

# **Competition Enforcement in the Internet-Based Trade – Current Practice of the BKartA**

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- disclaimer -

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- agenda -

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- 1. resale price maintenance**
- 2. dual pricing schemes**
- 3. restrictions in selective distribution**
- 4. parity clauses – platform cases**

# 1. resale price maintenance – cases

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- “where we come from” => **internet-related RPM-proceedings**:
  - Phonak – hearing aids (2009)
  - Ciba Vision – contact lenses (2009)
  - Garmin – navigation devices (2010)
  - Alessi – household items (2012)
  - Wala – personal care products (2013)

# 1. resale price maintenance – common characteristics

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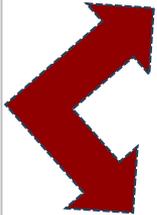
- **common characteristics of these cases:**
  - concentrated markets with strong traditional specialized shops – confronted with pricing pressure mainly by some online shops; RPM often initiated by retailers
  - producers argued with the protection of the image of their brand and consumer needs (presentation, service)
  - but: no convincing efficiency defense (well-established products; problems with free riding and adequate level of services not evident)
  - not indispensable -> other ways to solve possible coordination problems within vertical distribution chain (selective distribution)

# 1. retail price maintenance -> new restrictions

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a) new forms of **restraints directed against price aggressive online-dealers** / meant to protect traditional brick & mortar stores:

- dual pricing strategies (2.)
- non-price restraints (in selective distribution), e.g. prohibition to use intermediate platforms like Amazon (3.)



b) restrictions imposed by powerful platforms: **price parity clauses** / "retail MFN" clauses => same effect/same treatment as RPM? (4.)

## 2. dual pricing – theory of harm

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- **dual pricing** => a (hybrid) retailer is granted different purchase prices, depending on whether he intends to sell the products online or over-the-counter.
- by increasing the difference between the two prices a manufacturer could *de facto* determine the retailer's choice of sales channel + could prevent dealers from selling through the internet.

## 2. dual pricing – legal assessment

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- ruling of the **ECJ in “Pierre Fabre” (C-439/09)**: de facto prohibition of internet sales is competition restraint by object + hardcore restriction in terms of Art. 4(c) VBER (restriction of active or passive sales to end users)
- similar approach (restriction of sales relating to territory or costumers) towards dual pricing???  
(Vertical guidelines, para. 52: (+))
- effects of dual pricing may depend on scope of price difference, possible cost differences between sales channels ...
- but: high risk potential + general presumption of positive effects (VBER) not appropriate (indispensability doubtful)  
=> case by case analysis according to Art. 101(3) TFEU preferable

## 2. dual pricing - cases

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- our dual pricing-proceedings:
- the manufacturer of high-quality bathrooms fittings **Dornbracht** used a specialised trade agreement with wholesalers, which included a rebate exclusively granted for goods sold in a brick-and-mortar shop => goods intended for sale on the internet were sold by the wholesalers at higher prices
- in 2011 concerns of the Bundeskartellamt caused Dornbracht to give up this clause
- the Higher Regional Court of Düsseldorf last year supported our argumentation in a claim for damages-case against Dornbracht



## 2. dual pricing - cases

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- **BoschSiemensHausgeräte** (BSH)  
household applications (German market leader)
- retailers were granted a uniform purchase price but an annual discount on the purchase price ("performance rebate") was calculated in proportion to their online and offline sales
- numerous complaints by "hybrid" dealers => after an intervention of the BKartA BSH changed its practice: identical level of rebates possible, performance criteria (like quality of product presentation, qualification of sales force ...) are similar, adapted to the sales channel
- in our view lower rebates for online sales created incentive to sell less via internet and to increase prices => reduced intra-brand competition in combination with strong market position



## 2. dual pricing – justification?

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- BSH had argued that different rebate levels aimed at **compensating brick and mortar shops** for their high quality services
- [BSH did not allege higher costs on its side, cf. Vertical guidelines, para. 64]
- But:
  - BSH did not substantiate its claim
  - investigation showed that selling via brick and mortar is not inevitably costlier than selling via internet
  - fixed amounts could be an option to foster brick and mortar shops as fix costs seem to prevail



### 3. restrictions in selective distribution - non-price restraints

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- essential competition parameter => offer has to be found easily
  - importance of **intermediates** (eBay, Amazon, idealo, Google)
  - even more so in mobile commerce (apps`
- problematic clauses:
  - ban on the use of third party platforms (Amazon)
  - prohibition of supporting price comparison sites
  - prohibition of the use of brand names at Google "ad words"



# 3. restrictions in selective distribution - cases

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- proceedings against **Adidas**
  - ban on sales via online market places
  - different markets for sports clothes + shoes
  - market share above 30 %
  - conditions amended and proceedings closed in July 2014
- (ongoing) investigation regarding **Asics**
  - restrictions concerning online market places, price comparison websites and search engine advertising
  - SO of 28 April 2014 -> preliminary assessment:
  - market for running shoes in Germany
  - strong player in a concentrated market (3 major manufacturers), but individual market share below 30 %



