

Competition Law and E-Commerce

Key Legal Developments – EU and US Perspectives

Robert Bell, Arindam Kar & Victoria Newbold

11 July 2018

Robert Bell



Robert Bell is a partner in the London based competition team, with over 20 years of experience advising on complex competition and regulatory matters involving some of the leading cases before The Competition and Markets Authority, the European Commission and UK and European Courts.

He advises clients on a range of competition law issues including merger control, cartels, restrictive practices, competition litigation and public procurement law.

Bell has a particular sector specialism in advising international technology and media clients on the application of competition law and new media, telecommunications regulation, and on competition litigation.

He is currently Chair of the City of London Law Society's Competition Law Committee, which liaises with the UK Government and the EU & UK competition regulators in connection with the reform of competition law and practice.

Bell is recognised as one of London's leading lawyers by Chambers UK 2016.

Contact: robert.bell@bcjplaw.com

Arindam Kar



Arindam Kar's antitrust practice encompasses antitrust compliance, counseling, and investigations.

Mr. Kar's compliance practice includes the development and implementation of robust antitrust compliance programs for clients. Mr. Kar also develops and conducts comprehensive antitrust audits for clients, and he works with these clients on the implementation of recommendations in a cost-effective manner to strengthen the client's compliance and risk management profiles.

Mr. Kar has also counseled clients on the formation of group purchasing organizations and joint ventures in a diverse range of industries. Mr. Kar regularly counsels manufacturing and retail clients on complex pricing issues that involve, but are not limited to, online and traditional distribution strategies and resale price maintenance strategies.

Mr. Kar regularly represents clients in merger investigations before the U.S. Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice. In addition, Mr. Kar coordinates and manages multijurisdictional merger filing strategies on deals that have a global implications. Mr. Kar also has extensive experience in representing corporations and individuals in federal and state antitrust investigations.

Victoria Newbold



Victoria is a senior antitrust and competition associate based in BCLP's London office.

She advises clients on all aspects of competition law, including merger control, abuse of dominance, UK and EU market investigations and distribution and other commercial agreements.

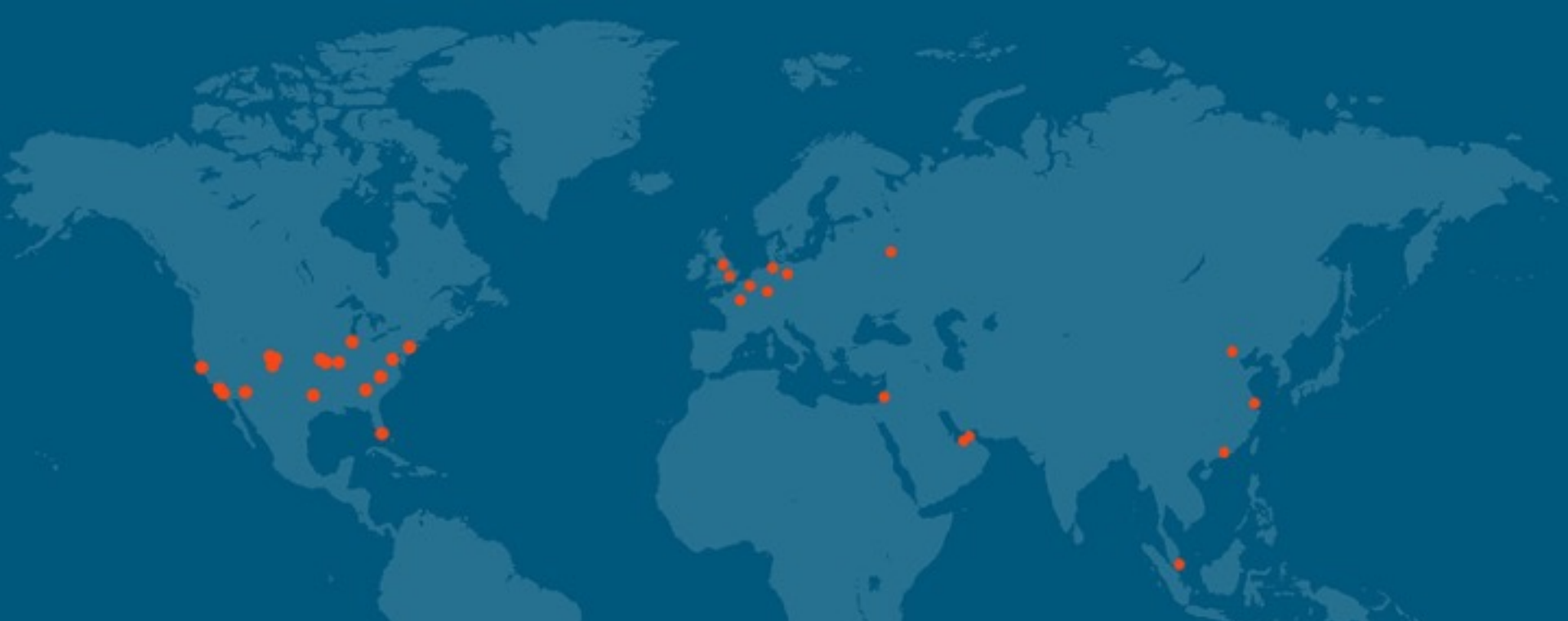
Victoria holds a post-graduate qualification in EU competition law from Kings College London and is recommended in the Legal 500 2017, in which she is described as 'very professional', 'knowledgeable' and 'fast-thinking'.

