競爭事務委員會
COMPETITION
COMMISSION

RESALE PRICE MAINTENANCE



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Why do we need competition?

In a free market economy, businesses compete with each other for customers by offering the best range of products (which may include services) at the best prices. This leads to consumers benefitting from paying less for better quality and more choices. Market competition also encourages business efficiency, facilitates innovation and enhances the overall vibrancy and sustainability of the economy.

While most business deals benefit consumers and the economy, some agreements or arrangements may harm the competitive process to the detriment of consumers and businesses. These anti-competitive practices may be engaged in by competing businesses in a market, or in some cases, businesses at different levels of the supply chain, such as suppliers and their distributors.

The Competition Ordinance (Ordinance) was enacted to promote competition and prohibit such practices in the marketplace.



What is resale price maintenance (RPM)?

Resale price maintenance (RPM) occurs when suppliers require their distributors (including retailers) to sell their products at a certain price (i.e. fixing the resale price) or not to sell them below a certain price (i.e. setting a minimum resale price).

Suppliers may conduct RPM by directly setting a fixed or minimum price for resale from which no reduction or discounts can be offered; or indirectly, for instance by fixing the distributors' margin or the maximum level of discount the distributor can grant from a set price level.

To achieve the above, suppliers may incentivise distributors, or may equally pressure them by using threats, intimidation, warnings, penalties, delays in or the outright suspension of the supply of products.

By limiting the ability of distributors to compete with each other on price, RPM arrangements may result in harm to competition and ultimately consumers. Such arrangements may contravene the Ordinance in certain circumstances.

RPM initiated by distributors

RPM can be initiated by a supplier or its distributors. In some cases, a distributor may pressure its supplier to implement RPM in order to limit price competition at the distributor level.

How can RPM harm competition?

RPM can have detrimental effects on competition in a number of ways.

The most obvious harm is that competition on price between distributors may be substantially reduced, and this would likely result in consumers paying higher prices. *For instance, after investigations into the bathroom and light fitting sectors in the United Kingdom which resulted in the removal of RPM arrangements, an estimated 17% fall in prices in both sectors was observed*[1].

RPM may prevent the emergence of new distributors. If resale prices are being fixed by the supplier, distributors or retailers seeking to enter the market by offering discounts will be unable to do so.

Online shopping can enhance competition by allowing consumers easy access to multiple retailers and price comparison. When selling online, retailers may avoid some of the costs associated with offline retail and may therefore be able to set lower prices. If RPM restricts the ability for retailers to set prices, this may weaken a key benefit of e-commerce for consumers.



1 See UK's Competition and Markets Authority, *Resale price maintenance: advice for retailers*, 29 June 2020

What is the Commission's approach to RPM?



The Commission takes the view that an RPM arrangement may have the object or effect of harming competition under the First Conduct Rule of the Ordinance.

In assessing whether an agreement has the object of harming competition, the Commission will consider the content of the arrangement establishing the RPM, how it is implemented and the relevant legal and economic context. For example, the Commission may likely consider that the agreement has the object of harming competition if one or more of the following factors are present:

- There is a clear indication that the sole intention of the parties concerned is to restrict price competition
- There is significant concentration of market shares at the supplier or distributor level
- The RPM is implemented by a supplier to foreclose competing suppliers or in response to pressure from a distributor seeking to limit competition at the distributor level
- The products affected are unlikely to require investment by distributors (eg. training, after-sales services)

- There are no apparent pro-competitive efficiencies which can satisfy each of the four conditions[2] set out in the efficiency exclusion under the Ordinance
- The RPM is not part of a coordinated price campaign for a franchise distributor system or a new product entering the market

If an RPM does not have the object of harming competition, the Commission will assess whether the RPM has the effects of harming competition. In making such an assessment, the Commission will consider:

- If the supplier imposing the RPM or its distributors have market power
- Whether the effect of the RPM on the competitive process is more than minimal
- What the market conditions would have been in the absence of the RPM conduct



2 The four cumulative conditions will be further discussed in the next section "Are there any exclusions?".

Is RPM a serious anti-competitive conduct?

The Commission considers that vertical agreements that harm competition may amount to serious anti-competitive conduct (SAC) under the Ordinance. In the case of RPM, as it involves the supplier "fixing, maintaining, increasing or controlling" the resale price of its products to customers, the arrangements may amount to price fixing under the SAC definition in the Ordinance.