### 3. restrictions in selective distribution - legal assessment

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- restriction of competition? -> selective distribution systems may fall outside **Art. 101 (1) TFEU** if  
*"resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary" (cf. ECJ, C-439/09, "Pierre Fabre", para. 41; ECJ, "Metro", 1977)*
- but maintaining prestigious image (as such) is no legitimate aim; preventing free-riding? or inappropriate presentation? -> no objective necessity

### 3. restrictions in selective distribution - legal assessment

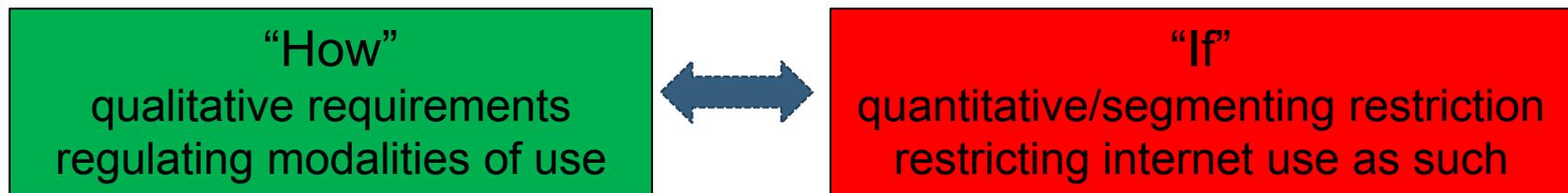
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- conditions of **Art. 101 (3) TFEU** satisfied?
    - do platform bans generate efficiencies?
    - is a blanket ban on all platforms irrespective of qualitative characteristics indispensable?
    - fair share for consumers?
    - no elimination of competition? (cumulative effects – key competitors also restrict use of market places)
- => framework of assessment: withdrawal of block exemption (Art. 29(2) Reg. 1/2003) **or** hardcore restriction + assessment under Art. 101 (3) TFEU?

# 3. restrictions in selective distribution - legal assessment

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- core question: **scope of the hard core restriction** (Art. 4(c) VBER => restriction of active or passive sales to end users): dealers should be free to sell to all end users, also via internet but supplier may require quality standards for internet-use



- attempts to differentiate, esp. equivalence principle (Vertical guidelines, para 56): level of requirements should not be higher for online sales preventing sales via internet
- objective aim of the clause (to limit internet sales)? -> no other legitimate purpose / no reasons of quality conceivable?

### 3. restrictions in selective distribution - legal assessment

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- (a.) prohibition to use search engine optimisation / prohibition of the use of brand names at Google AdWords  
=> hinders effective use of Internet; no relation to shop quality (invisible to end consumers)
- (b.) prohibition to support price comparison sites  
=> comparable to a directory?; efficient means to find (authorized) online shops?
- (c.) ban on the use of third party platforms  
=> most controversial; conflicting court decisions in Germany

## 4. price parity clauses - introduction

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- **price parity clauses**: the operator of a marketplace (Amazon; HRS) obliges one market side (dealers or hotels) to offer the opposite market side (consumers) most favourable prices and/or conditions if they want to sell over the platform
- interplay between price parity (platform->hotel)  
+  
RPM/prohibition of commission sharing  
(hotel -> platform)

