

HONG KONG COMPETITION COMMISSION BEGINS LANDMARK RESALE PRICE MAINTENANCE ENFORCEMENT

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Legal Briefings - By **Adelaide Luke, Howard Chan, Frances Xu and Joel Rheuben**

On 15 September 2022, the Competition Commission (Hong Kong) (the Commission) commenced its first enforcement proceedings in relation to resale price maintenance (RPM) arrangements against a food manufacturer, The Tien Chu (Hong Kong) Company Limited (Tien Chu).

WHAT IS RPM?

RPM occurs when an upstream supplier (e.g. a manufacturer) tries to set a price, or imposes a minimum price, at which its customer (e.g. a distributor or a retailer) can sell goods or services.

More indirectly, RPM happens through fixing the distributors' margin or the maximum level of discount that the distributor can grant. Suppliers may use threats, intimidation, warnings, penalties, delays, or the outright suspension of deliveries, to induce distributors to fixing a price, ultimately achieving RPM.

Differing from many jurisdictions, the First Conduct Rule in the Competition Ordinance (which governs anti-competitive agreements) makes a distinction between "serious anti-competitive conduct" (SACC) and non-serious anti-competitive conduct. RPM, as a form of price fixing (vertical price fixing), is classified as one of the four SACC defined in the Competition Ordinance, meaning the Commission can bring the case to the Competition Tribunal (Tribunal) directly and without issuing a warning notice to the relevant parties.

BACKGROUND TO THE TIEN CHU CASE

As set out in its press release (available [here](#)), the Commission suspects that Tien Chu engaged in RPM arrangements from 2008 to September 2017, through which Tien Chu imposed minimum resale prices on two local distributors in relation to its “Gourmet Powder”, a type of monosodium glutamate powder.

In particular, the Commission’s concerns focus on the following alleged conduct:

Issuing notices, reminders, and warnings to ensure that two distributors would not sell the Gourmet Powder for less than a fixed price; and

Upon receiving complaints from one distributor that the other was increasing its customer base through lower pricing, Tien Chu’s reaction involved imposing disincentives, threats and/or penalties to try to maintain the fixed price.

As for the two distributors, the Commission elected not to pursue them in this case, noting in its Q&A (available [here](#)) that one of the distributors had objected to the RPM arrangements in mid-2016 and had gradually deviated from the arrangements since.

WHY IS RPM PARTICULARLY PROBLEMATIC?

Although this is the first enforcement proceedings commenced by the Commission in relation to RPM arrangements, SACC has been a longstanding priority of the Commission since the Competition Ordinance came into force in 2015.

RPM restricts a downstream reseller’s pricing freedom, hence limiting its ability to compete. The ethos of competition law is that businesses should be free to compete with each other on price, quality and services. In this regard, RPM restricts market competition and deprives consumers of the lower prices that can flow from a fully competitive market. RPM can also create barriers to entry for retailers and distributors, as their ability to promote their businesses by offering discounts is hindered.

As RPM is a form of SACC, the Commission was entitled to bring the case directly before the Tribunal. However, because this is the first enforcement action in relation to RPM, the Commission instead issued Tien Chu with an infringement notice. Tien Chu declined to offer an appropriate commitment to remedy the conduct, thus resulting in the present proceedings.

ACCEPTABLE VERTICAL PRICING PRACTICES

While price fixing is strictly prohibited, the Commission has reiterated that it is permissible for suppliers to “suggest” or “recommend” retail prices, provided that retailers can, in practice, freely adjust prices to compete in the market.

There is a potential exception to an RPM arrangement, which can apply where a fixed retail price is imposed for a short introductory promotional period to allow a new product to establish itself in the market. This type of promotional activity can result in consumers enjoying greater choices and benefitting from greater competition in the long run. Care should be taken when relying on this approach, and the specific facts of the promotion must be carefully considered.

RPM HAS DIFFERENT RISK PROFILES ACROSS JURISDICTIONS

Hong Kong’s strict approach to RPM is in line with that of the EU, which characterises RPM as a hardcore restriction. Singapore, on the other hand, expressly exempts vertical agreements from the ambit of its equivalent of Hong Kong’s First Conduct Rule (although such arrangements could still be captured by Singapore’s equivalent of the Second Conduct Rule if the relevant party enjoyed Significant Market Power or dominance).

China has recently taken an approach that lies between the two - under the amended Anti-Monopoly Law (effective on 1 August 2022), an “effects” test was explicitly introduced in relation to RPM, meaning RPM is not “per se” illegal. Safe harbour thresholds are due to be released soon - where undertakings exceed those thresholds, they will bear the burden of proof in demonstrating that the RPM conduct does not have the *effect* of restricting competition. In practice, this is challenging and the types of arguments that may be acceptable to the competition authority are uncertain. Given the enforcement activity of the PRC authorities in this area (click [here](#) for more), arrangements still need to be considered carefully.

CONCLUSION

We expect the Commission to continue to target RPM arrangements: in the future, it may not provide companies with infringement notices (and therefore the opportunity to self-rectify), preferring instead to instigate Tribunal proceedings immediately.

In summary, RPM attracts a significant degree of risk in Hong Kong and it remains important for businesses to carefully assess how distributors and suppliers interact when it comes to pricing.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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