

Technology, Media and Telecommunications Webinar

Global Antitrust & Competition

E-commerce & E-collusion: Hipster Antitrust or Real Risk?

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Resale price maintenance

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Bans of online sales and use of
online market places

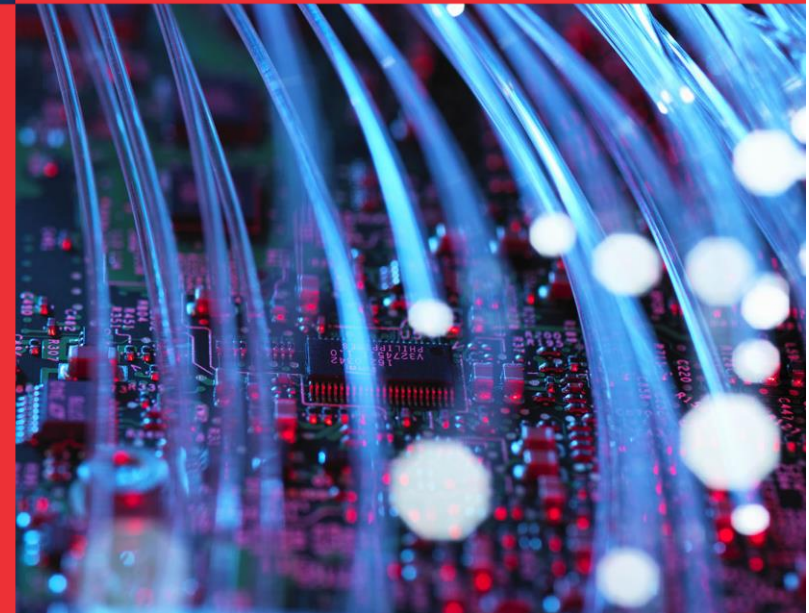
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E-collusion

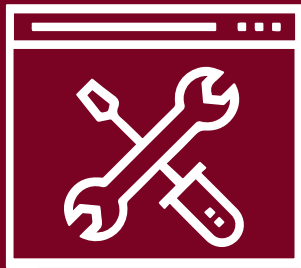
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What's next?

Resale price maintenance



RPM in e-commerce



Traditional RPM concerns
- easily transposed to the
e-commerce environment



Online tools used to
facilitate RPM - in some
instances in more covert
ways than the traditional
offline tools

Consumer electronics producers fined €111m for RPM

"The online commerce market is growing rapidly and is now worth over 500 billion euros in Europe every year. More than half of Europeans now shop online. As a result of the actions taken by these four companies, millions of European consumers faced higher prices for kitchen appliances, hair dryers, notebook computers, headphones and many other products. This is illegal under EU antitrust rules. Our decisions today show that EU competition rules serve to protect consumers where companies stand in the way of more price competition and better choice." (Vestager, July 2018)



RPM: recent fines

Europe

Austria

\$1.4m (2013)
\$27.8m (2013)
\$30m (2015)
\$12.5m (2016)
\$2m (2017)
\$800,000 (2017)

Belgium

\$6.7m (2017)

Bosnia & Herzegovina

\$180,000 (2012)

Bulgaria

\$1.4m (2012)

Croatia

\$250,000 (2017)

Czech Republic

\$42,000 (2012)
\$660,000 (2016)

Denmark

\$270,000 (2012)
\$180,000 (2013)
\$220,650 (2013)
\$1.3m (2016)
\$590,000 (2017)

Finland

\$4m (2011)

France

\$47m (2012)
\$54m (2013)
\$1.8b (2015)
\$85m (2016)

Germany

\$11m (2012)
\$9m (2013)
\$9m (2014)
\$3.8m (2015)
\$170m (2015)
\$138m (2016)
\$5.4m (2016)
\$14m (2017)
\$39.9m (2018)

Greece

\$11m (2014)

Latvia

\$4.5m (2017)

Lithuania

\$17m (2016)
\$75,490 (2017)

Poland

\$19m (2012)
\$670,000 (2012)
\$150,000 (2013)
\$590,000 (2015)
\$920,000 (2017)
\$8m (2017)

Portugal

\$450,000 (2012)

Romania

\$5.3m (2011)
\$680,000 (2012)
\$240,000 (2016)
\$29,000 (2016)

Serbia

\$540,000 (2017)

Slovak Republic

\$12m (2016)

Slovenia

\$42,000 (2012)

Spain

\$8.2m (2012)

Switzerland

\$520,000 (2012)
\$68,000 (2015)
\$164m (2017)