Victoria recently spent eight months in-house at Tesco, where she was responsible for advising all areas of the business on competition matters, including supply and distribution arrangements, licencing issues and a wide range of commercial agreements.

Agenda

1. Introduction to competition law: USA and EU Basic Principles
2. Why focus on e-commerce?
3. Key legal developments from a USA and EU perspective:
 1. Geo-blocking
 2. Selective distribution and luxury goods
 3. Advertising restrictions
 4. Platform regulation
4. Emerging themes - AI – price modelling software and collusion





Introduction to Competition Law

EU Competition Law: The Basics

- Article 101(1) TFEU prohibits agreements whose **object or effect** is the **prevention, distortion or restriction of competition** and which appreciably affects competition and trade **between Member States**
- Domestic Competition Law
 - Member States have their own competition laws modelled on the EU laws
 - This law applies where the competitive effect of the arrangement is purely domestic
- Relevant Authorities
 - The European Commission is primarily responsible for enforcing EU competition law
 - Member States competition authorities enforce domestic competition law but also enforce EU competition law in association with the European Commission.

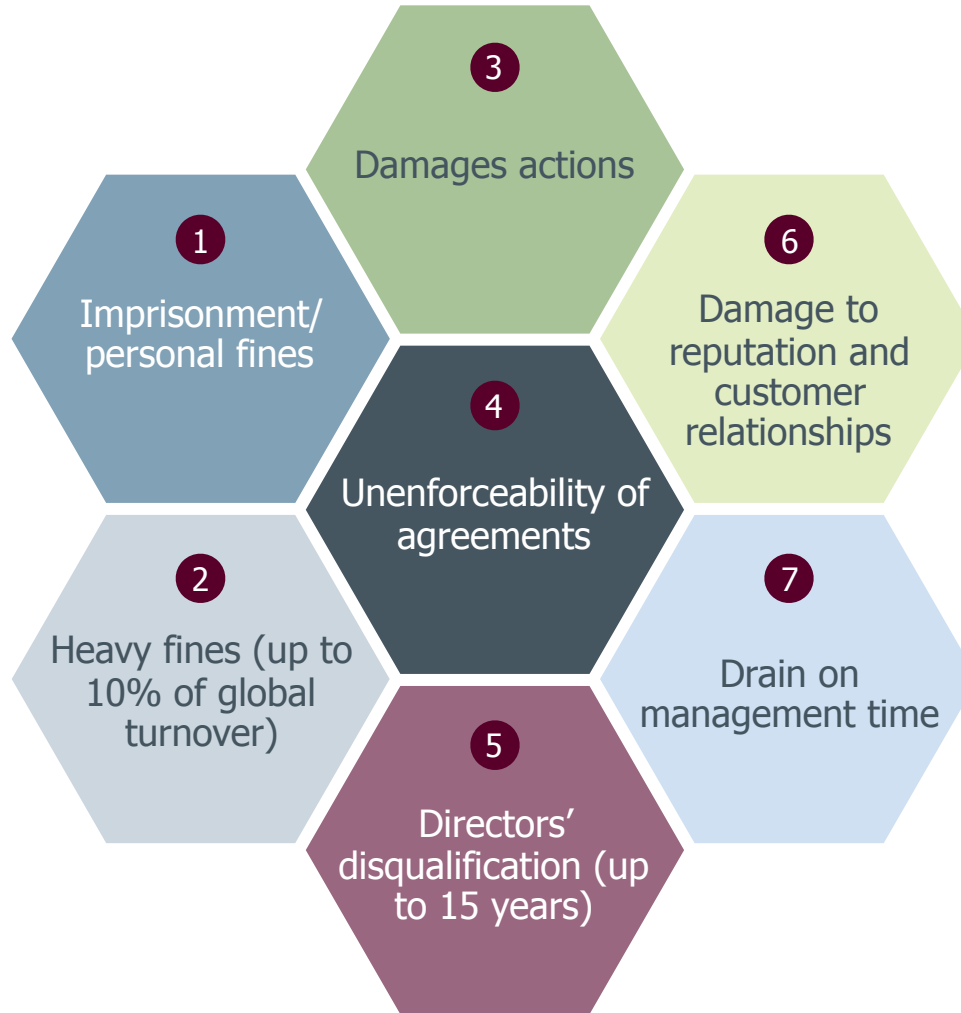


EU Competition Law: The Basics

- Article 101(1) TFEU prohibits agreements whose object or effect is the prevention, distortion or restriction of competition and which appreciably affects competition and trade between Member States
- Agreements/concerted practices
- Restrictions by object or effect
- Must appreciably affect competition and trade between member states



