競爭事務委員會
COMPETITION COMMISSION

Webinar on “Resale Price Maintenance”

20 September 2023



Outline

- Key elements of Competition Ordinance
- What is resale price maintenance (RPM)?
- What are the consequences of engaging in RPM?
- Are there any exclusions?
- Can suppliers set recommended resale prices?
- Practical tips for suppliers and distributors
- Examples / case studies
- Q&A



Key elements of Competition Ordinance

Background

- About 130 years ago, the US and Canada enacted antitrust laws to prohibit anti-competitive conducts.
- European countries also introduced competition law after WWII.
- Today, over 130 jurisdictions have enacted competition laws, including the Mainland, Japan, South Korea, India, Singapore, Malaysia and Indonesia.
- Hong Kong:
  - Sectoral competition regulation was introduced for the telecom and broadcasting sector in late 1990s
  - Competition Ordinance (Cross-sector):
    - Passed in June 2012
    - Full commencement since 14 December 2015



Benefits of Competition

In a free market, competition between businesses benefits consumers, businesses and the economy as a whole:

For Consumers (including Corporate Consumers)	For Businesses
▪ Better prices ▪ Better quality of products and services ▪ More choices	▪ Drives business efficiency and cost savings ▪ Encourages innovation ▪ More opportunities to enter the market

