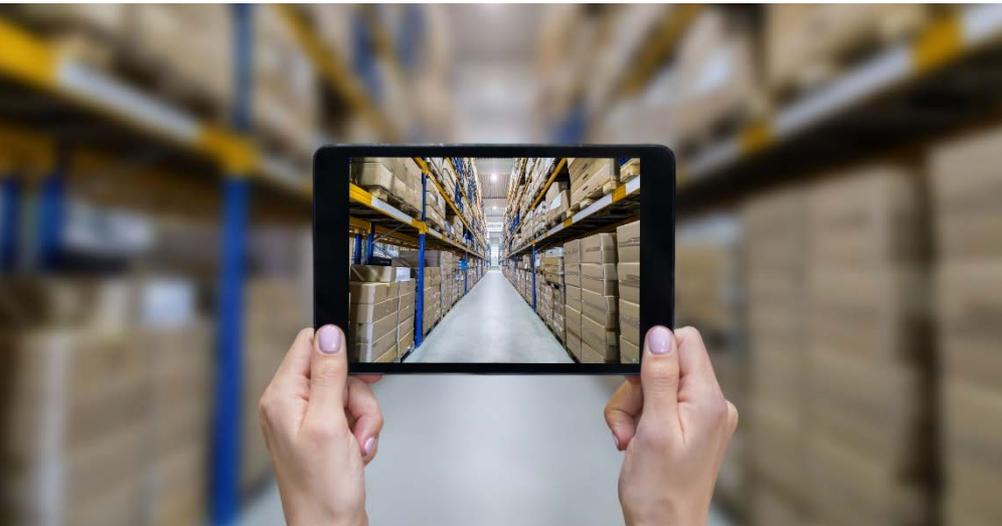
Global Pricing and Distribution Strategies

Christopher Finnerty, K&L Gates and Keith Burgess, Great Nordic Group



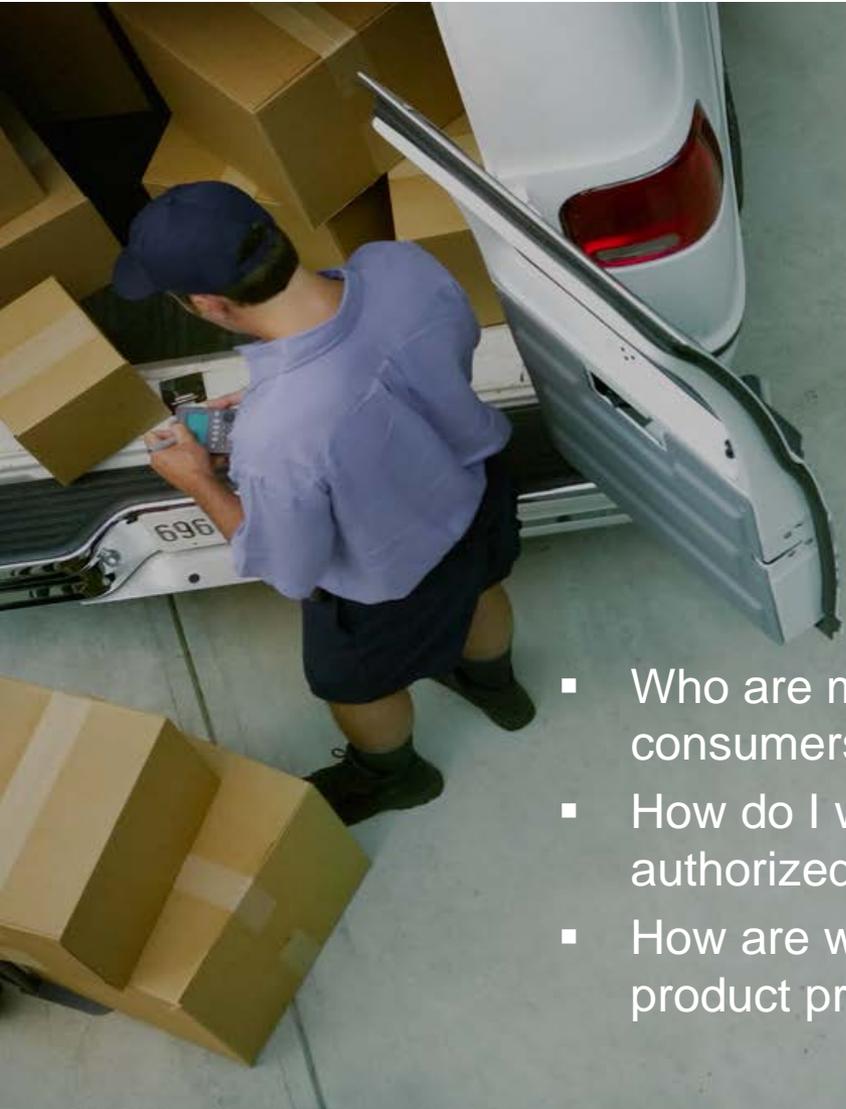
SETTING THE STAGE

- Manufacturers have traditionally engaged locally and regionally, trusting in distance and costs as a barrier to gray market and price arbitrage
- With the ease of international shipping and the massive growth and transparency of online sales, distance and cost no longer represent a significant barrier to gray market sales
- Five years ago it was premium products facing these issues. Now the efficiency of the global gray market has made it possible for 1€ products to be moved internationally profitably



- This shift is rapidly exposing many manufacturers' ill-equipped and inefficient go-to-market strategies
- How is the market moving? Can manufacturers take a 'wait and see' approach to online sale?