Turkey

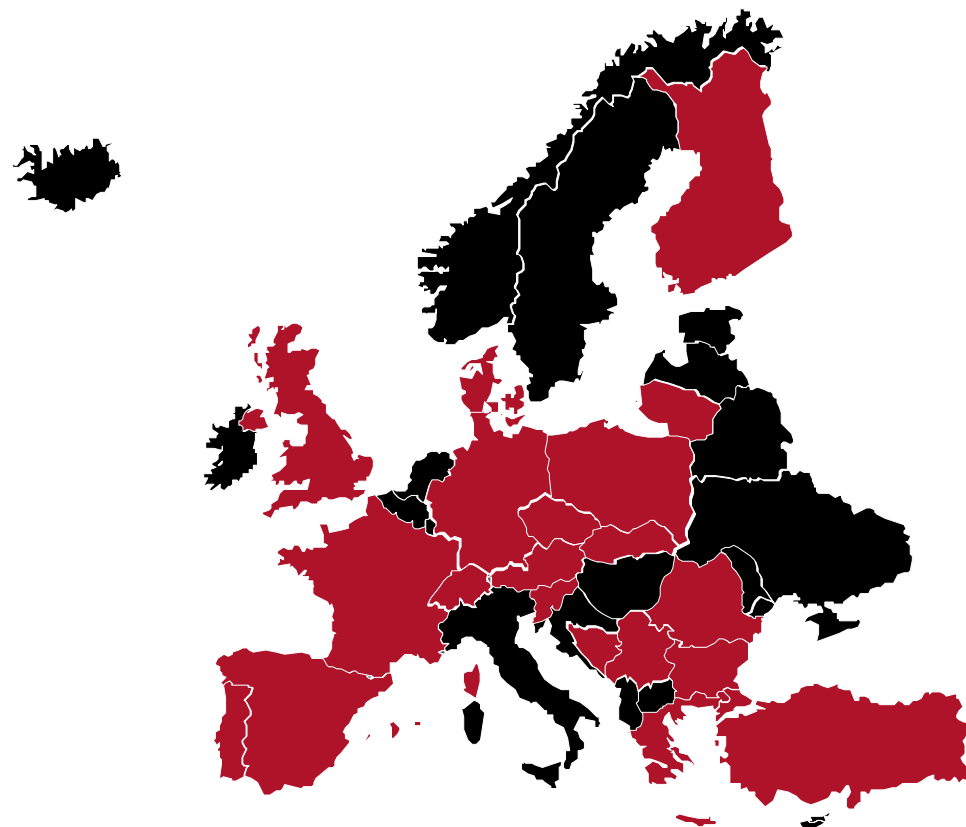
Companies fined with 10%
of their annual revenue
(2016)

UK

\$4.2m (2016)
\$1.1m (2016)
\$5.8m (2017)

European Union

\$128m (2018)



*fines also imposed on individuals

RPM: recent fines

Asia Pacific

Australia

\$1.7m (2013)
\$13,000 (2015)

China

\$77.2m (2013)
\$90,000 damages (2013)
\$110m (2013)
\$3m (2014)
\$45m (2014)
\$5m (2014)
\$58m (2015)
\$19.3m (2016)
\$2.9m (2016)
\$16m (2016)
\$1.4m (2017)
\$370,000 (2018)

India

\$13.5m (2017)

Japan

Cease and desist order
(2016)

Russia

\$300,000 (2014)

South Korea

\$156,000 (2013)
\$1.8m (2014)
\$276,000 (2016)

Taiwan

\$120,000 (2012)
\$657,000 (2013)
\$98,000 (2017)



