

B/S/H/

# Digitalisierung und Kartellrecht: Ausgewählte Themen aus Herstellersicht

Studienvereinigung Kartellrecht, Wien

25. Januar 2018

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**Robert Bosch  
GmbH**

100%

**B/S/H/**

**BSH Hausgeräte GmbH**

Founded in 1967



Cooking and Baking



Washing and Drying



Dishwashing



Refrigeration and Freezing



Consumer Products



## Global Brands



SIEMENS

GAGGENAU



## Local Heroes

*Thermador*★



Coldex

*Constructa*

PITSOS

PROFILO

ufesa

zelmer

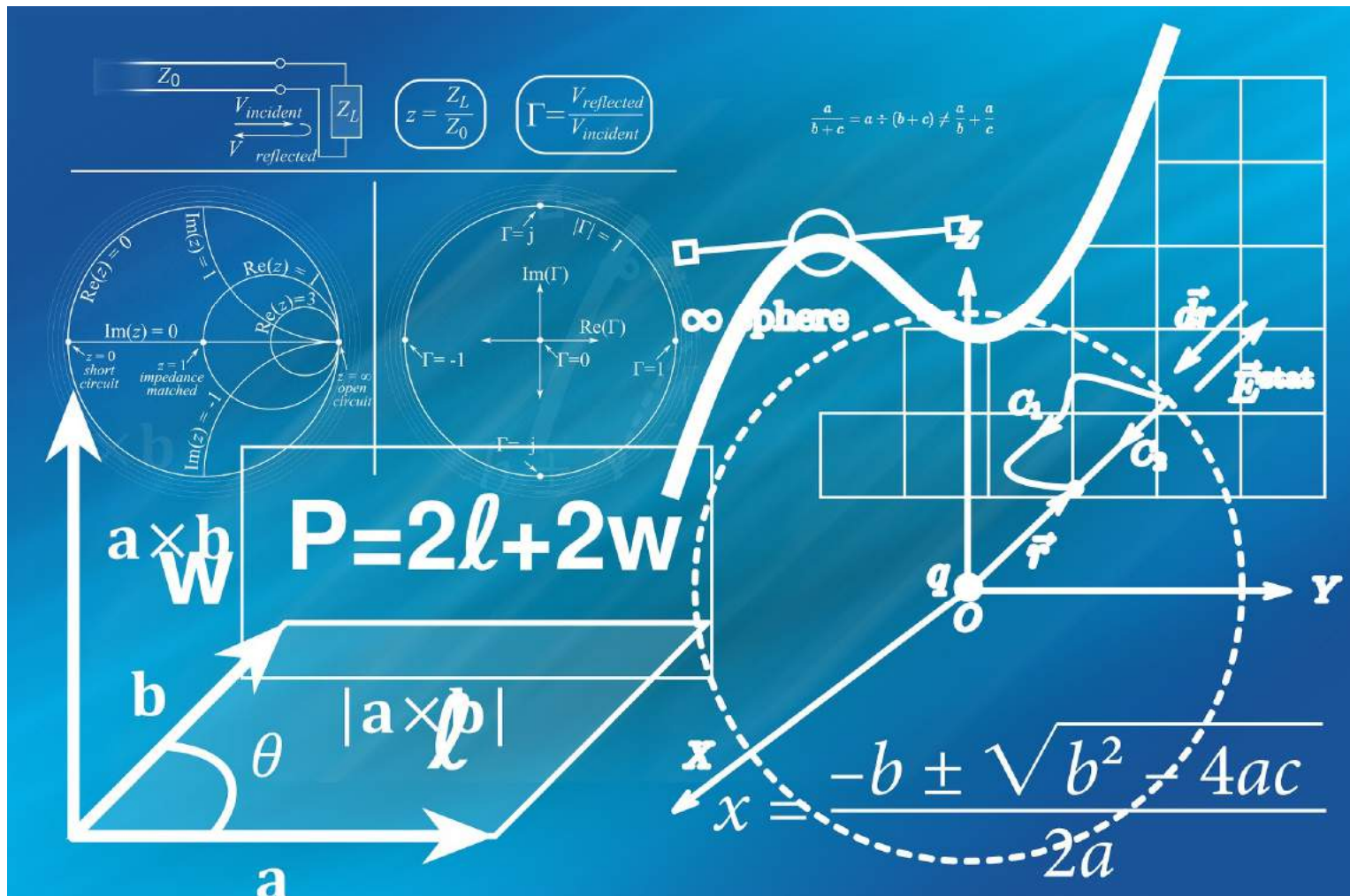
## Label Brands

JUNKER

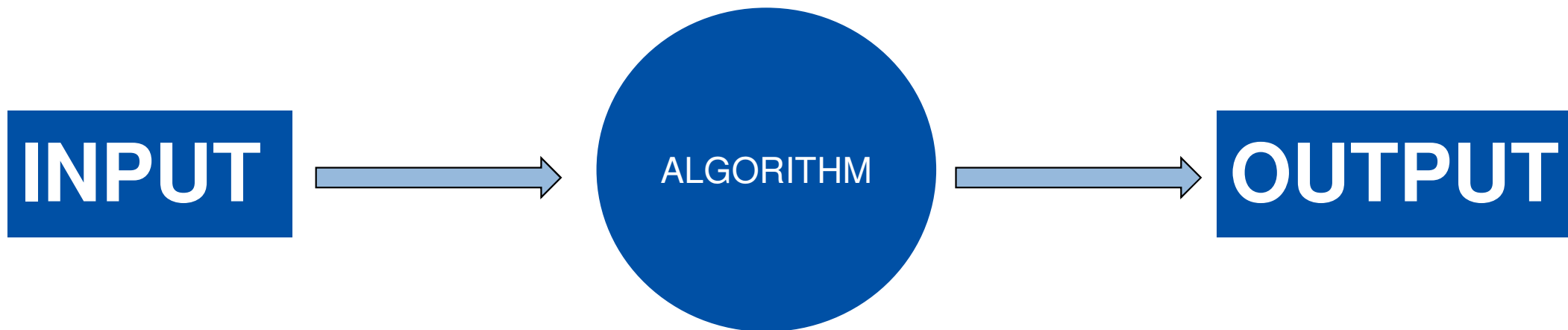
viva

BSH Home Appliances Group is a Trademark Licensee of Siemens AG for the brand Siemens and of Robert Bosch GmbH for the brand Bosch.