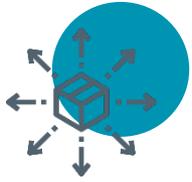
RESETTING THE STRATEGY



Geographic SALES isolation can no longer be assumed; choices in Singapore impact Germany, and likewise North America

Manufacturers must look at all jurisdictions they are selling into and consider:

- Who are my partners, how is the product getting into consumers' hands?
- How do I want internet sales to occur, are there online authorized and marketplace authorized resellers?
- How are we going to enforce? What happens when product problems are extraterritorial?



Authorization Program v. Selective Distribution Program

Key Terms



- Can the manufacturer prohibit extraterritorial sales?
- Can the manufacturer prohibit transshipping?
- Permissibility / enforceability of a liquidated damages clause?
- Permissibility of minimum purchase requirements or other volume / revenue based requirements?



Internet Curation

- Can the manufacturer limit online sales generally?
- Can the manufacturer limit online sales to specific URLs (prohibit marketplace sales, etc.)?
- Permissibility of a quantitative criterion for Internet sales (i.e., minimum purchase requirements to sell on specific URL, marketplace, etc.)



Pricing Policies

- Legality of RPM in jurisdiction?



Monitoring / Enforcement

- Can the manufacturer terminate resellers?
- Can the manufacturer create claims against unauthorized retail?
- What will monitoring / enforcement look like in terms of process?

ACHIEVING GLOBAL CONSISTENCY

- As discussed, manufacturers should seek to employ substantially similar terms across all jurisdictions, and specifically amongst Selective Distribution jurisdictions and Authorization Program jurisdictions
 - But country- and region-specific exceptions are critical (and inevitable)
 - Thus, some method of tracking the applicable terms in each jurisdiction is critical to the overall success of the program.

<i>Summary of Key Terms by Region</i>											
		Country 1	Country 2	Country 3	Country 4	Country 5	Country 6	Country 7	Country 8	Country 9	Country 10
		contract	contract	contract	contract	contract	contract	SD	SD	SD	SD
Program Tier 1	Prohibit Transshipping	Y	Y	Y	Y	Y	Y	Y	N	Y	Y
	Prohibit Extraterritorial Sales	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
	Liquidated Damages	Y	Y	Y	Y	Y	Y	N	Y	Y	N
	Law	country	country	country	country						
	Forum	country	country	country	country						
	E-signature Block	N	N	N	N	N	N	Y	Y	Y	Y
Program Tier 2	Minimum Purchase Requirement	N/A	Y	Y	Y	Y	Y	Y	Y	Y	Y
Program Tier 3	Restrict Online Retail	Y	Y	Y	Y	Y	Y	N	Y	N	N
	Restrict Marketplaces Sales	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
	Quantitative Criteria	Y	Y	Y	Y	Y	Y	Y (special)	Y	N	Y (special)
	RPM Legal	Y	N	Y	N	Y	N	N	N	N	N



Platforms and Algorithms, Competition Law Meets Regulation

Philip Torbøl, K&L Gates





ONLINE PLATFORMS

Online marketplaces on which one or more companies distribute their product and/or services. Recent EU regulation targets online platforms that play an intermediary role.



ALGORITHMS

Wide use of the term. Basically, a computer program that sorts, organises and displays data according to predefined parameters. An inherent component of online platforms, but another controversial use is pricing monitoring.

Efficiencies?

Platforms and pricing algorithms make markets more transparent and navigable for consumers

Transparency and price monitoring allow distributors/brands to react more quickly to consumers' choices/needs

"**Compliance by design**", focus on how these algorithms are used in practice

"I don't think competition enforcers need to be suspicious of everyone who uses an automated system for pricing"

Competition Commissioner Vestager, BKartA March 2017

But....

Vestager:

“Pricing algorithms need to be built in a way that doesn't allow [businesses] to collude”



ARTICLE 101 TFEU

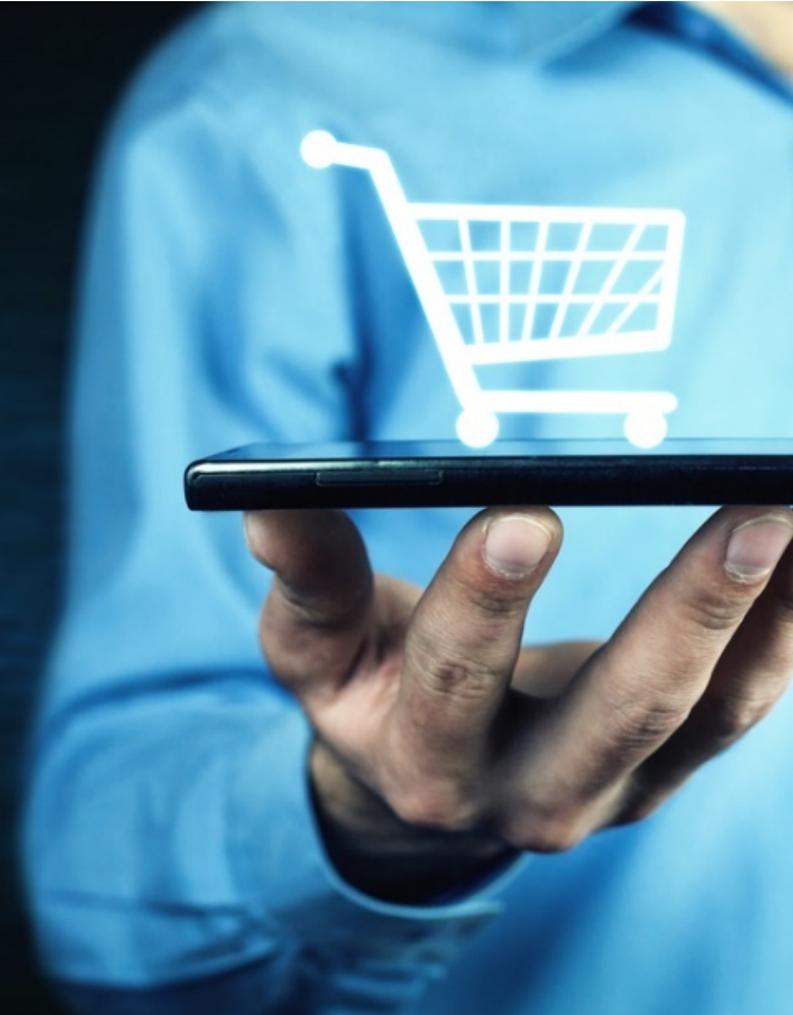
- **Vertical:** Tool for fixing, monitoring and enforcing/policing RPMs
- **Horizontal:** Monitoring/implementing/tacit collusion