Consequences of breaking the rules



US Antitrust Law

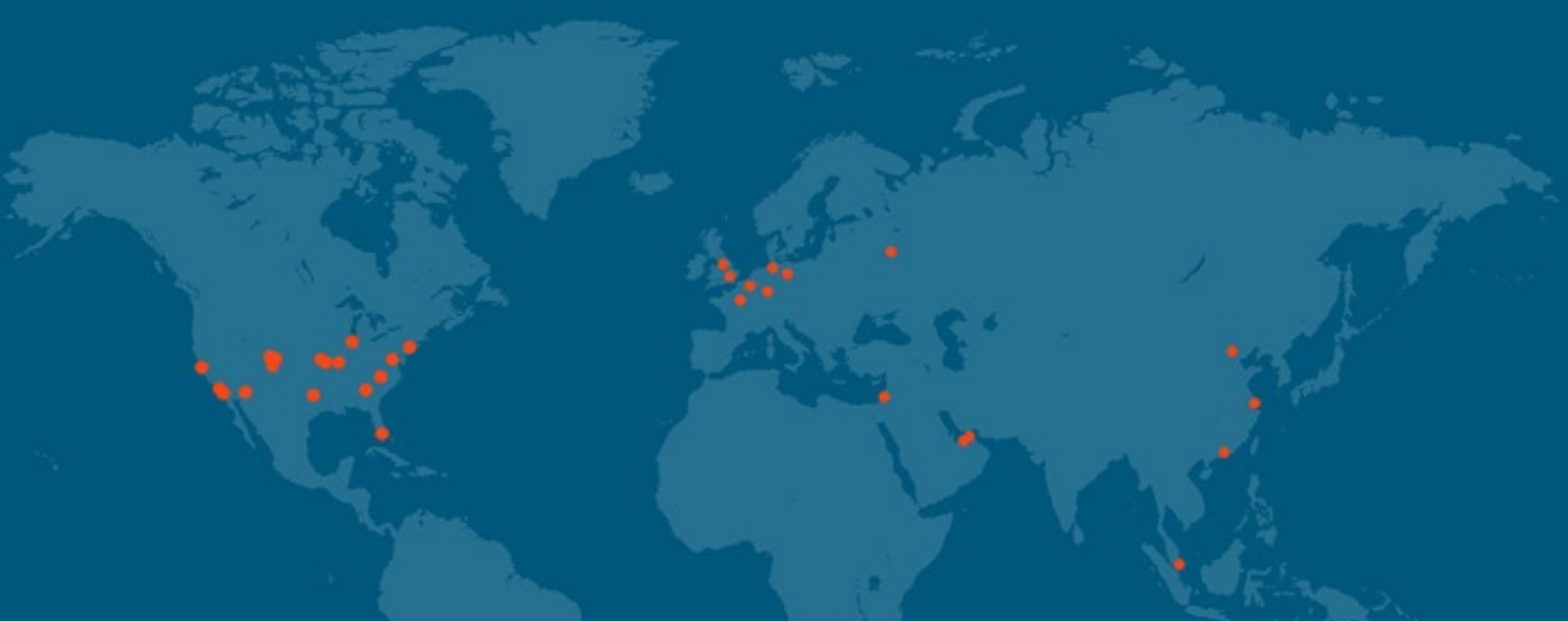
- Section 1 of the Sherman Act, 15 U.S.C. § 1
- Prohibits contracts, combinations and conspiracies in restraint of trade.
- The Supreme Court has interpreted the Sherman Act to only prohibit “unreasonable” restraints of trade. Determining what is unreasonable typically is a complex, granular exercise deeply impacted by economic analysis.
- Certain agreements, however, are per se illegal without any further analysis. It is generally per se illegal when competitors engage in price fixing, division of markets, bid rigging or group boycotts.



US Antitrust Law

- Criminal Penalties
 - Up to 10 years in prison for individuals
 - Criminal fines of up to \$100 Million for corporations or twice the loss/gain from the violation (whichever is greater)
 - Criminal fines of up to \$1 Million for individuals or twice the loss/gain from the violation (whichever is greater)
- Civil Penalties
 - Treble damages available to a successful plaintiff
 - Payment of the plaintiff's attorneys' fees and costs (on top of your own attorneys' fees)
 - Joint and several liability





Why focus on e-commerce?

In the EU?

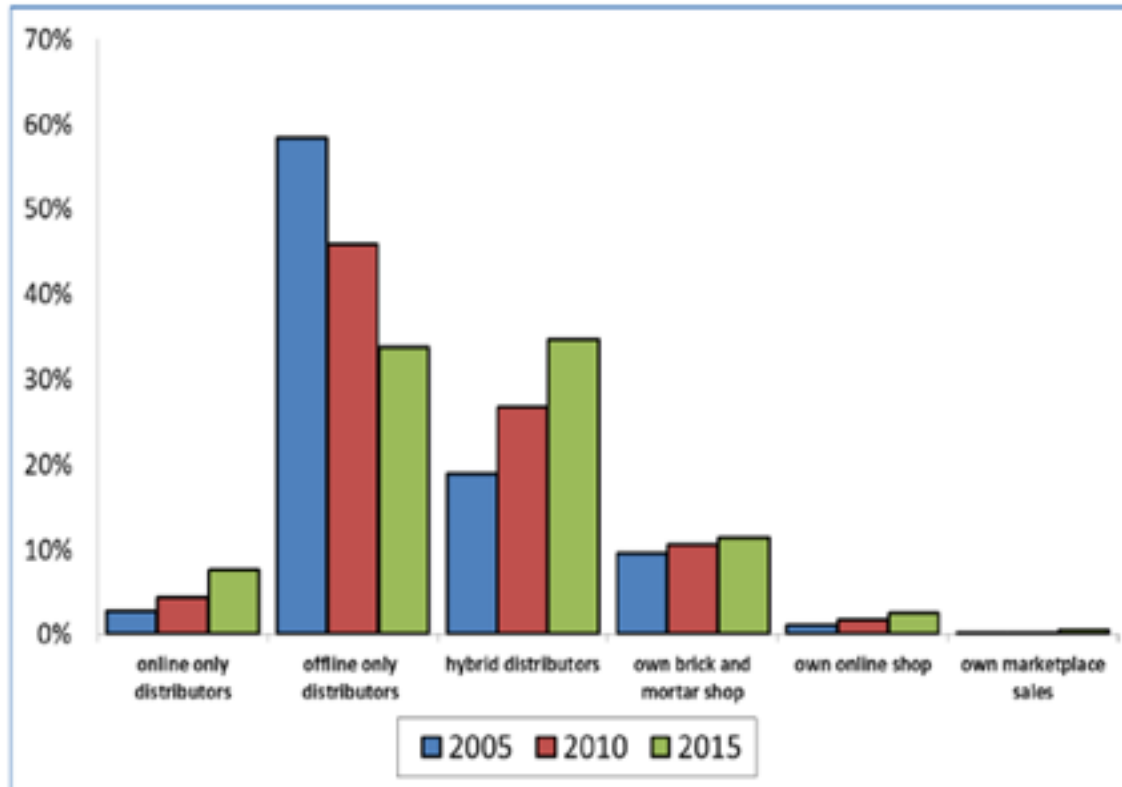
Why focus on e-commerce?