*fines also imposed on individuals

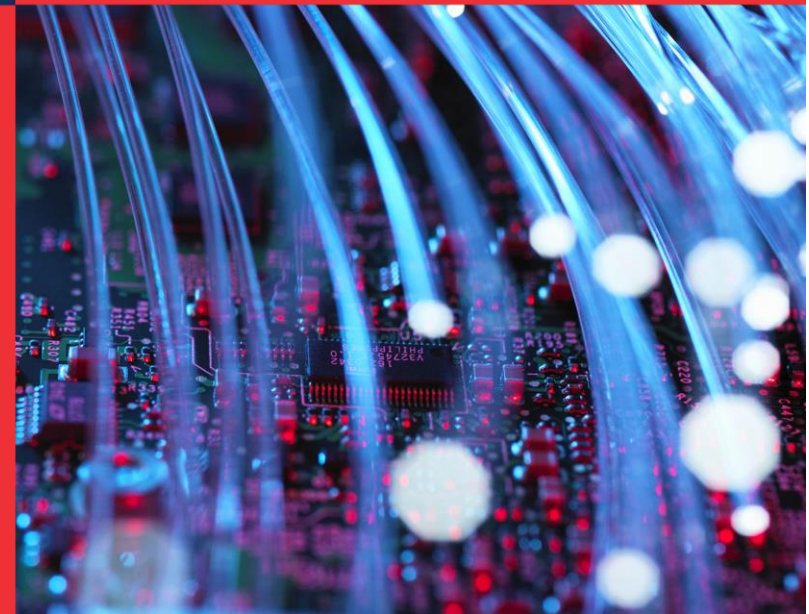
RPM: top tips

Junior key account managers may be most 'at risk': training needs to be repeated and refreshed

Training should be complemented with regular targeted checks / deep dives

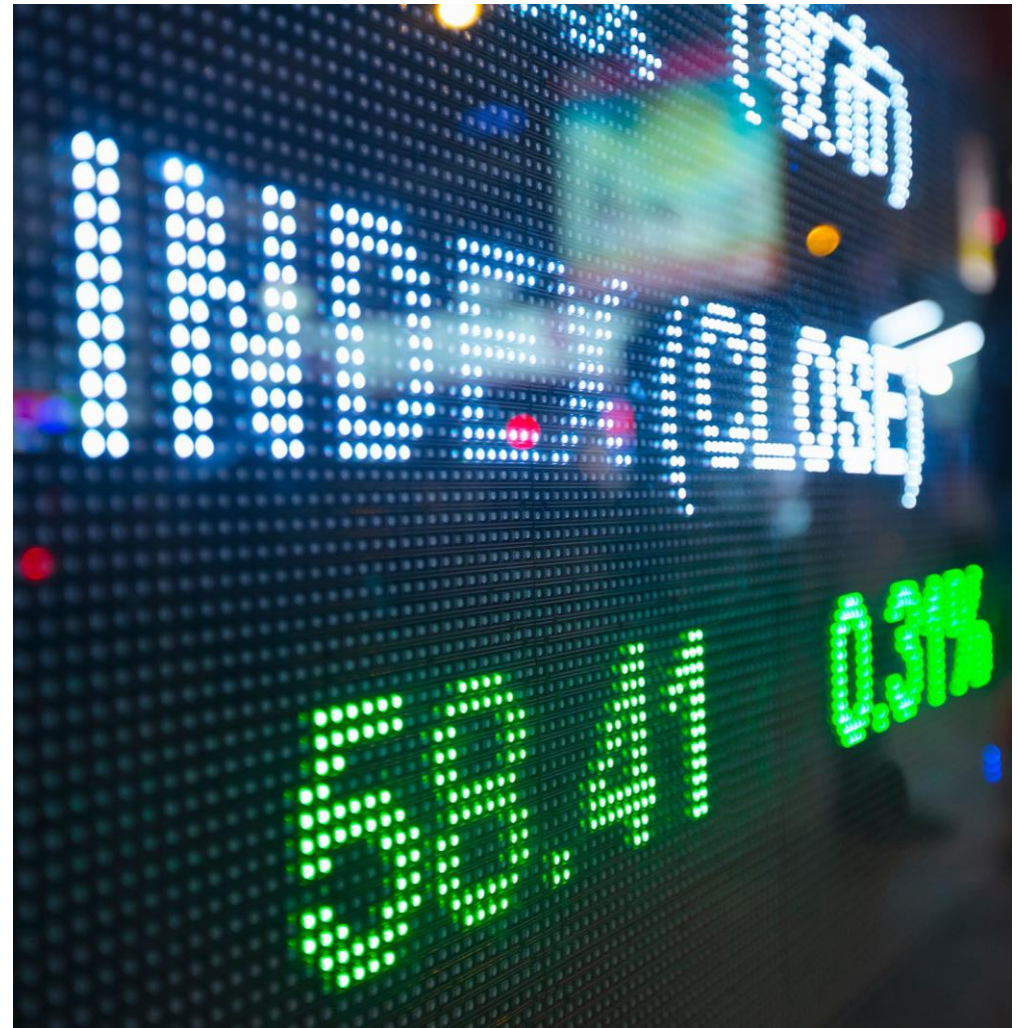
Issues and examples that are found during those health checks should be incorporated in future compliance refresher training

Bans of online sales and use of marketplaces



Online sales bans

- "A contractual clause such as the one at issue in the main proceedings, *prohibiting de facto the internet as a method of marketing*, at the very least *has as its object the restriction of passive sales to end users* wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system" (Pierre Fabre, Case C-439/09)