ARTICLE 102 TFEU

- Abusive use of algorithms as a tool to restrict competition
- **Google Shopping (2017):** Search algorithms may distort competition on online platforms or search engines if results are displayed in a biased or misleading fashion

COMPETITION LAW MEETS REGULATION: THE P2B REGULATION

- T&Cs: **Information** of business partners and **transparency** on rankings. Due notice of changes. **Justification** for differential treatment, including when distributing own goods and services
- Prohibition against **retroactive changes**
- Disclosure of various **data** access and option to opt out of unnecessary data sharing
- Duty to provide grounds for **MFNs** and make those available to the public
- Set up system to efficiently handle **complaints** and public report
- Duty to engage in **mediation** and inform business users of mediation record





WHERE DO WE GO FROM HERE?

- Vestager's dual role: likely more regulation
- Another P2B?
- What about P2C?
- Areas of focus:
 - Conditions of participation in platforms
 - Ranking algorithms – neutral display?
 - When platforms compete with business users
 - Use of data
- RPM/collusion: traditional competition law enforcement

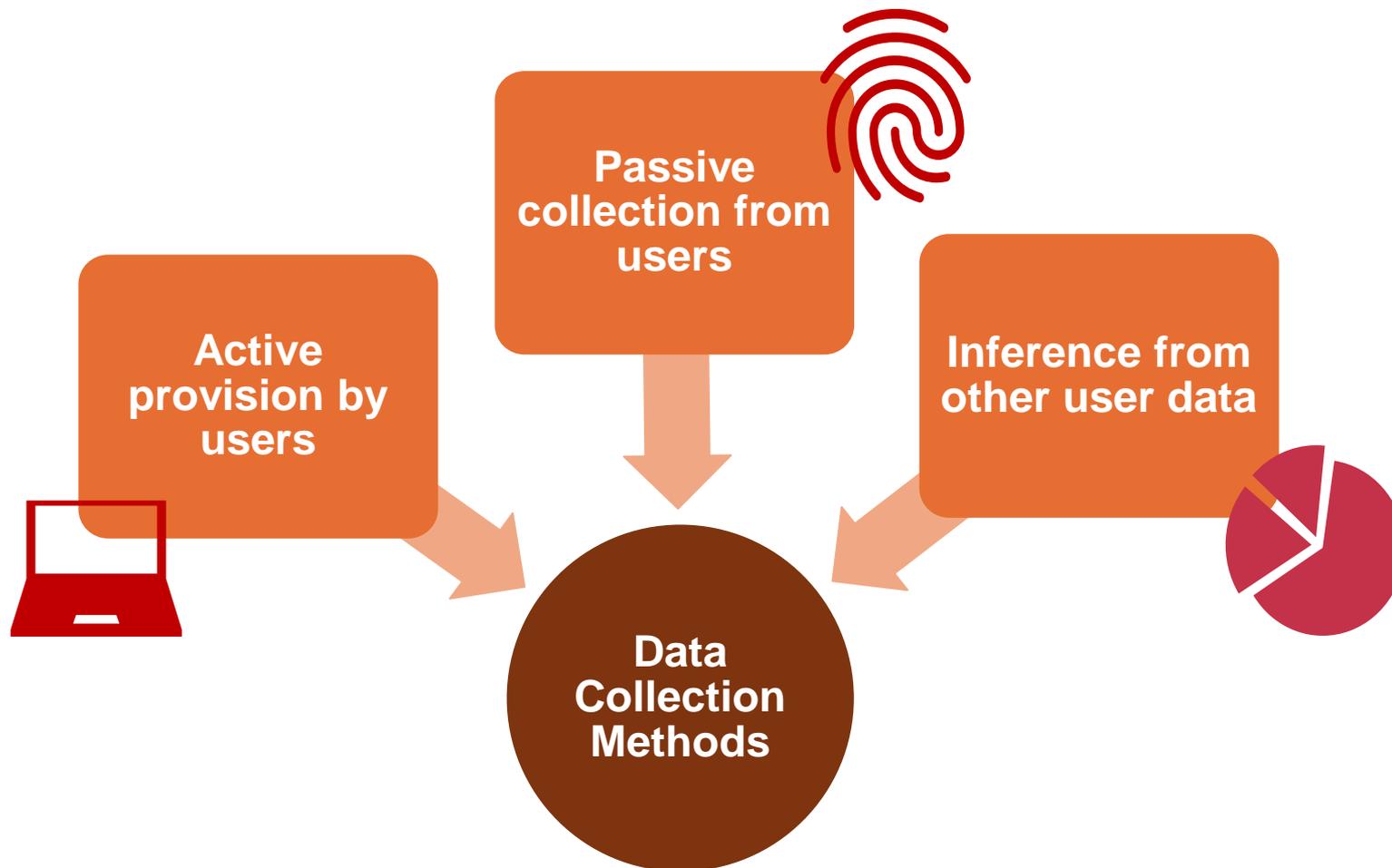


Data as the New Creator of Dominance

Annette Mutschler-Siebert, K&L Gates



The Data Provided by Users



Digitization and Competition

EU Report "Competition for the digital era" (4 April 2019): Is the current competition law framework appropriate for protecting competition in the digital era?