- Digital Single Market Strategy (EU)
 - Reversing “continental drift” – drive to harmonise the consumer experience throughout the EU
 - Applying single market philosophies to digital markets
- Future legislation on the cards?
 - Expiration of VABE
 - Online platform regulation
- Enforcement priority?
 - Digital markets a priority policy for the European Commission
 - Further enforcement activity likely in the next few years to fill the gaps in case law until legislation can catch up



E-commerce – increased scrutiny of digital markets

Average proportion of EU sales via the different sales channels (e-commerce sector inquiry)

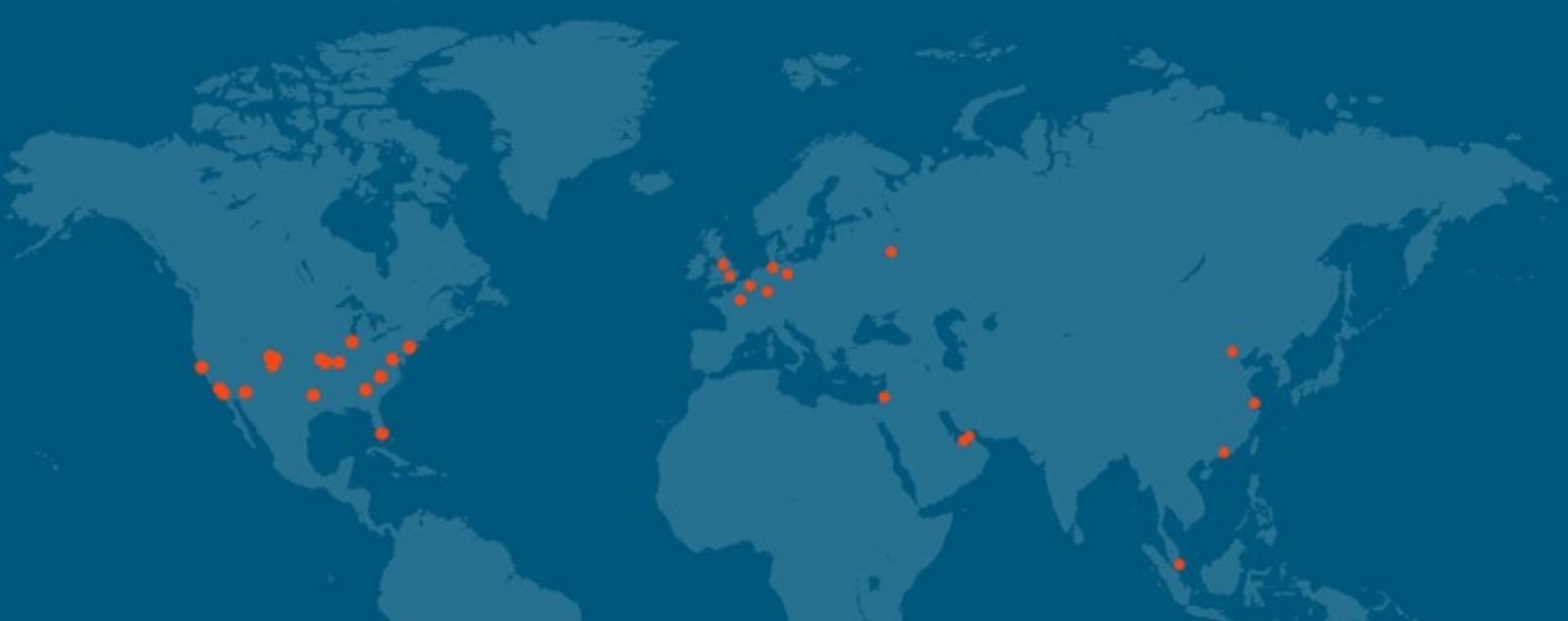


In the US?

Why focus on e-commerce?

- It's big business—and it's only getting bigger
 - 2017: \$453.46 billion online sales, which is a 16% increase from 2016
 - 13% of all retail sales, and 49.4% of the growth in retail sector
- Adjusting downstream sales strategy
 - Online platforms v. brick & mortar stores
 - Brand equity and integrity challenges
- Enforcement priority?
 - DOJ online promotional products industry investigation
 - Antitrust and big data





Key Legal Developments from a EU and US Perspective

Geo-blocking

- The E-Commerce Sector Inquiry launched 6 March 2015:
 - To identify business practices which may hamper competition in e-commerce
 - Part of the “Single Market Strategy” - aims to fight discrimination based on nationality or place of residence
 - Covers: clothing and shoes; consumer electronics; electrical household appliances; computer games and software; toys and childcare articles; media (books, CDs, DVDs and Blu-ray discs); cosmetics and healthcare products; sports and outdoor equipment, and house and garden products
- Final report published 10 May 2017



Geo-blocking

- The E-Commerce Sector Inquiry – Outcomes - Key competition concerns:
 - Greater direct manufacturer and customer relationships
 - Use of selective distribution
 - Restrictions on selling and advertising online
 - Price restrictions/recommendations
 - Marketplace bans
 - The use of “Big Data”
 - **Geographic restrictions – “geo-blocking”**
 - Legislative proposals published on 25 May 2016



Geo-blocking Regulation



- Adopted on 22 March 2018, entering into force on 3 December 2018
- Main elements of the proposal:
 - sale of products and services
 - access to websites
 - non-discrimination in payments

Digital copyrighted content, audio-visual, transport services and access to retail financial services currently excluded:



European Commission must assess, within two years after the entry into force of the regulation, whether to extend its scope.