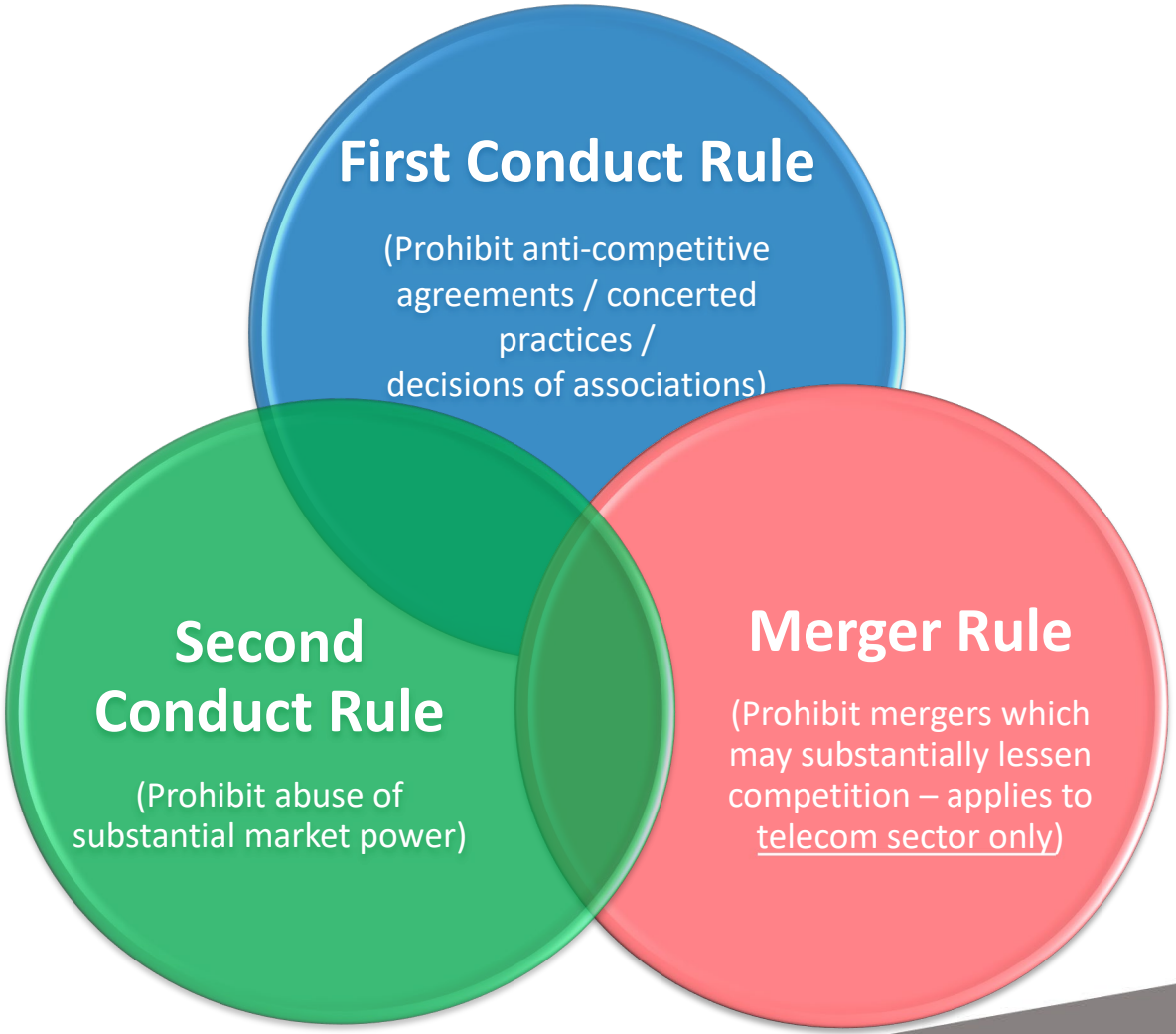
Two Cardinal Principles

"Protect competition and not competitors"



"Substance over form"

Competition Rules under the CO (Cap.619)



The First Conduct Rule (FCR)



- Prohibits an **undertaking** from making or giving effect to an **agreement** if the agreement has the **object or effect** of harming competition in Hong Kong; also applies to **concerted practices**; and **decisions of associations**

- Prohibits all kinds of anti-competitive agreements, involving at least 2 undertakings

The First Conduct Rule (FCR)



- Applicable to:
  - "**Horizontal**" agreements (arrangements between competitors in a market)
  - "**Vertical**" agreements (arrangements between businesses at different levels of a supply chain)

The First Conduct Rule (FCR)



- Arrangements that have the "**object**" of harming competition:
  - **"Cartel": price fixing, market sharing, bid-rigging and output restriction**
  - Regarded as **serious anti-competitive conducts** under the Ordinance

First Conduct Rule: “The Four Don'ts”

Don’t cheat. Compete. – The Four Don'ts.

Businesses, regardless of their size, should **never** agree with their competitors to:

- **Fix prices**
- **Share markets**
- **Rig bids**
- **Restrict output**



Do not engage in **Cartels!**

These are **serious anti-competitive conduct.**

Resale Price Maintenance

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)

What is RPM?

Suppliers may:

(a) **conduct RPM directly**

- by setting a fixed or minimum price for resale from which no reduction or discounts can be offered

(b) **conduct RPM indirectly**

- 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 pressure distributors by using **threats**, **intimidation**, **warnings**, **penalties**, **delays in** or the **outright suspension of the supply of products**, etc.



What is RPM?

RPM can also be initiated by **distributors**

- In some cases, a distributor may pressure its supplier to maintain the price of products in order to **limit price competition at the distributor level**



How Can RPM Harm Competition



Competition on price between distributors may be substantially reduced and consumers have to pay higher prices



Prevent the emergence of new distributors



When selling online, retailers may not be able to set lower prices

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 it has the object of harming competition, the Commission will consider (1) the content of the arrangement (2) how it is implemented and (3) the relevant legal and economic context

- If the arrangement does not have the object of harming competition, the Commission will assess whether it has the effects of harming competition



Commission's Approach to RPM

The Commission considers an RPM arrangement to be particularly problematic where:

a) The **sole intention** of the parties is to restrict price competition;
b) There is already a lack of **competition between different brands** of the product;
c) The products do not require **"free-ridable" investment** by distributors;
d) There are no apparent **pro-competitive efficiencies** stemming from the arrangement; and/or
e) The arrangement is **not** part of a coordinated price campaign for a franchise distribution system or a new product entering the market



Commission's Approach to RPM

- As RPM involves the supplier "fixing, maintaining, increasing or controlling" the resale price of its products to customers, it may amount to **price fixing** under the **serious anti-competitive conduct** definition in the Ordinance

- The Commission can bring proceedings against relevant undertakings and/or persons in the Competition Tribunal

- Penalties:
  - A fine of up to **10%** of an undertaking's **annual local turnover for a maximum period of 3 years**
  - **Director disqualification order for up to 5 years**