Particularities:

- Extreme returns to scale (disproportionate advantage to incumbents?)
- Network externalities (depending on multi-homing, data portability, data interoperability)
- The role of data (basis for AI, crucial input for online services, production processes, logistics etc.)

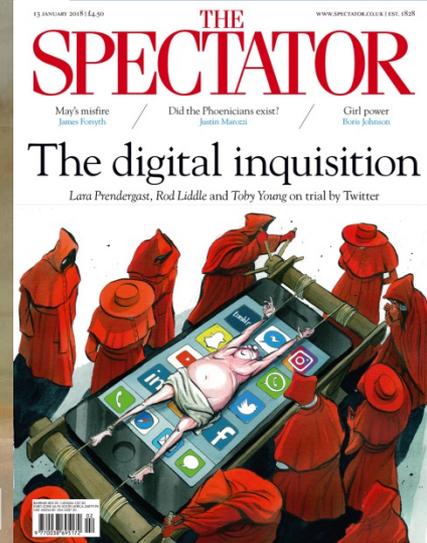
Digitization & Competition Law

The EU report and the expert report for the German Federal Government (September 9th) looked at different aspects and gave recommendations

-> focus here on:

- **Abuse of dominance through data**
- **Impact of data on Merger Control**

Scrutiny from left and right



Europe at the Cutting Edge

- Abuse of dominance standard more applicable to “exploitation” of user data
- Recent cases against **Google** on vertical discrimination (“Shopping”) and exclusion from Android store, investigation on Amazon data
- “*Competition in the Era of Digitisation*” report in March 2019



market power in digital markets?



any discussion of market power should analyse, case-by case, the access to data available to the dominant firm but not to competitors, and the sustainability of any such differential access to data



Legislative clarifications in 2017:

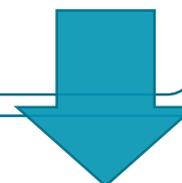
- Products or services that are supplied for free can constitute relevant "markets" for purposes of competition law
- Access to data as a source of market power (relevant factors as e.g. network effects etc.)



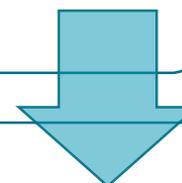
Investigation of Facebook for Abuse of Market Dominance through Data Collection



Investigation opened in 2016 against Facebook on abuse of dominance by use of data from third-party sources



On 7 February 2019 the FCO imposed restrictions on Facebook's processing of user data



OLG Düsseldorf overturned decision on appeal and FCO appealed to Federal Court of Justice

Right to data Access

“Conducts depriving some competitors from access to data could also weaken competition and even lead to exclusion of competitors in different situations. Refusal to access to data can be anticompetitive if the data are an “essential facility” to the activity of the undertaking asking for access.” (BKartA and French competition authority, “Competition Law and Data” paper, 10 May 2016)



What now?

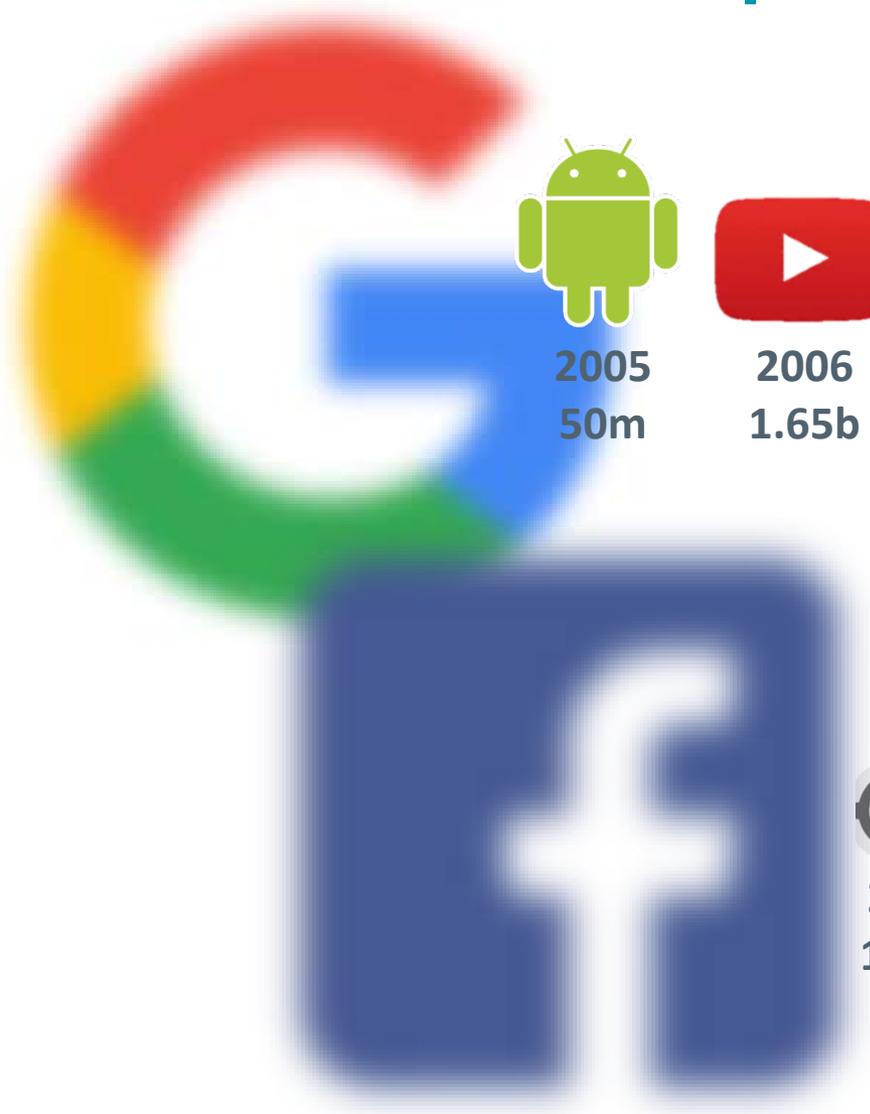
Data as essential facility?