Geo-blocking Regulation

Prohibits blocking of access to websites and the use of automatic re-routing without consent of the consumer



No obligation to sell, deliver border or harmonise prices



Prohibits discrimination in access to goods and services where it cannot be objectively justified

No justified reasons for geo-blocking or other discrimination in three situations:

- the sale of goods without physical delivery
- the sale of electronically supplied services
- the sale of services provided in a specific physical location



Geo-blocking in the US?

- Although geo-blocking has impacted U.S. companies doing business in EU, there is no U.S.-equivalent issue.
- Larger focus here is whether antitrust has a role in regulating “big data”
 - Congressional Democrat support for “hipster antitrust”
 - DOJ has indicated reluctance to regulate
 - Dec. 2017: “[S]keptical” of an antitrust policy toward big data, since it may impact innovation
 - Feb. 2018: “[E]vidence-based investigations are better than static, one-size-fits-all solutions.”
 - April 2018: Acknowledged that consumers have shown a “preference for personal data privacy in the digital economy”



Selective Distribution and Luxury Goods

Can manufacturers restrict how their products are sold on-line?

- In 2012, Coty brought a claim before the German courts seeking to prevent its authorised retailer, Parfumerie Akzente from selling its products through the website amazon.de.
- Not an absolute ban on passive sales per Pierre Fabre
- 6 December 2017 - ECJ confirmed:
 - Competition law does not preclude a platform ban of the type used by Coty where it is used in a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods, and on condition that the clause:
 - has the objective of preserving the luxury image of those goods;
 - is laid down uniformly and not applied in a discriminatory fashion; and
 - is appropriate for preserving the luxury image of the goods and does not go beyond what is necessary to achieve that objective.
- Contrasts with the approach adopted in Germany (Asics)



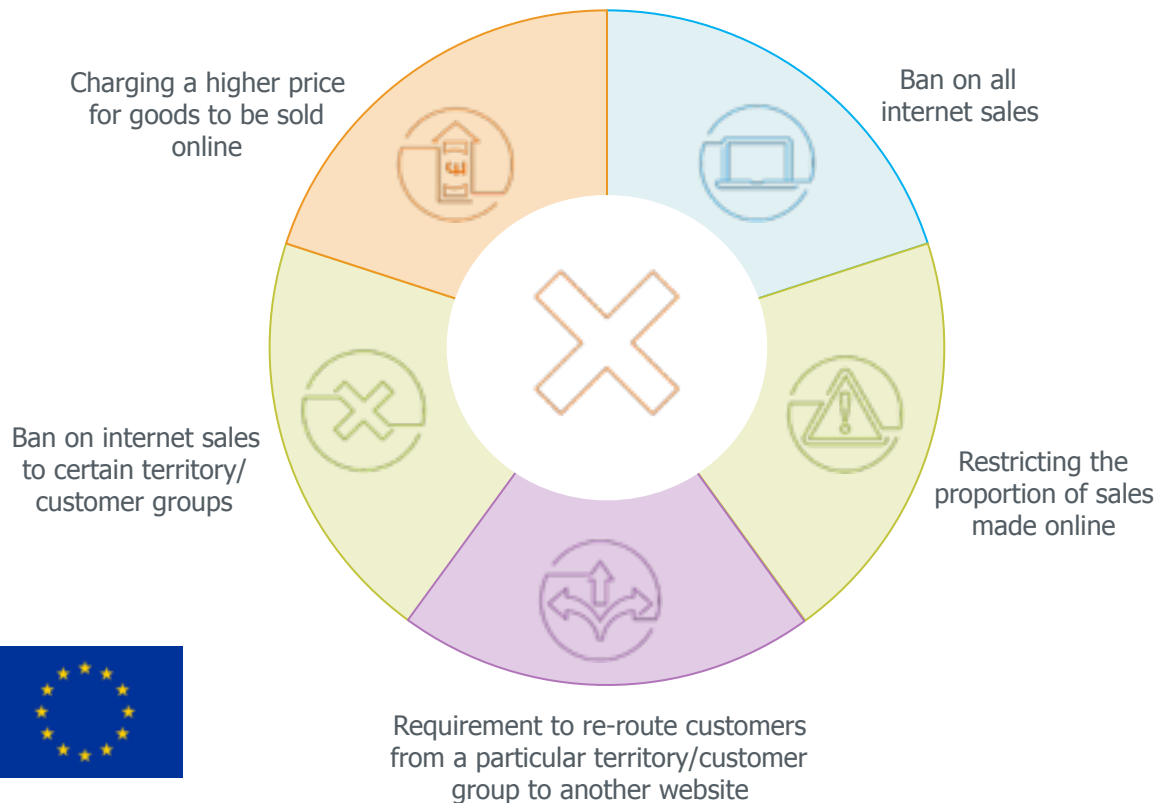
Active/passive sales restrictions – a reminder

ACTIVE SALES:

VABE permits exclusive allocation/reservation of territories or customer groups, combined with a ban on active sales.