## Price algorithms



## Algorithm



*“an instant of logic that generates an output from a given input” ... “an unambiguous, precise list of simple operations applied mechanically and systematically to a set of tokens or objects”*

*OECD, Algorithms and collusion: Competition Policy in the Digital Age, 2017*

## (Online) price algorithm

**Current online prices of competitors**

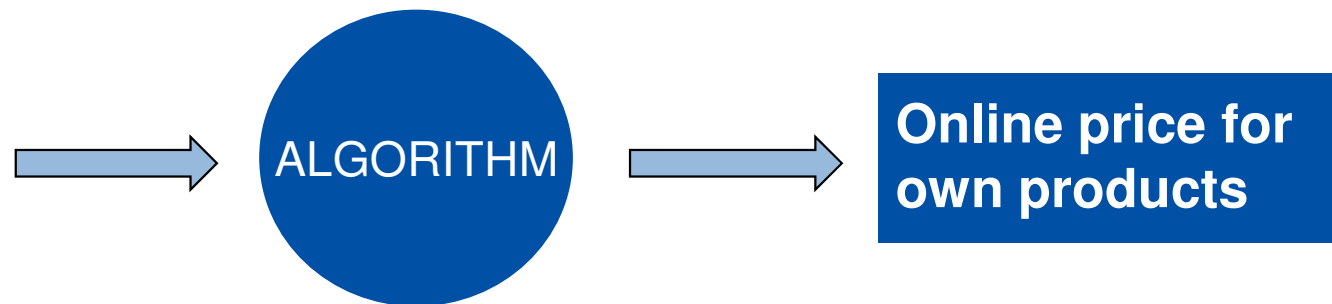
**Any other factors influencing demand, e.g.**

- new product launch
- advertising campaigns
- time of year / day of the week / time of day
- public holidays or major events
- personal preferences of individual customers
- ...

**Available stock**

**Analysis of historical data and experiences**

...



The majority of those retailers that use software to monitor prices, adjust consequently their own prices to those of their competitors (78%).