- EU decision on Google Search (Shopping) not based on essential facility doctrine but discrimination
- High thresholds (depends on substitutability / reproducibility of respective data)

Or rather improved consumer control/data access?

- Competitors will be able to attack data-based power positions (if data portability, third parties access to the user accounts, establishment of data trustees)
- What about access to data for the purpose of training AI algorithms for unrelated purposes? Regulation?

Platform Acquisitions



2005
50m



2006
1.65b



2008
3.1b



2009
750m



2011: 12.5b
sold 2015:
2.9b



2013
3.2b



2012
100m



2012
1b



2013
750m



2014
19b



European Commission Merger Control

- Lessons learned from recent cases:
 - Inadequacy of turnover thresholds for mergers involving acquisition of companies that only offer free or quasi-free services generating little or no revenues (**Facebook/WhatsApp**)
 - Framework for a theory of harm in mergers involving the acquisition of datasets (**Microsoft/LinkedIn**)
- Considerations for the future:
 - New theories of harm?
 - Monitor” killer acquisitions”
 - Introduce new thresholds as in Germany and Austria?



Vertical Rules in the Digital Distribution

Zsuzsa Cserhalmi, Directorate-General for Competition, European Commission (Unit C6)





Vertical rules in the digital distribution

Zsuzsa Cserhalmi

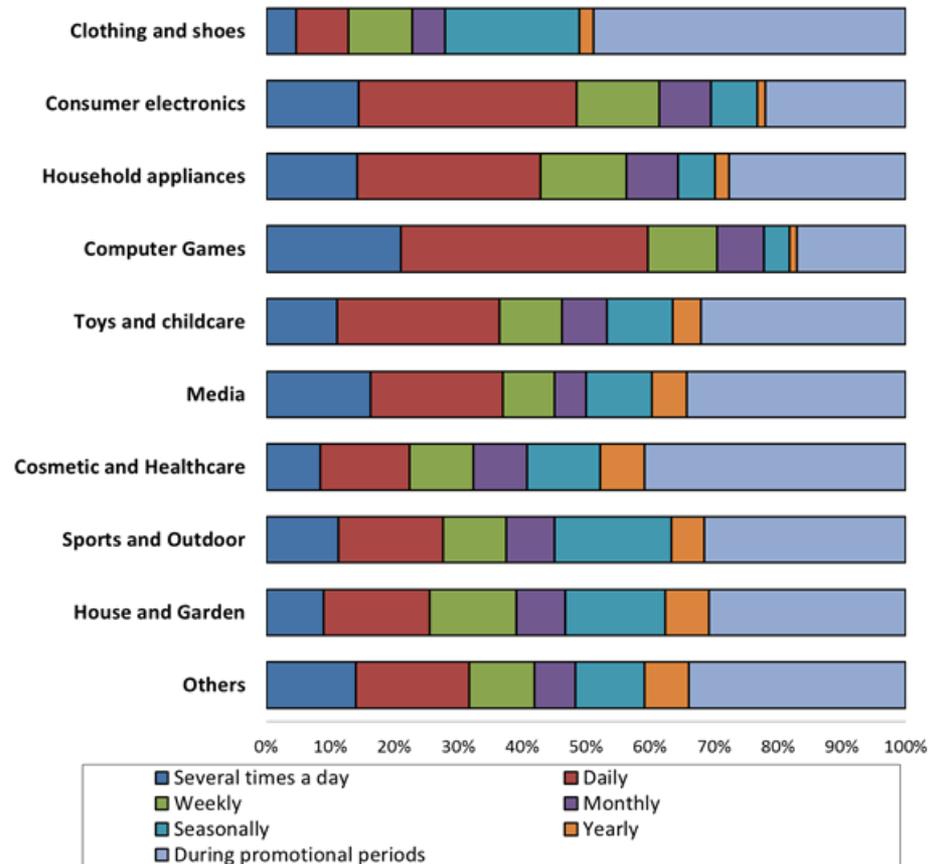
E-commerce and data economy, DG Competition

The views expressed are purely personal and do not necessarily represent an official position of the European Commission.