PASSIVE SALES:

Ban on passive sales = a hardcore restriction. This includes:



But note:

- Manufacturers may require retailers to operate at least one brick and mortar store
- Manufacturers may agree a fixed fee to support brick and mortar sales



Selective distribution – a reminder

Outside Article 101

Metro

✓ SD is permitted where:

- Resellers chosen on the basis of objective, qualitative criteria, laid down uniformly for all potential resellers and applied in a non-discriminatory way
- The product's characteristics necessitate SD to preserve its quality & ensure proper use
- The criteria laid down do not go beyond what is necessary

Under the VABE

✓ SD is permitted where:

- Resellers chosen on the basis of specified (qualitative or quantitative) criteria
- Resellers can sell to other authorised resellers

✓ Can be combined with exclusive distribution (but not in the same territory)



Selective Distribution and Luxury Goods

Can manufacturers restrict how their products are sold on-line?

- No active/passive sales concept in the U.S.
- A supplier can restrict downstream sales of its brands by platform
 - Nonprice vertical restraint
 - Authorized retailer policy
 - Authorized Internet retailer policy



Advertising Restrictions

Can manufacturers impose bans on key word advertising?

- Asics and Adidas German Cartel Office investigations
 - Prohibited distributors from:
 - using price comparison websites to drive traffic to their site
 - using their brand names on the websites of third parties to guide customers to the third parties' online stores
 - using online market places and restricted their re-sellers' use of their name as key words on Google Adwords
- Adidas agreed to remove these restrictions on its re-sellers
- In August 2015, the German Cartel Office announced that Asics had violated competition law – upheld on appeal in 12 December 2017
 - Per se prohibitions on price comparison websites which are not tied to quality requirements are illegal and should be viewed as hard core restrictions.



Advertising Restrictions

Can manufacturers impose bans on key word advertising?

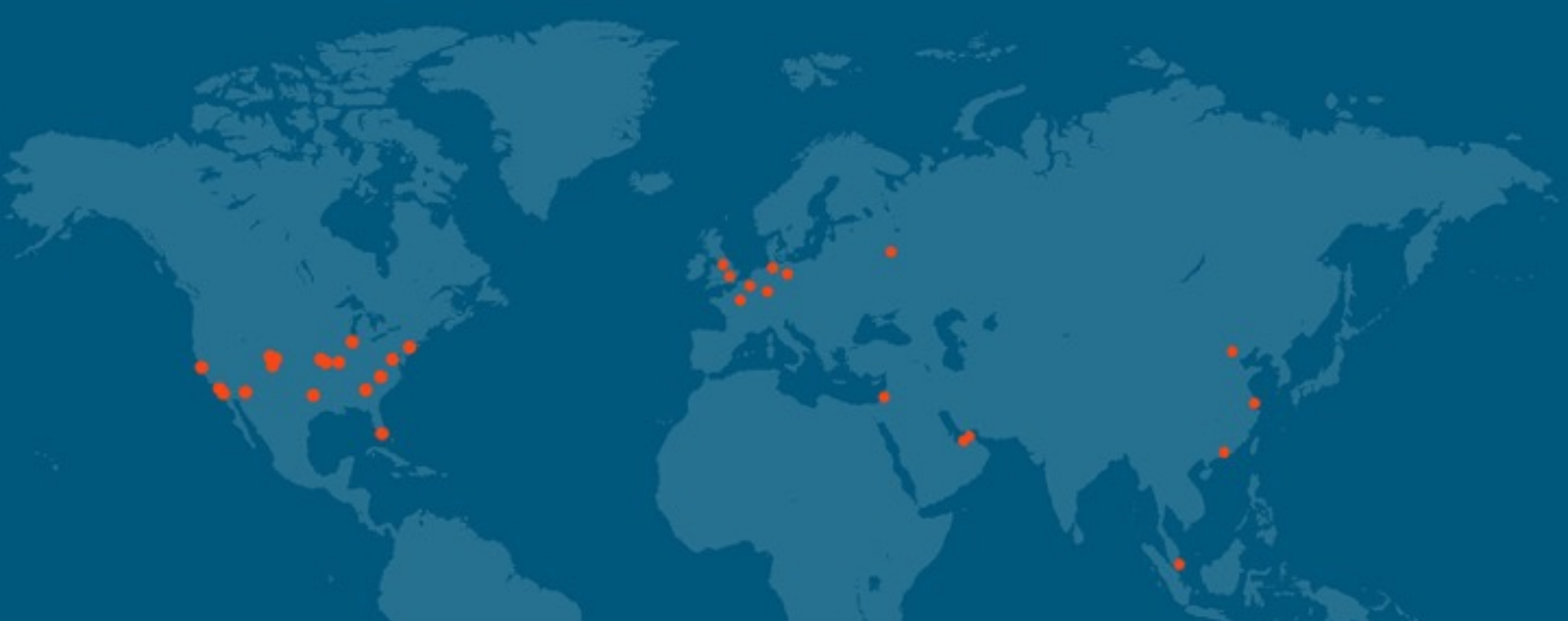
- A manufacturer can restrict key word advertising
 - Nonprice vertical restraint
 - Authorized retailer policy
 - Authorized Internet retailer policy