Are there any exclusions?

RPM agreements may sometimes lead to efficiencies that benefit consumers. In scenarios where all four conditions of the efficiency exclusion[3] under the Ordinance are satisfied, the agreement in question would not be unlawful.

Efficiencies may arise, for example:

- where the RPM is for a short introductory period to allow a new product to establish itself in the market
- where the RPM structure encourages distributors to provide sales services for the benefit of consumers (*as in the case of complex products or products that need pre-sales advice*) while avoiding the "free-riding" scenario where a customer obtains the services provided by a distributor but then purchases the product at a lower price from another distributor

3 The four conditions of the efficiency exclusion are elaborated on the next page.

Under the Ordinance, the First Conduct Rule does not apply to any agreement (including RPM agreements) that enhances overall economic efficiency. Specifically, efficiencies are assessed on a case-by-case basis and the party seeking exclusion must prove that each of the four cumulative conditions is satisfied:

1. **The agreement contributes to improving production or distribution, or promoting technical or economic progress**
2. **Consumers receive a fair share of the efficiencies**
3. **The RPM must be indispensable to the attainment of the relevant efficiencies**
4. **The agreement does not lead to eliminating competition in respect of a substantial part of the products in question**

What are the consequences of engaging in RPM?

The Commission's position is that RPM can amount to a form of SAC under the Ordinance. Where a conduct is considered to be SAC, the Commission can bring proceedings against relevant undertakings and/ or persons in the Competition Tribunal without issuing a warning notice first. Businesses, no matter big or small, enjoy no exemption from the Ordinance for SAC conduct[4].

Penalties

Where a contravention of the Ordinance is proven, the Competition Tribunal may impose a fine of up to 10% of an undertaking's annual local turnover for a maximum period of 3 years. The Tribunal may also impose penalties on individuals including fines and a director disqualification order for up to 5 years.

Companies and individuals found to have contravened, or been involved in a contravention of the Ordinance may also be subject to "follow-on" claims for damages by victims of the contravention.

4 While there is an exclusion from the First Conduct Rule for arrangements between businesses where their combined turnover is ≤ HK$200 million, that exclusion will not apply if the arrangement is SAC as defined by the Ordinance.

Can suppliers set recommended / maximum resale prices?

Suppliers merely "recommending" resale prices or setting maximum resale prices of their products are less likely to raise competition concerns if they are truly providing recommendations and distributors can freely adjust their prices to compete with each other.

However, when a so-called recommended resale price or maximum price is combined with measures that effectively require the distributors to follow that recommendation, it will be considered a form of RPM. The measures could include, for example, the use of a price monitoring system, an obligation on distributors to report those who deviate from the recommendation, or imposing some form of penalty or adverse consequences on those who depart from it.

In certain circumstances, recommended resale prices or maximum prices set by suppliers with market power may give rise to concerns when they serve to establish a "focal point" for distributor pricing (*that is, where the distributors generally follow the recommended or maximum price*).

Hypothetical examples

1

Home Store owns a large number of household product retail shops across Hong Kong. It is a significant customer of Clean Co which supplies a range of household products widely available in supermarkets, online stores, chain stores and smaller shops.

Some of Home Store's competitors are selling Clean Co's products at prices lower than Home Store. Home Store is concerned that this will affect the profitability of its business and therefore pressures Clean Co to require its customers to sell its products across Hong Kong at a fixed retail price determined by Clean Co. As Home Store is a significant customer, Clean Co yields to the pressure and implements the RPM arrangements.



The Commission would likely consider this arrangement as having the object of harming competition.

Clean Co introducing a fixed retail price across Hong Kong in response to pressure from Home Store has an inherent ability to harm competition. The purpose of the arrangement is merely to protect Home Store from the competitive pricing of its competitors. In addition, there would unlikely be sufficient justifications for this RPM arrangement to satisfy the terms of efficiency exclusion under the Ordinance.

2

Nail Co is a leading manufacturer of nails and screws which sells its products in Hong Kong through independent retail stores. Nail Co requires the retailers to sell its products at a price it sets, justifying it as a means of ensuring an orderly market and avoiding customer confusion as a result of differing prices for the products across Hong Kong. Nail Co also claims that the arrangement affords the stores a healthy profit margin.



The Commission would likely consider this arrangement as having the object of harming competition.

