

# ARE MINIMUM RESALE PRICES ALLOWED?

## A FRESH LOOK AT VERTICAL PRICE RESTRAINTS IN HONG KONG

Many suppliers and distributors in Hong Kong often see some form of control over resale prices in their distribution contracts. In Hong Kong, the legality of vertical price restraints remains untested, and official guidance on resale price maintenance (RPM) has been somewhat ambiguous. The Hong Kong Competition Commission (**Commission**) recently published a new brochure on the topic to raise awareness of the issue in Hong Kong. In this briefing, we discuss the key takeaways from the brochure and highlight what businesses in Hong Kong need to know about RPM.

### RPM back in focus

While the Commission's enforcement efforts have mostly focused on cartels since it began enforcement in 2015, in June 2023, the Commission published a [new brochure on RPM \(RPM Brochure\)](#) as part of its city-wide educational campaign to raise awareness on RPM. This is a step forward for the Commission in its fight against anti-competitive RPM practices, after bringing its first RPM enforcement case to the Competition Tribunal (**Tribunal**) in September 2022. That case involved a supplier allegedly imposing minimum resale prices for its monosodium glutamate (**MSG**) product (see [our client briefing](#) for details).

Whilst the RPM Brochure falls short of adopting a *per se* approach towards RPM (for example, it states that RPM “*may* contravene the [Competition] Ordinance *in certain circumstances*” (emphasis added)), it sets out a tough stance on RPM - a lot of emphasis is put on the potential harm to competition that may arise from fixed or minimum resale prices. It also makes it clear that there is a requirement for parties to strictly prove all four conditions of the statutory exclusion for economic efficiencies if they wish to benefit from the exclusion.

However, upon closer examination, the stance in the RPM Brochure is neither more hostile nor more favourable to vertical restraints when compared to the Commission's Guideline on the First Conduct Rule (**FCR Guideline**) published in 2015 - the RPM Brochure broadly reflects the points already set out in the FCR Guideline, albeit (and understandably) with greater emphasis on discouraging RPM practices to support the Commission's advocacy on promoting compliance generally. The RPM Brochure also reworks the FCR Guideline's hypothetical examples on RPM and includes a specific reference to the application of RPM to e-commerce, which will aid in raising awareness and educating the public on the subject.

### The latest position on RPM in Hong Kong

The Commission's principles for analysing RPM in the RPM Brochure generally remain the same as those identified in the FCR Guideline. The key takeaways from the Commission's RPM Brochure can be summarised as follows:

- (1) **No warning before RPM enforcement:** As the Commission's position is that RPM can be a form of “serious anti-competitive conduct”, it can take enforcement action against unlawful RPM in the same manner as cartel cases, i.e. small and medium businesses may not benefit from the statutory “agreements of lesser significance” exclusion, and enforcement proceedings in the Tribunal can be lodged without prior Warning Notice.
- (2) **Not all RPM arrangements are outright prohibited:** The Commission remains committed towards analysing whether the RPM arrangement in question has the “object” or “effect” of harming competition, and whether the economic efficiency exclusion applies in the circumstances.

- (3) **High-risk “object” scenarios for RPM:** The RPM Brochure outlines a number of scenarios where RPM arrangements would be deemed as having the “object” of harming competition (which would make it easier for the Commission to bring enforcement proceedings before the Tribunal) - these are discussed further below.
- (4) **Assessing RPM for harmful effects:** The Commission reiterated its approach to analysing RPM by effects if the RPM arrangement does not have the “object” of harming competition. The RPM Brochure further specifies that, in the context of assessing the “effects” of RPM, it will consider: (a) the market power of the parties involved, (b) the impact on the competitive process, and (c) the market conditions in the absence of RPM.
- (5) **Recommended and maximum resale prices are lawful if they are genuine:** While it remains generally lawful for suppliers to recommend resale prices or set maximum resale prices, the RPM Brochure emphasises vigilance against scenarios where downstream price competition is restricted in practice (e.g. if recommended prices serve as a “focal point” for downstream pricing, or if resellers are effectively required to follow recommended prices via price monitoring mechanisms or incentive arrangements).
- (6) **Strict proof required for economic efficiencies:** The RPM Brochure includes a stern reminder that, if economic efficiencies are to be claimed, all four limbs of the statutory economic efficiency exclusion must be satisfied. However, the RPM Brochure mentions only two examples of efficiencies, namely where: (a) RPM is set for a short period of time to introduce a new product, and (b) RPM is used to prevent discount resellers free riding the benefit of investments made by other resellers.

### Helpful guidance for vertical price restrictions

The RPM Brochure includes a “practical tips” section for suppliers and distributors wishing to avoid engaging in RPM. However, these practical tips are not exhaustive. It therefore remains important to understand that determining the legality of RPM arrangements may not be a clear-cut exercise, and may require complex economic analysis of factors beyond those mentioned in the RPM Brochure.

That said, the “object” scenarios set out in the RPM Brochure should help parties wishing to distinguish higher-risk scenarios from those that are lower risk, i.e. higher-risk scenarios include where minimum resale prices:

- (a) are implemented to foreclose competing suppliers, or in response to pressure from a distributor/reseller seeking to limit competition at the downstream level;
- (b) are clearly used for the sole purpose of restricting price competition;
- (c) involve a supplier or distributor/reseller with a significant market share (i.e. weak competition between different brands of similar products or different resale channels);
- (d) are set on products that are unlikely to require investment by distributors/resellers (e.g. in terms of training sales staff or providing after-sales services);
- (e) do not create any apparent pro-competitive efficiencies that satisfy the economic efficiency exclusion; and
- (f) are not related to the introduction of a new product into the market, or part of a coordinated price campaign for a franchise distributor system.

In view of the Commission’s enforcement approach set out in the RPM Brochure, it would be prudent for Hong Kong businesses, particularly those with higher market shares, to steer away from the above higher-risk scenarios when implementing or responding to vertical price restraints - whether fixed or minimum resale prices, or recommended or maximum resale prices. If in doubt, seeking legal advice would be sensible, as recommended in the RPM Brochure.

### More RPM cases to come?

Overall the RPM Brochure is a welcome addition to the Commission’s growing library of educational material. It presents a fair summary of RPM analysis under the local statutory framework. The RPM Brochure also reaffirms the Commission’s commitment to broadly align its enforcement approach with internationally accepted best practices. Yet it falls short of providing further legal certainty on the issue, which is understandable pending the Tribunal’s first decision on RPM (the MSG case mentioned at the outset).

Nevertheless, this latest campaign by the Commission may result in more RPM complaints, which could in turn lead to more investigations and enforcement cases on RPM in the future.

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