Key findings of the e-commerce sector inquiry

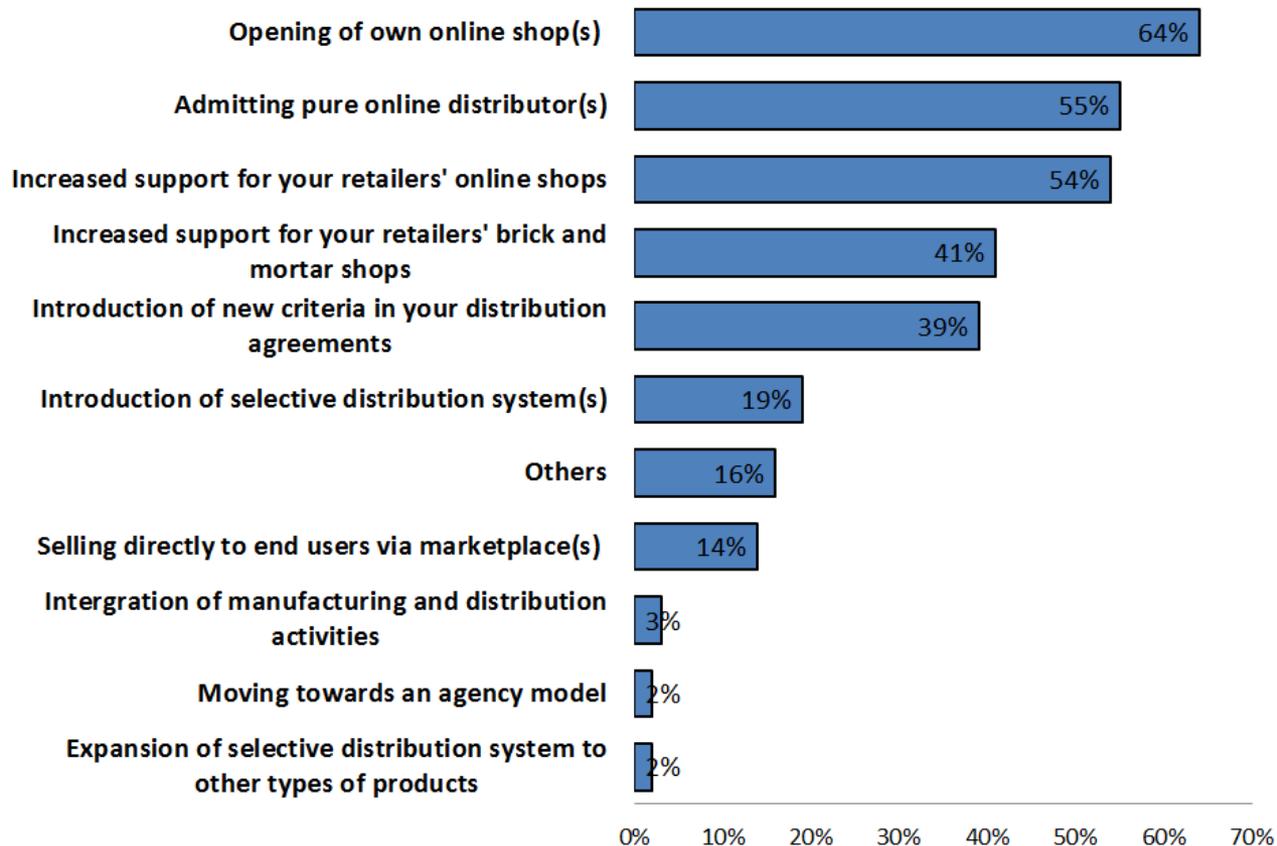


I. More price transparency and price competition



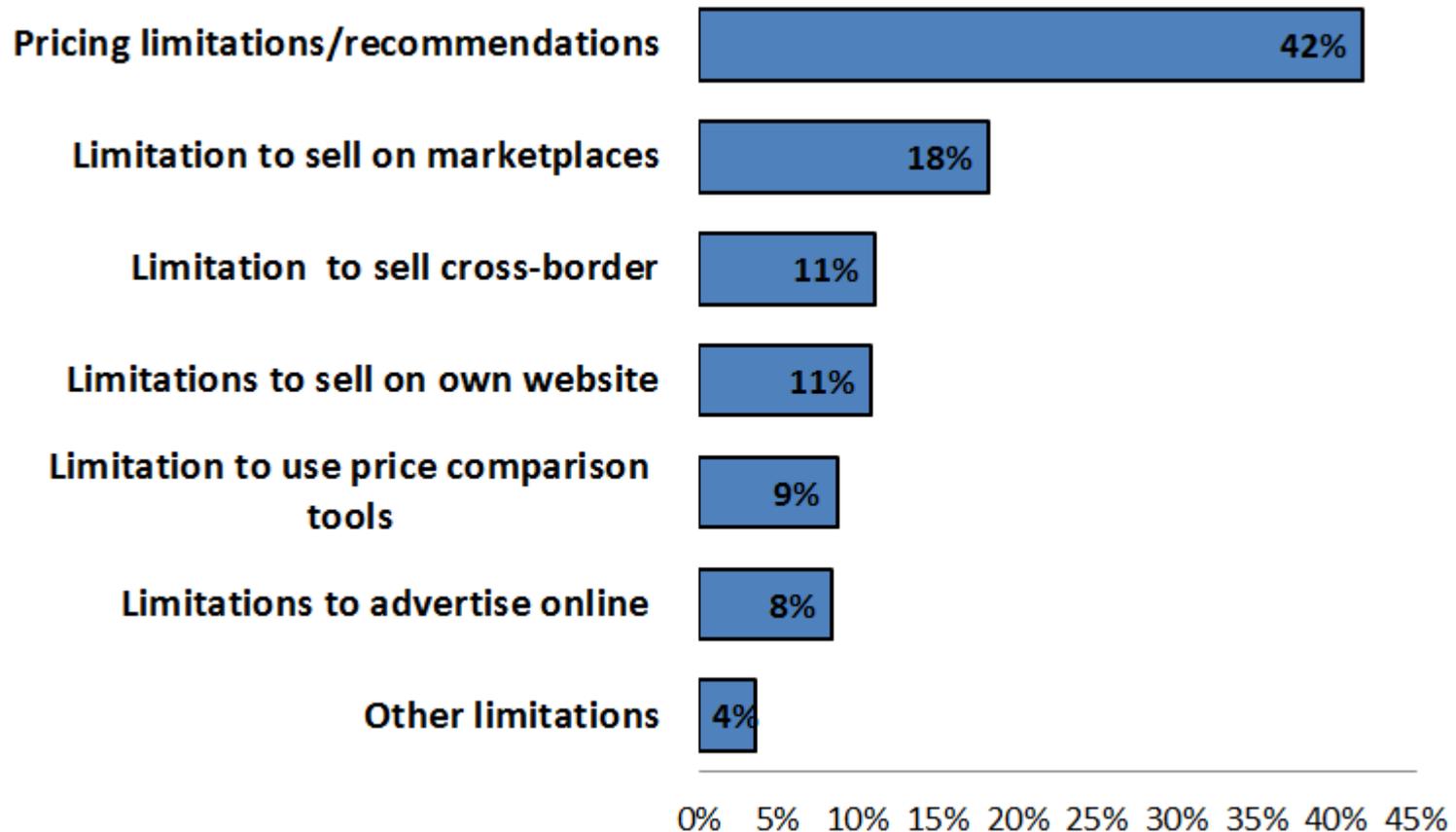
Frequency of modifying online prices based on the responses of retailers