Advertising Restrictions

- Important to note that in the U.S. a manufacturer can implement and enforce certain resale pricing strategies in addition to key word advertising restrictions
 - Unilateral Price Policy (“UPP”)
 - Unilateral; actual resale price
 - Strict enforcement and penalties
 - Can be for portfolio or single product
 - Unilateral Minimum Advertised Price Policy (“UMAP”)
 - Unilateral; advertised price only
 - Strict enforcement and penalties
 - Can be for portfolio or single product





Platform Regulation

Platforms

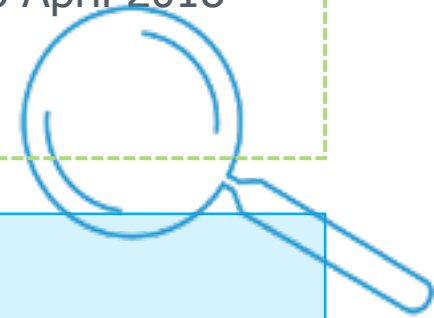
Are there any rules that restrict the behaviour of platform operators?

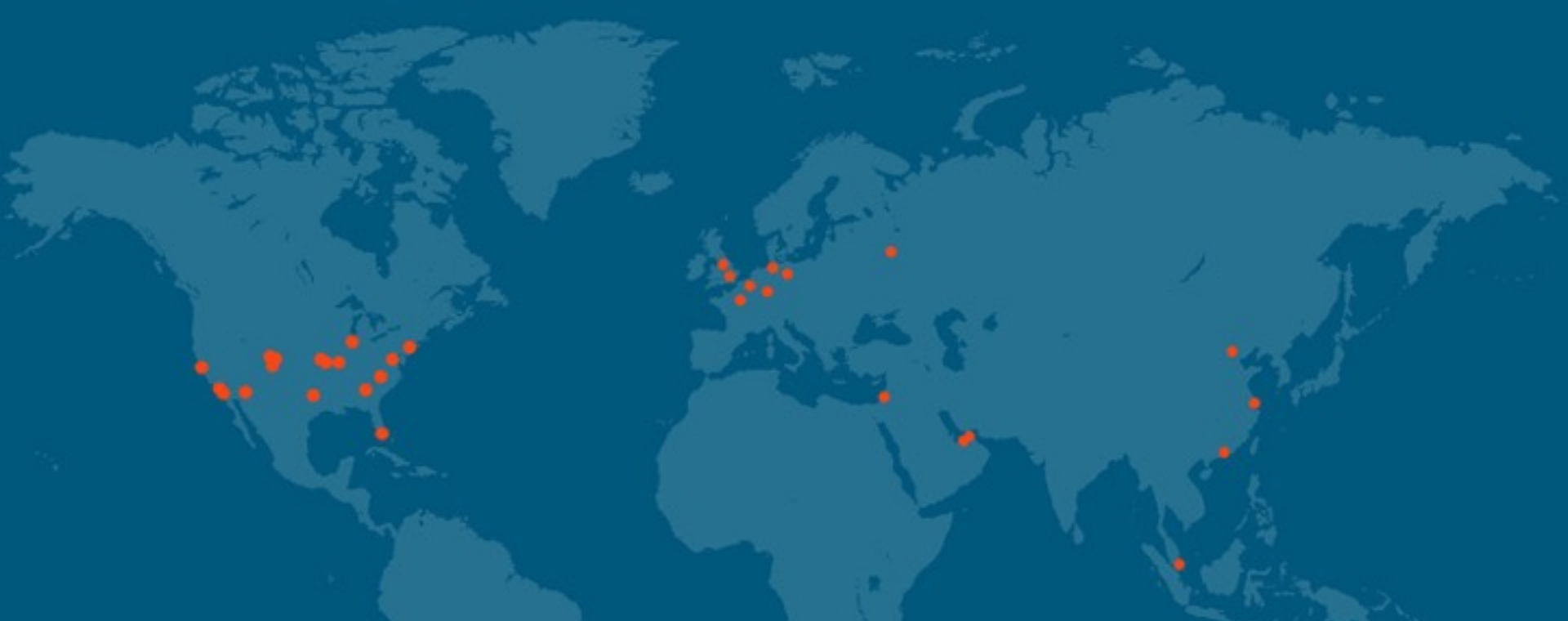
“Fairness and Transparency in Online Platform trading”

Draft regulation published by European Commission on 26 April 2018
Applies to “Platform Operators”

Addresses “potentially harmful trading practices”:

- > Unilateral variation of terms
- > De-listing products without notice
- > Asymmetric access to customer data
- > Lack of transparency over search and ranking results





Emerging Themes – What's on the Horizon?

AI – Price Modelling Software and Collusion

Can robots fix prices?

- 67% of retailers tracking online prices use automatic software programmes that adjust their own prices in response to competitors
- Tacit collusion v illegal collusion?
 - Posters and frames, CMA (2016)
 - “We are still waiting for colluding algorithms...we haven’t found them yet” (Andreas Mundt, September 2017)
 - “The challenges that automated systems create are very real,” (Magarethe Vestager)
 - FAS raids (consumer electronics)
- Price discrimination:
 - CMA inquiries into Comparethemarket.com and hotel booking sites
- Do authorities possess the right tools?
 - OECD report
 - BEIS Consumer Green Paper “Modernising Consumer Markets”



AI – Price Modelling Software and Collusion

Can robots fix prices?