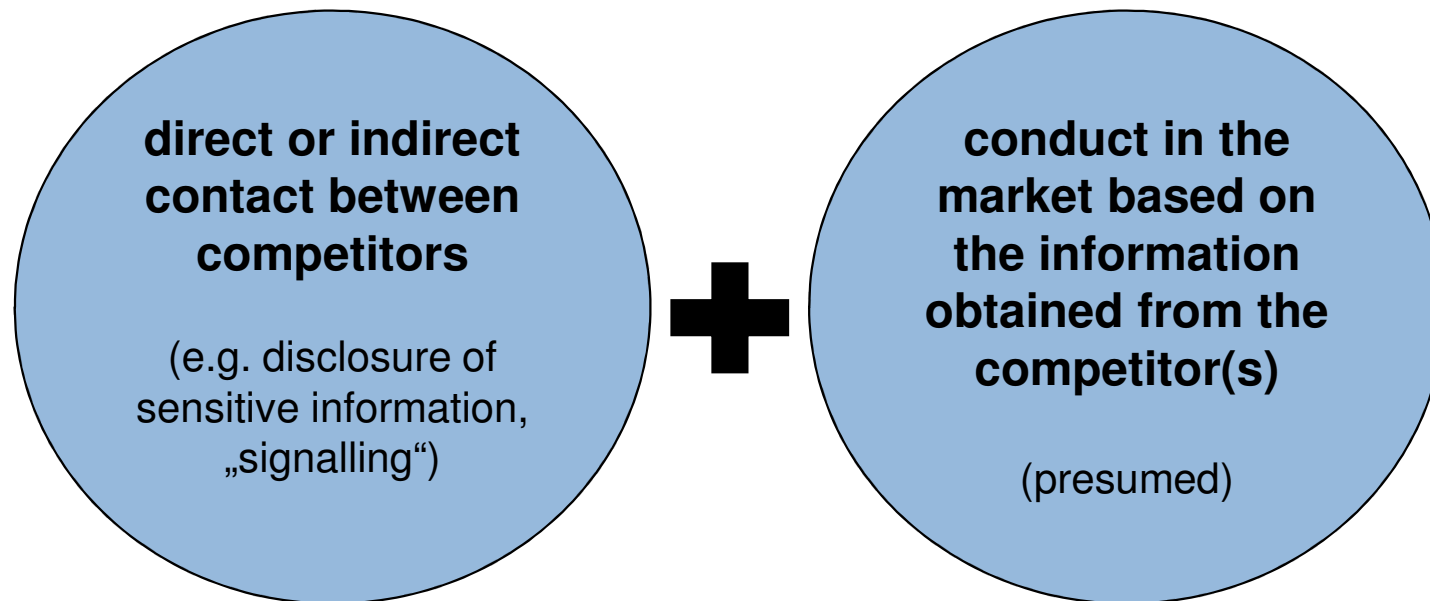
Most of them adjust prices manually (43%), but some (8%) use **automatic price adjustments based on pricing software programmes [...]** and a significant number (27%) uses both manual and automatic price adjustments.

Final Report on the E-Commerce Sector Enquiry, Commission Staff Working Document, May 2017, para. 605



While algorithms might be used to **implement virtually any anti-competitive conduct** [...], a particular concern [...] is the risk that algorithms may work as a **facilitating factor** for collusion and may enable **new forms of co-ordination** that were not observed or even possible before.

OECD, Algorithms and collusion: Competition Policy in the Digital Age, 2017



## Price algorithms – what is allowed and what is not?

- Unilateral decision use a price algorithm as tool that collects publicly available competitor information and, by applying certain rules, enables “intelligent adaptation” to perceived market developments
- Use of artificial intelligence / “deep learning technologies”, allowing the algorithm to make accurate predictions about and draw inferences from competitors’ behaviour that could otherwise only be obtained by direct contact between competitors

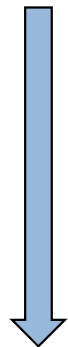


- Agreement on the use of a price algorithm and on the specific rules to be applied by the algorithm
- Hub-and-spoke type agreement involving the software provider as a facilitator (e.g., collection and use of non-public data; facilitation of agreement on algorithm parameters)
- Programming of the algorithm to react to “signals” previously agreed upon (e.g., short-term unusual price increases at a particular point of time at night)
- Competitors deliberately “feed” each other’s algorithms secret, sensitive, non-publicly available data (e.g., dates of future price increases)

## Competition and Markets Authority: GB Eye / Trod (2016)



Trod Limited



Trod Limited

# amazon

re-pricing software

re-pricing software



£ 3,49

£ 3,49


## Competition and Markets Authority: GB Eye / Trod (2016)

They agreed “*not to undercut each other in certain specified circumstances on prices for posters and frames sold by both Parties on Amazon UK. [...]*”

*GBE implemented the arrangement by the use of repricing software which was configured to give effect to it.*

*Trod also used automated repricing software to implement the arrangement, albeit different software from that used by GBE.”*

<https://assets.publishing.service.gov.uk/media/57ee7c2740f0b606dc000018/case-50223-final-non-confidential-infringement-decision.pdf>




What businesses can – and must – do is to ensure antitrust compliance by design. That means that pricing algorithms **need to be built in a way that doesn't allow them to collude.** [...]

And businesses also need to know that when to decide an automated system, they will be held responsible for what it does. **So they had better know how that system works.**

**Margrethe Vestager** (Bundeskartellamt 18<sup>th</sup> Conference on Competition, 16 March 2017)

## Business intelligence: price monitoring tools





Manufacturers that want their retailers to stick to minimum retail prices need a way to deal with discount stores that undercut those prices.