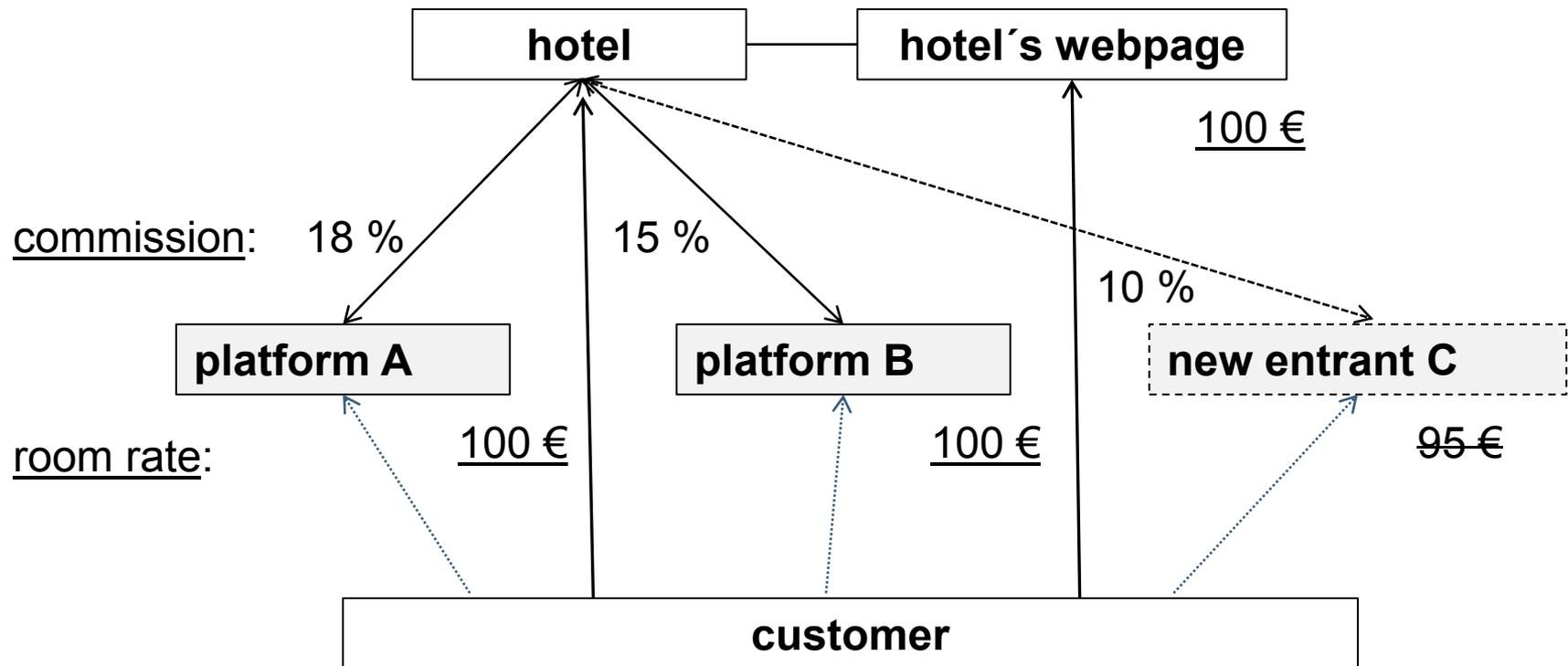
## 4. price parity clauses – theory of harm

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- effects on **competition between hotels**
  - platform increases transparency + competition
  - but parity clause precludes price discrimination across channels (yield management)
- softening of price **competition between platforms** / increased level of commission
  - higher commission (on platform A) is not passed through to final prices on that platform (A) but spread across all channels/platforms
  - decline in sales (as a result of higher hotel prices) also affects all platforms/channels
  - other platforms cannot benefit from lower commission
- same effect also **hinders market entry** by new portals

# 4. price parity clauses – theory of harm

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## 4. price parity clauses – Amazon case

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- **Amazon Marketplace** is a B2C online retail platform which presents a large range of products of third party dealers in parallel with Amazon's own offers
- third party dealers had to accept best price clause
- focus: since Amazon is primarily active as a dealer itself, the horizontal aspect of the constraint on dealers using its marketplace was main issue of the case
- investigations indicated a price enhancing effect, lower commission cannot be passed on to end consumers
- Amazon declared to give up its price parity clause – we closed proceedings (Nov. 2013).

## 4. price parity clauses – HRS case



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- started in 2010 with complaints by hotels and smaller new platforms
- at the outset of the case – **HRS** by far the strongest portal. Dependency of hotels strong because of overall market position and HRS strategy to offer services to firms needing hotel rooms for their business travels.
- clause also used by main competitors (Booking, Expedia), top 3 together cover more than  $\frac{3}{4}$  of the relevant market
- scope of the parity clauses: price, conditions for booking and cancellation, availability – all distribution channels (!)
- relevant market: German market for hotel portal services, combining the functionalities of searching, comparing and booking of hotel rooms
- market share of HRS above 30 %

## 4. price parity clauses – legal assessment

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- argued that restriction by object under Art. 101 (1) TFEU but left open und scrutinized effects
- no hardcore restriction within the meaning of Art. 4 (a) VBER (RPM)
- in hotel case: effects very similar to RPM, but may depend on market characteristics
- network of similar vertical restraints (all 3 large portals use parity clauses)
- no individual exemption in accordance with Art. 101 (3) TFEU

## 4. price parity clauses – legal assessment

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- efficiency gains? – relevance of free-riding?

### **argument:**

- hotel could use widely known platform to get attention by customers, then bypass the platform fee by offering consumers who found the hotel on the platform a better price on the hotel's website => platform abused as gratuitous search site
- risk of free-riding between platforms (“no-frills” offer of competing platform)

## 4. price parity clauses – legal assessment

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- **but:**

(1) is there significant free-riding problem?

-> relationship-specific investments (cost of platform per hotel) are low, recouped with few bookings

(2) would MFN clause solve free-riding problem?

less conversions (clicks that led to a booking) when price on competing platform is lower -> but this effect on the conversion rate is relatively small

(3) is MFN clause indispensable? -> alternative commission models conceivable

(4) fair share for consumers? -> does a (claimed) better quality compensate for higher prices?

(5) no elimination of competition? -> parallel networks

Thank you for your attention!



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