  - **Follow-on action** by victims



Exclusions

- In scenarios where all four conditions of the efficiency exclusion under the Ordinance are satisfied, the RPM agreement in question would not be unlawful

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**



Exclusions

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 while avoiding the “free-riding” scenario



Setting Recommended/ Maximum Resale Prices

- Suppliers merely “recommending” or setting maximum resale prices are **less likely** to raise competition concerns if they are truly providing recommendations and distributors **can freely adjust their prices**

- 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: the use of a price monitoring system, an obligation on distributors to report those who deviate from the recommendation, or penalising distributors who depart from it



Review Supplier-distributor Arrangements

- Suppliers and distributors should review their resale arrangements and refer to the **practical tips** from the Commission on what they should and should not do

- If in doubt, they should consider **seeking legal advice**

- If you suspect that an RPM arrangement may have contravened the Ordinance, **report** it to the Commission



Practical Tips

	For suppliers		For distributors
√	May suggest or recommend resale or promotional prices for products, while refraining from asking distributors to report their pricing decisions	√	Should set the price of their products they sell **independently**, whether in-store, online or via other channels
×	• Should not specify a fixed or minimum price at which their distributors resell their products • Should not pressure or incentivise 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	×	• 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.

Examples / case studies

Hypothetical example (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.



Hypothetical example (1) (Continued)

- 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. There would unlikely be sufficient justifications for this RPM arrangement to satisfy the terms of efficiency exclusion under the Ordinance.



Hypothetical example (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 retailer 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.



Hypothetical example(2) (Continued)

- 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 unlikely satisfy the terms of efficiency exclusion under the Ordinance.



Hypothetical example (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 retailer to sell its product at a fixed price of HK$5, which the producer understands to be a lower price than those of the leading competing brands



Hypothetical example (3) (Continued)

- 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 more competitive pricing.

- 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.



Resale Price Maintenance in Hong Kong

- In the past few years, the Commission has received a number of enquiries and complaints concerning resale price maintenance

- The top three sectors involved in RPM complaints are:
  - Food and groceries
  - Beauty and personal care
  - Household goods and electrical appliances



Resale Price Maintenance in Hong Kong

- In September 2022, the Commission filed a case in the Competition Tribunal against a producer for engaging in resale price maintenance when supplying its MSG powder product to two local distributors

- Legal proceedings are ongoing



Case Summary

The Commission's Case

Since the Competition Ordinance came into full effect on 14 Dec 2015 until at least 27 Sep 2017, Tien Chu[1] continued to engage in **Resale Price Maintenance (RPM)** arrangements, which began in 2008, by imposing minimum resale prices for its Gourmet Powder[2] to be charged by its two main local distributors.

Tien Chu



Complained to **Tien Chu** about **Distributor II's** discounting behaviour in 2016 and 2017.

Tien Chu acted upon **Distributor I's** complaints and took steps to secure compliance with the resale prices it set, including the use of threats and/ or penalties on **Distributor II**.

Tien Chu issued communications and warnings during the period in an effort to ensure the distributors would not sell its Gourmet Powder for less than the minimum resale price.

Distributor I



Distributor II



Distributors sold Gourmet Powder to sub-distributors, whose customers are mainly Chinese restaurants in Hong Kong.



The Commission has reasonable cause to believe that Tien Chu's conduct contravened the First Conduct Rule and constituted Serious-Anticompetitive Conduct under the Competition Ordinance.

[1] Tien Chu refers to The Tien Chu (Hong Kong) Company Limited.
[2] Gourmet Powder refers to Finger Citron Ve-Tsin Gourmet Powder sold in 4.54kg packages (in boxes of five), which is a monosodium glutamate (MSG) powder product Tien Chu manufactured.

Education and Advocacy

TV Advertisement

Radio Advertisement



Micro Movie



Seminar



Brochure



Complain and Report

- Completing an Online Complaint Form available on the Commission's website: www.compcomm.hk
- Email: complaints@compcomm.hk
- Reporting number: (852) 3462 2118
- Leniency hotline: (852) 3996 8010
- 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)



Q&A



Thank You!