With **monitoring algorithms**, manufacturers can **easily spot when that's happening**. And they can ask retailers – not always very politely – to put the price back up.

**Margrethe Vestager** (Bundeskartellamt 18<sup>th</sup> Conference on Competition, 16 March 2017)



**Ecenter**  
EDEKA

SCHWEINFURT  
OSKAR-VON-MILLER-STR.6

RADIESCHEN	0,59
KAESEAUFSCH.	1,39
BAUCHSPECK	1,19
BAUCHSPECK	1,19
DORNFELDER	0,99
CLEMENTINEN	2,49
L&M BLUE	3,50
L&M BLUE	3,50
<b>SUMME</b>	<b>EUR 14,84 *</b>
BAR	50,00
RÜCKGELD	EUR 35,16

ENTHALTENE MEHRWERTSTEUER

MWST	NETTO	
7,00 %	0,45	6,40
19,00 %	1,28	6,71
<b>SUMME MWST</b>	<b>1,73</b>	<b>13,11</b>

EDEKA HANDELSGESELLSCHAFT  
NORDBAYERN-SACHSEN-THÜRINGEN MBH  
STEUERNUMMER: 257/115/30471

QUITTUNG

NUTZEN SIE DIE EDECARD  
PUNKTE SAMMELN+PRÄMIEN ERWERBEN  
IHR EINKAUF WÄRE UNS  
1 BONUSPUNKTE WERT GEWESEN !

08.12.07 16:27 37589 48 4 8500

ES BEDIENTE SIE: H. SEUFERT

VIELEN DANK FÜR IHREN EINKAUF!  
AUF WIEDERSEHEN IM E-CENTER  
UNSERE OFFNUNGSZEITEN FÜR SIE:  
MONTAG-SAMSTAG: 08.00-20.00UHR

Montag - Samstag 8 - 21Uhr

H-Milch 3,5% OGT  
TassimoCafféCre  
Nuts Royal  
Bananen  
0,394 kg x 1,15  
Papiertraget.  
Sahne Jogh. Pfirsic  
Skyr ger. Erdbeer  
2 x 0,  
Sahnepudding Schoko

zu zahlen  
Bar

REWE  
Hoheluftchaussee 23-25  
20253 Hamburg  
Tel.: 040/42914311

Steuer.Nr.: 215/5940/2801

FELIX KABELJAU	0,8
VITAL UND FIT	1,2
CASTELLO BLAU	2,1
PIZZA KIT	1,7
JA! GOUDA MA	1,6
SPAGHETTI MIT EI	1,1
MOND 2ER JA	1,1
PIZZA HAWAII	2,49 B
<b>SUMME</b>	<b>EUR 12,40</b>

Sie erhalten 2 Treuepunkt(e)

BAR	EUR 20,00
Rückgeld BAR	EUR 7,60

Steuer	%	Netto	Steuer	Brutto
A =	19,0%	0,93	0,18	1,11
B =	7,0%	10,55	0,74	11,29
<b>Gesamtbetrag</b>		<b>11,48</b>	<b>0,92</b>	<b>12,40</b>

14.07.2010 17:13 Bon-Nr.:251  
Markt:0566 Kasse:1 Bed.:121212

REWE Markt GmbH

**MIGROS**  
GENOSSENSCHAFT MIGROS ZÜRICH  
M HONGG  
TEL. 044 344 10 20

Kartoffelbrot Nuss	CHF 3.00	1
Bauernschinken	7.15	1
Schweinsbratwurst	5.65	1
MClass Linsen m. Speck	1.70	1
SPZ Grande Dess Cappuccino	1.05	1
<b>TOTAL</b>	<b>18.55</b>	
BAR	20.00	
ZURUECK	1.45	

MWST-NUMMER: 231'102  
GR MWST% TOTAL MWST  
1 2.50 18.55 0.45

CUMULUS NUMMER: 2099.356.356.990  
ERHALTENE PUNKTE: 18.550  
DAVON BONUSPUNKTE: 0.000

BESTEN DANK FÜR IHREN EINKAUF!