- No current government focus on AI
- U.S. v. Topkins: the defendant and his co-conspirators agreed to fix, increase, maintain, and stabilize prices of certain posters sold on Amazon Marketplace by agreeing to adopt specific pricing algorithms for the coordinated sale of posters
- Manufacturers must account for AI price matching algorithms in their UPP and/or UMAP policies



Conclusions

- Competition enforcement in e-commerce is a priority for antitrust and competition regulators globally
- More interventionist approach in EU through specific legislation (such as geo-blocking and platform regulation)
- U.S. antitrust law is far less interventionist; in fact certain resale price strategies can be legally employed with respect to e-commerce platforms
- Antitrust and competition law is grappling with the challenges of new technology

CLE Points

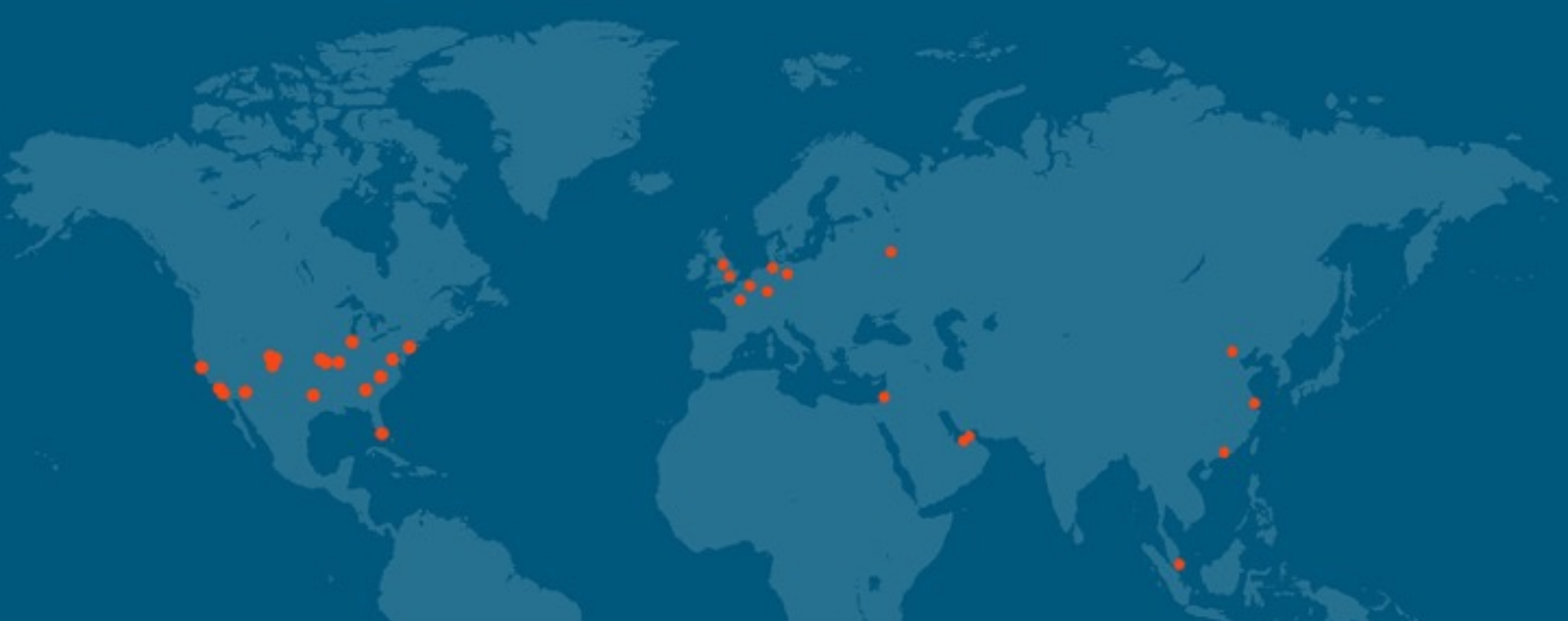
- CPD points and CLE credit are available for this webinar.
- CPD points and CLE credit may be collected by emailing: europa.marketing@bcplaw.com

[marketing to confirm address]

Eu-competitionlaw.com

The screenshot displays the homepage of the website 'EU & COMPETITION LAW'. The main header features the site title and social media icons for Twitter and YouTube. Below the header is a large banner image showing various European Union member state flags in front of a modern building. The page is organized into several sections:

- Navigation:** Home, Articles, Authors.
- CATEGORIES:** Abuse of Dominance, Anti-Competitive Agreements, Cartels, EU & Regulatory, General, Litigation, Mergers, Procurement.
- POPULAR POSTS:** Competition Regulators Attack Private Clubs in...; Competition Whistleblowers in Technology Aftermarkets; Proposed Reform on Software Patents Will Not Save ETC.; Compliance Strategies for Whiskey Retail...
- Featured Article:** Litigation: CLAIMANTS' GUIDE TO ANTI-TRUST/COMPETITION LITIGATION IN THE EUROPEAN UNION. The article text states: "Recent years have seen a significant increase in the number of private competition claims in the European Union. The Claimants' Guide to Anti-trust/Competition Litigation in the European Union provides an overview of the process for recovering compensation for breaches of competition law before the national courts of an EU Member State as well as the likely impact of Brexit on such actions. Please follow this link to read the guide." It is written by Robert Bell on Thursday, February 23, 2017.
- CONTACT US:** ROBERT BELL - EDITOR.
- SUBSCRIBE:** RSS and Email icons.
- EU TEAM:** A dark button.
- EC NETWORK:** A dark button.



Competition Law and E-Commerce

Key Legal Developments – EU & US Perspectives

This document provides a general summary only and is not intended to be comprehensive. Specific legal advice should always be sought in relation to the particular facts of a given situation.