Nail Co's justifications merely suggest that RPM is a good way of keeping the prices high and the claim that RPM avoids confusing customers is tantamount to suggesting that price competition is harmful to consumers. Price competition leads to lower prices for consumers and is central to the competition regime. The justifications would not be likely to satisfy the terms of efficiency exclusion under the Ordinance.

3

A well-known confectionery producer wishes to introduce a range of overseas candy products into Hong Kong. The producer's existing share of supply in Hong Kong is less than 5% and it is hoped that the new product range will be its "break" in terms of reaching Hong Kong consumers. As part of a 1-month promotional campaign, the producer markets the product across Hong Kong and requires its retailers to sell its product at a fixed resale price of HK$5, which the producer understands to be a lower price than those of the leading competing brands.



The Commission is unlikely to consider that this RPM has the object of harming competition as it is a short introductory promotion intended objectively to allow a new product to establish itself in the market by way of a more competitive price offering.

The Commission would then assess whether this arrangement has any harmful effects on competition. Noting the small market presence of the relevant producer, the Commission will likely conclude that this RPM does not give rise to concerns under the First Conduct Rule on the basis of its effects.

Practical tips for suppliers and distributors

Except for cases where the arrangements in question satisfy the terms of efficiency exclusion under the Ordinance, businesses should be cautious that RPM may raise concerns under the Ordinance. Here are some practical tips on what suppliers and distributors should and should not do if they wish to avoid engaging in RPM.

Suppliers

- should not specify a fixed or minimum price at which their distributors resell their products
- should not pressure (*e.g. by threatening to stop supply, increase wholesale prices, cancel discounts, etc.*) or incentivise (*e.g. by offering discounts on wholesale prices, providing delivery advantages, extending payment periods, etc.*) distributors to increase the price at which they resell products or to stop discounting products
- should not pressure distributors to adhere to recommended resale prices or punish a distributor who does not follow the recommended price
- should not exchange sensitive information (*e.g. future pricing of other distributors*) when communicating with distributors

- may suggest or recommend resale or promotional prices for products, while refraining from asking distributors to report their pricing decisions

Distributors

- should set the price of the products they sell independently, whether in-store, online or via other channels
- should not agree with suppliers on a fixed or minimum resale price
- should not indicate that they will follow the recommended prices on the condition that other distributors also follow the same prices
- should not ask a supplier to influence a competing distributor's prices, including seeking to influence the wholesale prices offered to other competing distributors

If in doubt, suppliers and distributors should consider seeking legal advice before proceeding.

What can you do when you suspect a contravention?

If you suspect that an RPM arrangement may have contravened the Ordinance, report it to the Commission. The Commission will accept complaints and queries in any form, including those provided to the Commission directly and/or anonymously, or through an intermediary (such as a legal adviser).

A complaint can be made to the Commission by:

- Completing an online complaint form on the Commission's website (www.compcomm.hk)
- Email : complaints@compcomm.hk
- Phone : +852 3462 2118
- Post : Competition Commission
  19/F South Island Place, 8 Wong Chuk Hang Road,
  Wong Chuk Hang, Hong Kong
- In person at the Commission's office (by appointment only)

When reporting a suspected contravention to the Commission, complainants and whistleblowers should provide the Commission with as much information as possible. Information which is particularly useful includes communications in relation to the RPM arrangement, records of conversations (in any form including instant messages and emails), and written log of relevant events. Preserve all available evidence as soon as you suspect a contravention.

Confidentiality

The Commission will generally seek to protect confidential information provided to the Commission, including the identity of complainants and whistleblowers. It will generally only disclose the complainants' identity with their consent. In exceptional cases e.g. where disclosure is ordered by the court, it may be necessary to disclose the complainants' identity without their consent.

To support the Commission's ability to investigate the reported conduct, complainants should not alert the suspects or make it publicly known that they filed a complaint to the Commission. This may greatly reduce the likelihood of the Commission securing sufficient evidence to take enforcement actions.


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To learn more about the Competition Ordinance and the Competition Commission's work, please visit our website **www.compcomm.hk**.



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Address	:	19/F South Island Place, 8 Wong Chuk Hang Road, Wong Chuk Hang, Hong Kong
Telephone	:	+852 3462 2118
Fax	:	+852 2522 4997
Email	:	enquiry@compcomm.hk
Website	:	www.compcomm.hk



Disclaimer

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