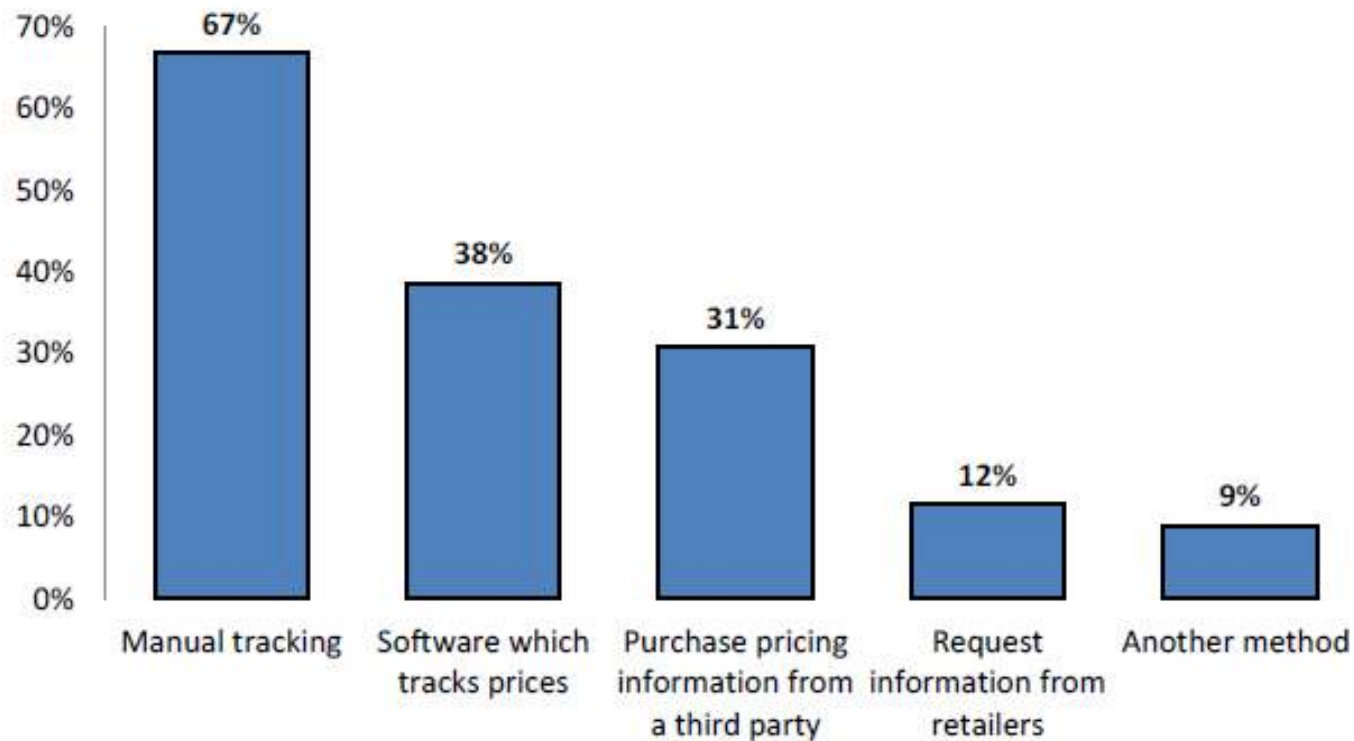


004025342511260001855  
ART 00005 TRANSAKTION: 02534  
BEDIEN. KNR KST. DATUM ZEIT  
0000113 004 150002 25.02.2011 11:26

A STRECKER  
-GORKIJ-STR. 21  
IBURG - RIESELFELD  
0761 4598420  
KASSE: 3 21.05.2012

R	1.89 A
R	0.99 A
ZEL R	1.49 A
S R	1.09 A
R	5.69 A
R	1.69 B
R	0.59 A
	-0.60 B
ARK R	1.09 A
ARK R	1.09 A
R	0.99 A
R	1.59 A
R	0.69 A
R	1.10 A
R	1.69 A
R	0.75 A
R	1.59 A
R	0.69 A
ZW-SUMME	24.10
<b>TOTAL</b>	<b>24.10</b>

Figure B. 75: Most commonly reported methods to monitor retail prices by manufacturers<sup>313</sup>



Final Report on the E-Commerce Sector Enquiry, Commission Staff Working Document, May 2017, para 577

Thanks to WorkIT's Tracker, W2P and Alerts tools, you can get answers to the questions you ask yourself **every day**:

- Which sites carry **my products**?
- **Who is driving the market down** on my core products?
- What are my competition's prices on products with comparable **technical** features?
- Is my **selective distribution** policy really being respected? ?
- Which of my products are **sold-out** on line?
- How is the **launch** of my latest range going?
- How does my **product structure** compare to the competition's?