II. Evolving distribution strategies



Measures taken by manufacturers in the last 10 years to react to the growth of e-commerce

III. Contractual Restrictions



Proportion of retailers having contractual restrictions, per type of restriction



Enforcement

❖ Increased **focus on vertical restrictions**

❖ **Territorial restrictions**

- Pioneer (July 2018)
- Guess decision (December 2018)
- Pay-TV commitment decision (March 2019)
- Nike decision (March 2019)
- Video Games SO (April 2019)
- San Rio (July 2019)

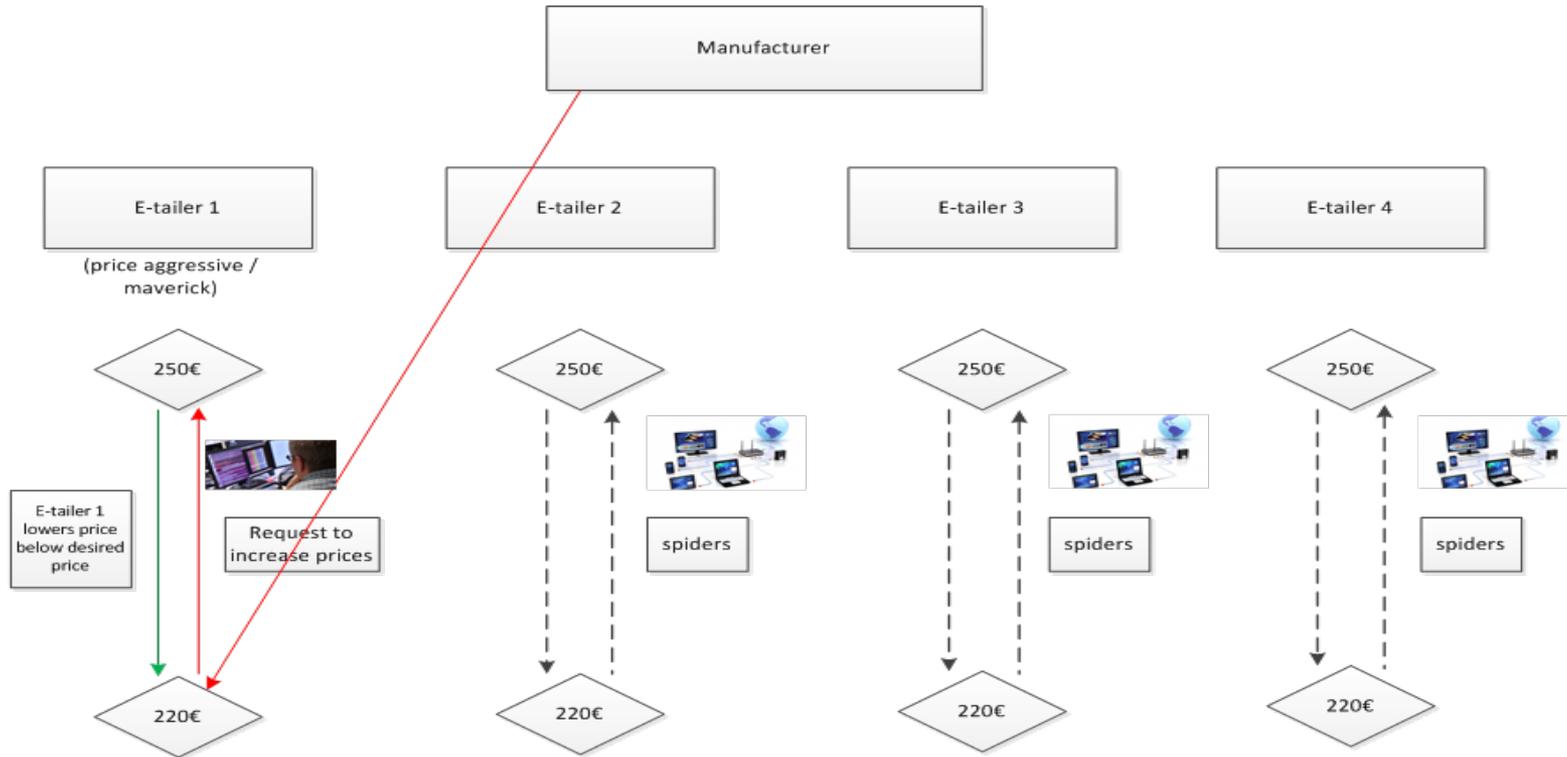
❖ **Resale price maintenance** cases (RPM)

