

# CRA International Economic developments in European competition policy

## RPM and Hub-and Spoke-Cartels Making sense of retailer/supplier communication

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The views expressed are those of the author alone (G3)  
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# Outline

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- Disclaimer
- RPM and RPR: The German Perspective
- Glance at the theoretical background
- Two (hotly debated) cases
- Conclusion

# RPM: The German Perspective

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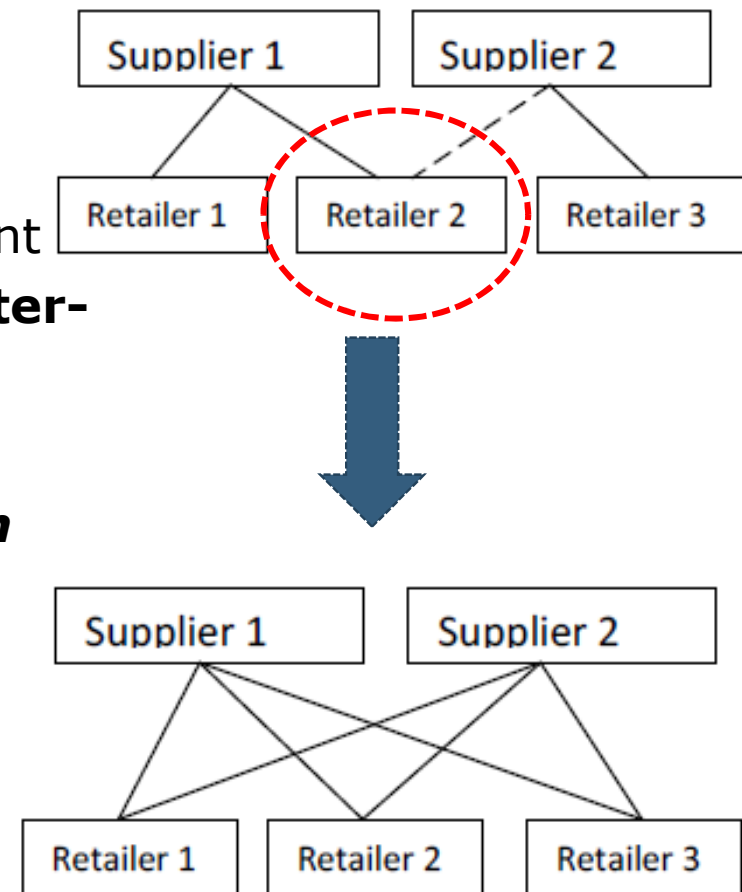
- **Chequered history of RPM in Germany**
  - Until 1973: “per-se legality” (“no-frills” retail concepts like ALDI and LIDL started / became successful since the mid-70’s)
  - Since 1973: Legality of resale price recommendations (RPR)
  - 2005: full adoption of the EU framework
- **Policy debate post-*Leegin* → assignment and level of burden of proof is key**
  - “*per se*” vs. “(full) *rule of reason*” inappropriate
  - better: rebuttable presumption of illegality or legality?
  - Strongly in favor of rebuttable presumption of illegality:
    - German competition policy traditionally “risk-averse” concerning anti-competitive practices / effects (stronger focus on type-II-errors / false negatives)
    - less private litigation compared e.g. to the U.S. (no “frivolous litigation”; no “treble damages”)
    - prioritization: using intervention discretion of public enforcement

# Glance at theoretical background

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## Rey / Vergé (2007/2008, i.a. HoAE)

- **Objective:** Mitigating a deficiency of modeling vertical relations
- **Approach:** „common agency“- argument (Bernheim/Whinston, RAND 1986); „**interlocking relationships**“
- **(One) result:** „Even as part of purely bilateral contracts, **RPM** indeed [...] **can generate industry-wide monopoly pricing.**“
- **Intuition:** RPM and effectively interlocked hub-and-spoke cartels (see e.g. EU vertical guidelines, para. 224)



- Buehler/Gärtner, CES-Ifo WP 2010: Making Sense of Non-Binding RPR / supplier-retailer communication
    - **Approach:** Analysis of RPR under repeated vertical trade with private information on (marginal) cost of production and/or asymmetric information on demand
    - **Result:** non-binding RPR as a communication device can improve supply-chain efficiency (maximization of joint profits)
    - **Carveats / Limitations:**
      - Theoretical results strongly depend on assumptions on how consumers react to RPR and on transfer schemes deployed between suppliers/retailers (linear, non-linear)
      - Only bilateral relationship considered (see above on “interlocking relationships”?)
  - **But:** e.g. Jullien/Rey, RAND 2007  
RPR can substitute for anti-competitive RPM, in particular if suppliers have means of pressuring retailers into adherence (also facilitating collusion among suppliers).
- **Key issue: When does RPR / communication turn into (anti-competitive) RPM?**

# Two (hotly debated) cases

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## ▪ **Phonak (hearing aids): fine € 4.2 Mio. (2009)**

- Background: Merger investigation *Phonak / ReSound* in 2007; extremely limited competition upstream (MIS, patent pools, cross-licensing; tacit collusion?)
  - Network of RRP; very high margins
  - Retailer driven (threat of) refusal to sell to “deviators” downstream (hub-and-spoke communication)
- **RPR/RPM as an enforcement mechanism downstream (further dampening competition upstream)**

## ▪ **Confectionary, coffee, pet food (2010)**

- Dawn raid (4 manufacturers, 11 retailers): 14 January 2010
  - First indications obtained in the course of (horizontal) cartel inquiries against coffee roasters (fine: € 160 Mio. + 30 Mio.) and suppliers of confectionery (still ongoing)
  - Suspicion: RPM (presumably accompanied by facilitating practices such as MFCC / MCC)
  - Investigation still ongoing
- **RPM as facilitating practice up- and downstream**

- Trying to “separate the chaff from the wheat”:  
Case-specific communication of the BKartA’s 11<sup>th</sup>  
Decision Division
  - **No guidelines! Case-specific communication!!**
  - **Legal background:** leniency applicants have to terminate / refrain from queried behavior
  - **Approach due to background:** “graduation of risk” for different practices and “safety gap”
  - **Problem due to substance:** classification / assessment of single arrangements / behaviors which essentially can only be assessed in an overall assessment
- Shady consequence: intense debate / slam of details (sometimes based on quite selective / de-contextual quotes and single-edged interpretation)
- Positive consequence: awareness-raising (still ongoing) discussion in the sector → advocacy!

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## RPM and Hub-and Spoke-Cartels

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communication

*Thank you very much!*



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