## What we offer

A Retail Scorecard tracks JBP compliance over the term of the **agreement with retailers** by tracking specific KPIs around the agreement. Here's an example of what we typically check for out JPB customers:

- **Promotions**
  - Extra display activation
  - In-store location of extra display
  - Extra display out-of-stock
- **Product Launches**
  - Presence
  - **Price**
  - Placement
  - Attention getter activation

JUNE 16, 2017

## QBerg launches the Advanced e-commerce tools

Sophisticated tactical tools to allow an increasingly closer control of e-commerce

The evolution of the e-commerce world is continuous: that's why we at QBerg try to provide our customers with ever more efficient tools allowing them to control the phenomenon more closely. One of e-commerce's hottest themes of the moment is figuring out who's the first player to break down a price, and if such abatement is momentary or instead will results in a downward trend, and which competitors line up. QBerg's new **Price Erosion Tracker** report answers these questions: it is only the first in a series of tools that we will build in the coming period, in order to meet the needs of increasingly targeted insights coming from our customers. Contact us to know more.

<http://workit-software.com/for-brands>; <https://www.bemyeye.com/en-joint-business-plan-tracker>; <https://www.qberg.com/news>

## Price monitoring: Risk mitigation



### No current prices of individual retailers

Price monitoring tools are hardly suitable for unlawful purposes if they do not feature any current prices of individual retailers – use average prices or, if necessary, historic individual prices instead



### Clear definition and documentation of the purpose

In the agreement with the service provider and/or in internal documents, clearly explain the legitimate objectives for using the tool



### Access restriction

Access to the data should be granted on a strict need-to-know basis

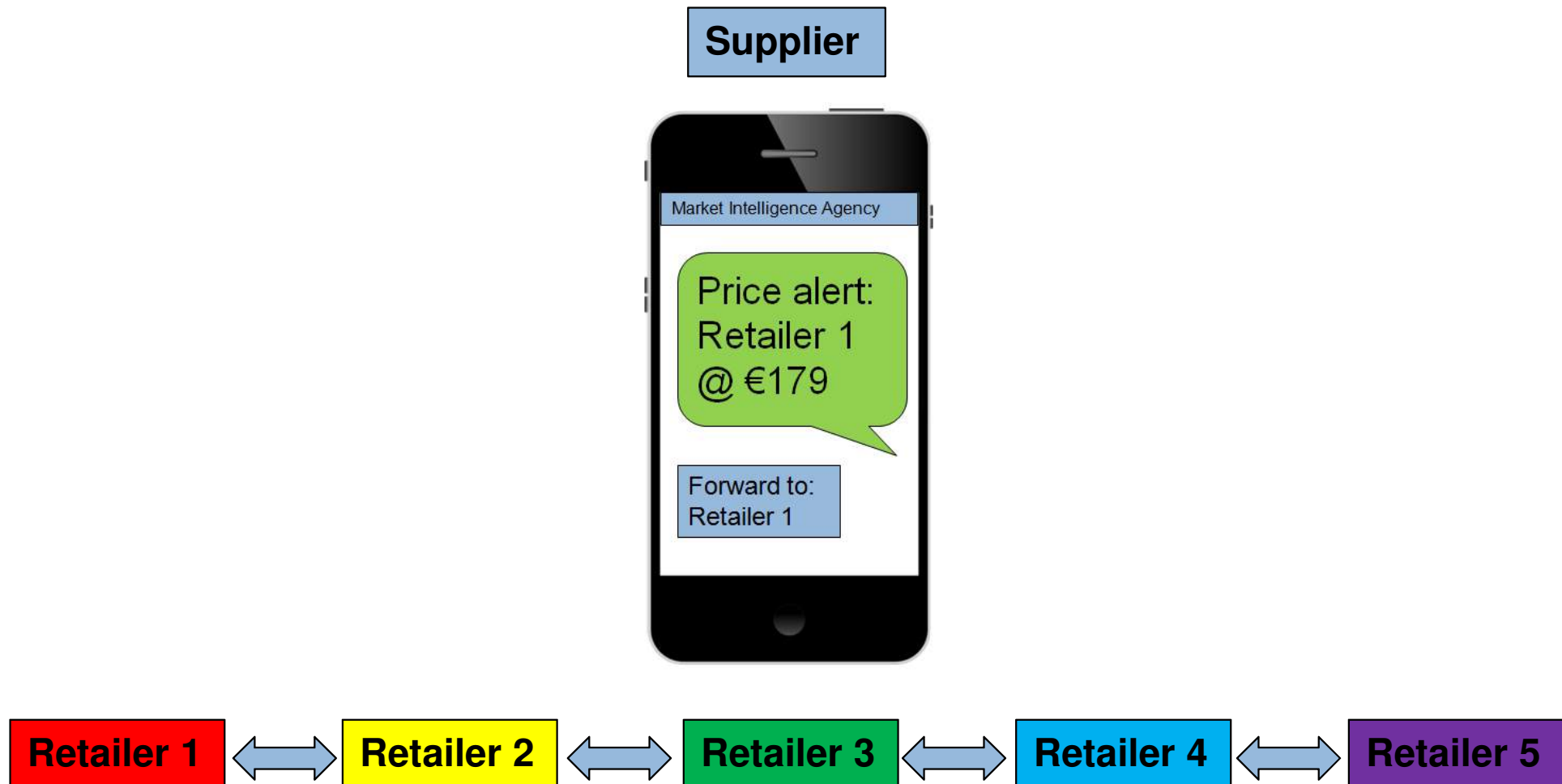
Where prices of individual dealers are reported, no sales representatives or other employees with dealer contact should have access