- Decisions in July 2018 against 4 manufacturers of consumer electronics (Philips, Pioneer, Asus, Denon & Marantz)



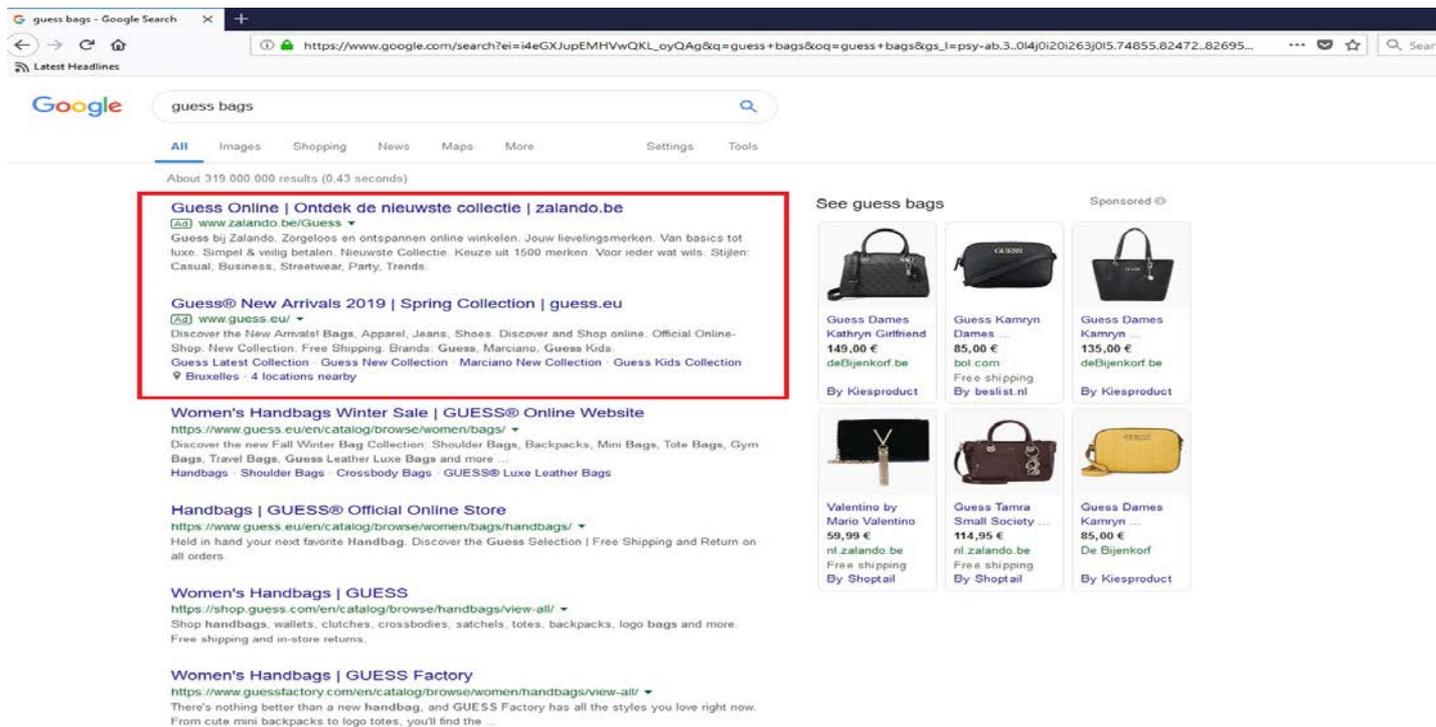
European
Commission

Algorithms and competition law - RPM



Spiders are a software which monitors resale prices of key competitors and automatically adjust prices to match (lowest) price in the market. Getting price mavericks to adhere / raise to desired price levels has knock-on effects on multiple e-tailers.

Online search advertisement restriction



guess bags - Google Search

https://www.google.com/search?ei=i4eGXJupEMHVwQKL_oyQAg&q=gues+bags&coq=gues+bags&gs_l=psy-ab.3..0i4j0i20i263j0i5.74855.82472..82695...

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About 319 000 000 results (0,43 seconds)

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Review of the Vertical Block Exemption Regulation - Timeline

- Evaluation phase (from 10/2018 to Q2/2020):
 - Evaluation roadmap from 8/11/2018 to 6/12/2018
 - **Public consultation** from 4/2/2019 to 27/5/2019
 - **Evaluation support study** launched in August 2019
 - **Stakeholder workshop** on 14/15 November 2019
 - Ongoing **discussions in the NCAs (ECN Verticals WG)**
 - Staff Working Document planned for end of Q2/2020
- Impact assessment phase:
 - From Q3/2020 until the expiry of the VBER in 5/2022



Questions?