Online marketplace bans

EU: within a selective distribution system a supplier of luxury goods may under certain conditions prohibit authorised dealers from selling the supplier's products on third-party online platforms (Coty)

China: antitrust agency so far has not been very active in antitrust enforcement on non-price restraints except for those that fall under “abuse of dominance”

Australia: restrictions of sales via third party platforms are permissible under some (but not all) circumstances

Japan: non-price restraints in online sales/e-commerce might be problematic when they lead to foreclosure or price maintenance effects

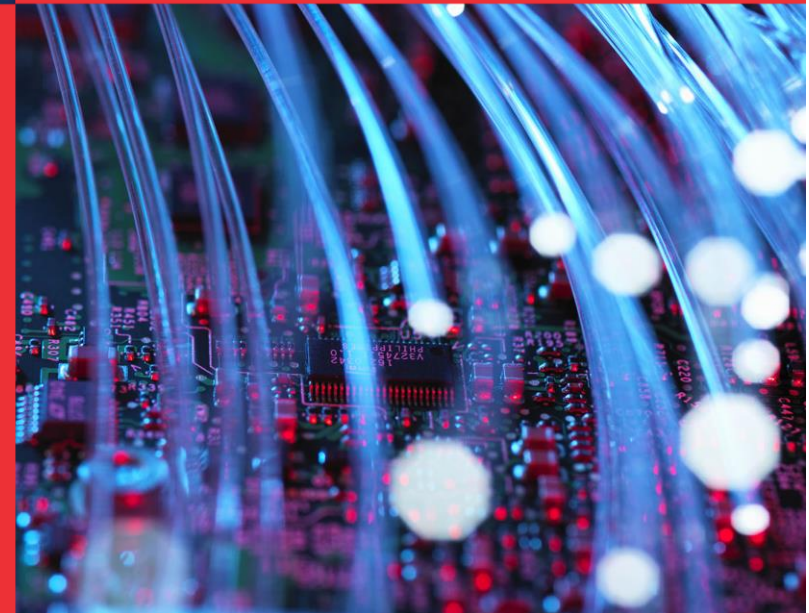
Bans on online sales and use of marketplaces: top tips

The position at EU level has been clarified, suppliers of goods may lawfully prohibit sales of those goods on TPPs

Still, the debate is not over and companies should be particularly wary of TPP bans in Germany or where market share thresholds of the VBER are exceeded

No specific guidelines or cases in Asia Pacific on restrictions on sales to online marketplaces (yet), however some restrictions/enforcement under certain circumstances in China, Australia and Japan so caution needed when operating in these markets

E-collusion



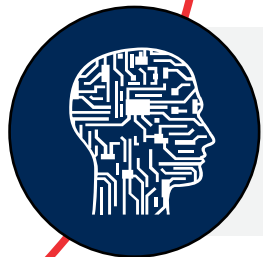
Key risks



Use of algorithms to **implement and monitor price-fixing schemes**



Use of same third-party platform to **determine prices and react to market changes** (hub-and-spoke)



Self-learning algorithms

Global interest



*"Companies **can't escape responsibility** for collusion by hiding behind a computer program"*

*"Companies may face **higher fines** if they use software tools as part of their cartels(...) competition enforcers need to be suspicious of everyone who uses an automated system for pricing"*



Australia introduced Harper competition reforms to revamp competition law to focus on effects to **protect against e-collusion**



*"Opaque algorithms that digital companies deploy could present a risk of collusion and formation of cartels (...) to consider **new frameworks in the digital space** (...)."*



BKartA currently investigating the "**ticketing algorithm** written for a specific market situation", as used by Lufthansa, and whether this algorithm infringed competition law

E-collusion: top tips

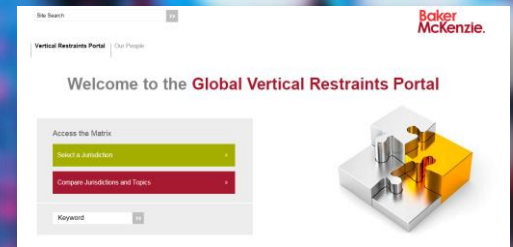
Be aware of the technology used by employees to communicate, including platforms and chat tools

Training is key: juniors (under pressure) but also their managers

Understand how algorithms are used - and the impact they are having in practice

What's next?

Global Vertical Restraints Portal



The portal is a Baker McKenzie dynamic publisher site which provides an 'at a glance' assessment of the most relevant and common vertical restraints under the national laws of 24 jurisdictions. It also includes partner contacts and details of recent enforcement (which is updated regularly).

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Thank you