### Special trainings

Before obtaining access to the tool, employees should be given special training regarding the limits of lawful collection and use of retailer data

## Price monitoring by suppliers + price algorithms at dealer level



## Direct-to-consumer business (D2C): vertical meets horizontal



[M]anufacturers have significantly increased their **direct sales** in the last ten years by opening own online shops and by selling directly via online marketplaces.

Final Report on the E-Commerce Sector Enquiry, Commission Staff Working Document, para. 187

## BSH Austria: Bosch flagship store



### Willkommen im neuen Bosch Store Wien 7

Erleben Sie die exklusive Welt der Hausgeräte! Entdecken Sie Europas Haushaltsgroßgeräte Marke Nr. 1 mitten in Wien: der neue Bosch Store in Wien 7, Mariahilfer Straße 74b. Erleben Sie eine Top-Auswahl von über 1.500 Haushaltsgeräten!



## BSH Austria: Bosch online shop



### Der neue Bosch Online Shop

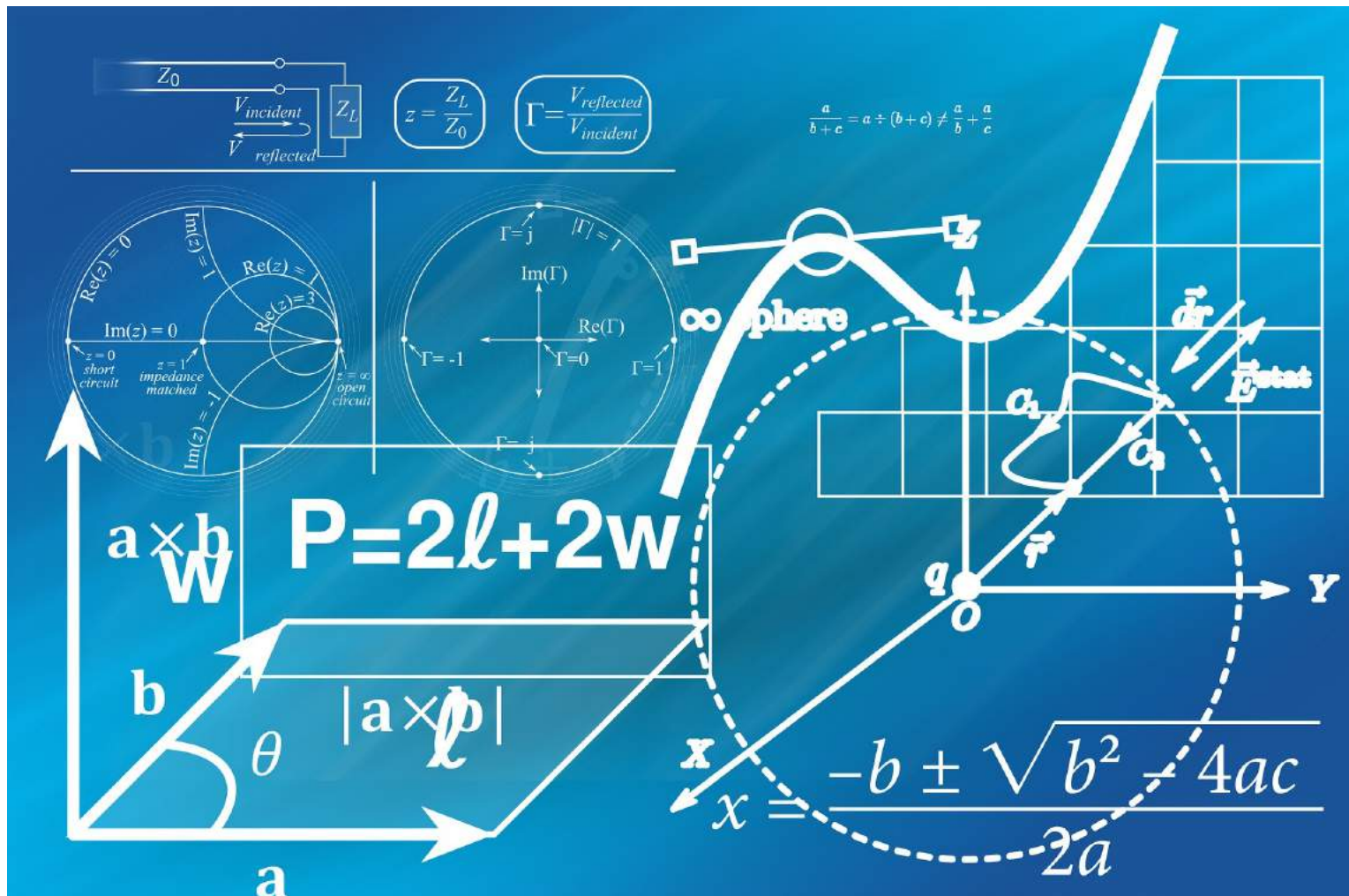
Hier endet Ihre Suche nach exklusiven Innovationen. Die vielfältigen Hausgeräte von Bosch können Sie jetzt bequem auch von der Couch aus bestellen. Unser neuer Bosch Online Shop bietet Ihnen die Möglichkeit, die innovativen Produkte mit nur ein paar Klicks zu bestellen.



