

## Questions and Answers

### **1. How was the case initiated?**

The case was initiated as a result of a complaint.

### **2. What had Tien Chu done in this case and why is it liable under the Competition Ordinance?**

According to the Commission's case, since the Ordinance came into full effect on 14 December 2015 until at least 27 September 2017, Tien Chu engaged in resale price maintenance (RPM) whereby it imposed a minimum resale price on its two main local distributors with respect to a MSG powder product it processed and manufactured, namely "Finger Citron Ve-Tsin Gourmet Powder" sold in 4.54kg packages (in boxes of five) (Gourmet Powder). Elements of the RPM arrangements are as follow:

- Tien Chu signed a series of distribution agreements with each of the distributors, which contained a requirement to "avoid improper price competition";
- The parties entered into agreements in relation to the Gourmet Powder in 2008 and 2011 respectively, stipulating the minimum resale price to be charged by the distributors which must not be changed without Tien Chu's consent;
- Tien Chu updated the minimum resale price of the Gourmet Powder through further letters issued to the distributors, including post-commencement of the Ordinance;
- Tien Chu issued instructions for the distributors to observe minimum resale prices and/or to refrain from discounting, which were expressly or tacitly accepted by each of the distributors;
- When one of the distributors began to complain to Tien Chu about the other distributor (discounter)'s discounting and competitive behaviour in 2016, Tien Chu acted upon the complaints and took steps over the course of 2016 and 2017 in an effort to secure compliance with the resale prices it set, thereby limiting competition amongst the distributors. This included the use of disincentives, threats and/or penalties.

To the extent the above RPM conduct continued after the full commencement of the Ordinance, the Commission has reasonable cause to believe that Tien Chu engaged in conduct which had the object of harming competition in Hong Kong, in contravention of the First Conduct Rule under the Ordinance. In addition, it is the Commission's case that the RPM conduct constituted serious anti-competitive conduct as defined in the Ordinance.

### **3. What is the impact brought by the alleged RPM conduct in this case?**

The majority of end-customers purchasing the Gourmet Powder in Hong Kong are Chinese restaurants which apply the product in cooking to boost the flavor of certain dishes. Tien Chu's RPM arrangement was intended to prevent its two main local distributors from offering sub-distributors a discount on the resale price set by Tien Chu for the Gourmet Powder. An RPM arrangement of this kind substantially reduces or even prevents competition between the relevant distributors on price, and may result in customers paying higher prices than they would absent the RPM arrangement.

### **4. Will the Commission take action against the two distributors involved in the case?**

In line with common enforcement practice in respect of RPM, the Commission targets enforcement action against Tien Chu as the manufacturer ultimately responsible for coordinating the resale pricing by its distributors, and has decided not to pursue the two distributors in this case. Indeed, one of the distributors communicated its objections to the arrangements to Tien Chu in mid-2016 and gradually reduced its adherence.

The Commission makes such decisions on a case-by-case basis.

### **5. What is RPM and what is its potential harm?**

RPM is an arrangement where a supplier establishes a fixed or minimum resale price to be observed by its distributors (which may include retailers) when those distributors resell the product affected by the RPM obligation.

RPM can be implemented in a number of ways:

- Directly, by setting a fixed or minimum price for resale from which no reduction or discounts can be offered; or
- Indirectly, for instance by fixing the distributor's margin or the maximum level of discount the distributor can grant from a set price level.

The supplier might use threats, intimidation, warnings, penalties, delays in or the outright suspension of deliveries to achieve RPM.

Where an RPM arrangement is in place, a distributor may find itself prevented from or even punished for offering a discount on the fixed or minimum price set by the supplier. The most obvious harm is that competition on price between the distributors will be substantially reduced

and consumers for that supplier's product will be less likely to find a lower price by shopping around among different distributors.

RPM may also prevent the emergence of new retailers or distributors. If prices are being set by the supplier, a retailer that wants to enter the market by offering discounts will be unable to do so.

## **6. How does the Commission assess whether specific RPM arrangements are problematic under the Ordinance? Are there any exclusions or exemptions?**

The Commission takes the view that where an arrangement involves direct or indirect RPM, it may have the object of harming competition. Whether this is in fact the case will depend on the content of the arrangement establishing the RPM, how it is implemented and the relevant context. If RPM does not have the object of harming competition, the Commission will assess whether the RPM causes harm to competition by way of its effects.

In the proceedings against Tien Chu, the Commission has set out a framework for assessing when RPM should be considered to have the object of harming competition.

On the other hand, RPM arrangements may sometimes lead to efficiencies that benefit consumers. For example, a fixed retail price for a short introductory promotional period may allow a new product to establish itself in the market. In this scenario consumers benefit from more choices and greater competition. The Ordinance provides an efficiency exclusion,<sup>1</sup> so that, if its conditions are met, the conduct would not amount to a contravention of the First Conduct Rule.

Efficiencies must be proved by the party claiming to benefit from the exclusion, and assessed on a case-by-case basis.

## **7. When would RPM be considered serious anti-competitive conduct?**

The Ordinance defines serious anti-competitive conduct to mean any conduct that consists of any of the following or any combination of the following:

- (a) fixing, maintaining, increasing or controlling the price for the supply of goods or services (price fixing);
- (b) allocating sales, territories, customers or markets for the production or supply of goods or

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<sup>1</sup> The four conditions of the efficiency exclusion are that the relevant agreement: (i) contributes to improving production or distribution or promoting technical or economic progress; (ii) allows consumers a fair share of the resulting benefit; (iii) does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives stated in (i); and (iv) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question

services (market sharing);

(c) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services (output restriction);

(d) bid-rigging.

The Commission considers that RPM arrangements that have the object or effect of harming competition amount to serious anti-competitive conduct when they fall within the above definition. This is most likely because the arrangement involves the supplier fixing, maintaining, increasing or controlling the resale price for the supply of its products to customers.

**8. In general, would a supplier raise competition concerns if it sets up “recommended resale prices”?**

Suppliers setting up recommended resale prices (RRP) from which distributors are entirely free to depart are less likely to cause competition concerns. Where a supplier sets a RRP, the Commission will not consider this to have the object of harming competition but will instead assess whether the arrangement has an anti-competitive effect.

Moreover, the Commission does not simply look at what an agreement says but considers how it works in practice. Therefore, where a so-called “recommended” resale price is combined with measures that make them work in reality as fixed or minimum prices, e.g. where the supplier retaliates or threatens to retaliate when its RRP is not followed, it will be assessed in the same manner as RPM.

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