## Price monitoring



## Price algorithms



Agreement or concerted practice („concurrency of wills“); exchange of sensitive information

Generally taking the „dual distribution scenario“ into account in both D2C-related conduct and in the conduct vis-à-vis dealers

Purely unilateral conduct; market observation and intelligent adaptation to competing retailers



## Selective distribution / online restrictions



## Luxury?



Several manufacturers report about a differentiated distribution system, whereby **only the premium product line** is sold under selective distribution, while the rest of their products are sold in open distribution.

Final Report on the E-Commerce Sector Enquiry, Commission Staff Working Document, para. 237



The exemption [...] shall apply on condition that the market share held by the supplier does not exceed **30% of the relevant market on which it sells the contract goods** [...]

Vertical Block Exemption Regulation, Article 3 (1)

Hersteller führen vermehrt Selektivvertriebssysteme ein, um **preisaggressive Händler auszuschließen und die Endverkaufspreise zu stabilisieren.**

Stellungnahme der österreichischen Bundeswettbewerbsbehörde zum Zwischenbericht der  
Sektoruntersuchung e-commerce;  
[http://ec.europa.eu/competition/antitrust/e\\_commerce\\_files/bundeswettbewerbsbehörde\\_de.pdf](http://ec.europa.eu/competition/antitrust/e_commerce_files/bundeswettbewerbsbehörde_de.pdf)

[T]here are legitimate requirements, such as the **maintenance of a specialist trade** capable of providing specific services as regards high-quality and high-technology products, which may **justify a reduction of price competition** in favour of competition relating to factors other than price.

ECJ, Case 107/82 – AEG, para. 33

[T]he documents [...] do in fact demonstrate the existence of a distribution policy **motivated both by a desire to guarantee a high profit margin** for approved resellers and to **impede**, so far as at all possible, **the admission of new forms of trade**, which are regarded a priori as being incapable of satisfying the specialist trade conditions.

ECJ, Case 107/82 – AEG, para. 76



## Competition and Markets Authority: Ping (2017)

The Competition and Markets Authority (CMA) has found that Ping broke competition law by **preventing 2 UK retailers from selling its golf clubs on their websites.** [...]

The CMA found that, while Ping was pursuing a genuine commercial aim of promoting in-store custom fitting, it could have achieved this through less restrictive means.

<https://www.gov.uk/government/news/cma-fines-ping-145m-for-online-sales-ban-on-golf-clubs>

## Ping: Prohibition of online sales – fine: GBP 1.45 million

### Facts

- Ping is a supplier of golf clubs and operates a selective distribution system
- Ping promotes „dynamic face-to-face custom fitting“ for its golf clubs – which is not possible over the internet
- Lively competition; all other suppliers allow online sales



### CMA decision

- Prohibition of online sales = restriction by object
- Ping to provide objective justification
- Ping's policy of individual custom-fitting is recognised as a „*genuinely held commercial concern*“.
- But: The CMA finds that there are less restrictive measures – and makes suggestions such as
  - “*a mandatory tick box for consumers to confirm that they understand the importance of custom fitting*”
  - “*websites must have online interactive features which provide an opportunity for personal advice*”

### Appeal pending

Ping has appealed the decision, claiming *inter alia*

- a violation of fundamental rights (freedom to conduct a business / right to property),
- that the online sales restriction should not be viewed as a restriction by object, and
- that the CMA's proposed alternative measures are impractical and less effective







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