

Resale Price Maintenance (RPM) Amnesty Programme



What you should know - Questions and Answers

What is this document all about?

Resale Price Maintenance (RPM) is a conduct prohibited in Mauritius, under the Competition Act 2007 (the Act). RPM is sanctionable by fines which can go up to 10% of the turnover of an enterprise for every year of the breach for a maximum period of 5 years. The Competition Commission of Mauritius (CCM) launched an Amnesty Programme which is valid from 5th June to 5th October 2017, under which enterprises which have engaged in RPM may benefit from immunity under prescribed conditions. During the dissemination of the programme the CCM has received several queries from enterprises seeking clarifications. This document replies to some common questions with regards to RPM, with a view to guiding enterprises in identifying what conduct may amount to RPM and what conduct may be permitted.

Maximum Resale Price

Does the fixing of a maximum resale price by the supplier qualify as RPM?

Agreements or arrangements between a supplier and his resellers, which set a **maximum** resale price and prevent resellers from raising prices do not qualify as RPM under the Act.

Where a supplier requires its resellers to apply

a retail price that has been fixed by the Ministry of Industry, Commerce and Consumer Protection for a controlled good/product, does it qualify as RPM?

No. In the present circumstance, the supplier would not breach the RPM prohibition if he requires his resellers to apply a price **fixed by the Ministry of Industry, Commerce and Consumer Protection** in order to comply with the provisions of the law.

Where the maximum price (or mark-up or margin) of a product is fixed by regulation and the supplier requires the reseller not to sell above the maximum price, does it amount to RPM?

No. In the present circumstance, the supplier would not breach the RPM prohibition if he requires his resellers to abide to the regulation. Further, imposition of a maximum resale price by a supplier does not amount to RPM.

Where the maximum price (or mark-up or margin) of a product is fixed by regulation or legislation and the supplier prevents the reseller from selling below that maximum price, does it amount to RPM?

Yes. The setting of a maximum price (or mark-up or margin) of a product by regulation allows a person to sell at or below but not above the prescribed price (or to apply a

mark-up or margin at or below the prescribed level). A reseller remains free to set a lower price (or apply a lower mark-up or margin) and price competition between resellers plays to the advantage of consumers. Where a supplier restricts the ability of a reseller to price below the maximum price (or apply a lower mark-up or margin) and where the reseller agrees to or applies such restriction, such conduct would qualify as RPM.

Recommended Price

If a supplier supplies its products with a price tag on it containing a resale price that the supplier has determined, without mentioning that it is a 'recommended price', and resellers sell it at the affixed price, does this amount to RPM?

Where a supplier affixes a resale price, as determined by itself, on the product, he must affix the words 'recommended price' on the price tag. Otherwise, if an understanding between the supplier and the reseller regarding the establishment of a fixed resale price can be demonstrated, which is usually the case, this would suffice to establish RPM.

Where a supplier recommends a resale price, is the supplier under an obligation to affix the recommended price on the product?

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The Competition Act does not impose any obligation on the supplier to affix a price on the products it supplies to its resellers. RPM will not occur so long as the supplier and the resellers do not agree on the price to be observed by the reseller when reselling the product.

The requirement to affix the terms 'recommended price' on the product occurs only when the supplier supplies its products to resellers with a recommended price (as determined by the supplier) appearing on the product.

Where the suppliers supply variable weight products to resellers without the recommended price on the price tag, what should resellers do?

If no price is affixed on the product by the supplier (that is without any price tag or price labelling), then there is no issue and the reseller may affix its own price.

Where the supplier affixes a price on the tag without the words 'recommended price' appearing next to the resale price, the reseller should not accept such products and must immediately inform the supplier that the supplier should affix the words 'recommended price'.

If the reseller accepts the products with an affixed price on the product (as determined by the supplier), without the words

'recommended price' appearing on the product, it may constitute an RPM. The reseller may be seen to agree to the supplier's pricing policy. This may be further accentuated if the reseller does not have the possibility to freely determine the price to be affixed on the product by the supplier.

Will a reseller (such as a supermarket) be liable to financial penalty if it accepts a product with a resale price affixed on the product, as determined by the supplier, without the words 'recommended price' on the price tag?

The RPM agreement is a vertical one which exists between the supplier and the reseller and establishes a resale price to be observed by the reseller. The reseller (a supermarket) can therefore be a party to the RPM agreement, whether written, verbal or otherwise, and may thus be liable to penalty if it accepts the products without the words 'recommended price' on the price tag.

However, it remains the jurisdiction of the Commission to decide whether a reseller will be liable to penalties for RPM conduct taking into account various factors including the reseller's participation in the setting up, enforcing and monitoring of the RPM.

As from when will the obligation to affix the words 'recommended price' on the price tag

where a price determined by the supplier is affixed on the product be enforced?

This obligation is imposed by the Competition Act since its coming into force in November 2009.

Where a supplier recommends a resale price that is not binding and the reseller practices that price, does it amount to RPM?

So long as the recommended price is not binding, appropriate measures have been taken to ensure that the reseller understands that the resale price is not binding and if the supplier affixes the recommended price on the product the words 'recommended price' are affixed next to the price, it will not amount to RPM.

Where a reseller requests its supplier to indicate the price at which the reseller may sell the product and the supplier provides a recommended price to the reseller, does the conduct breach the Competition Act?

A supplier may recommend the price at which the reseller can resell his product provided that it is not binding and it is made clear to the reseller that it is merely a recommended price. Also, the supplier should not provide any incentive (financial or otherwise) to the reseller to induce the reseller to abide to that recommended price.

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Reseller X practises the resale price recommended by the supplier but sees other resellers deviating from the recommended price. If reseller X requests the supplier to ask all resellers to abide to the recommended price, does the conduct amount to RPM and will reseller X be liable to fines?

If, in the given circumstances, the supplier asks all resellers to abide to the recommended price then there is likely to be an RPM in which case, reseller X may also be fined as he actively participated in the RPM.

Agents/Agency agreements

Do resellers include agents for the purpose of RPM?

RPM within bona fide 'agency' arrangements, in which one enterprise acts on behalf of another but does not take title of the goods or services, may be permissible. However, The CCM will examine any such arrangements and would expect to take action under Section 43 if it believed that the agency arrangement aimed at evading the Section 43 prohibition. Factors that may be considered include the purpose of the agency arrangement, the extent to which the supplying enterprise retains control over the goods or services, and whether the supplying enterprise assumes the risk of loss.

Where a manufacturer sells its products through agents and the manufacturer determines the price at which the agents must sell the products, does that amount to RPM?

RPM does not apply to bona fide agency agreements, i.e. where an agent is appointed to sell the products on behalf of the manufacturer without taking ownership of the product being sold.

However, the CCM may scrutinise agency agreements for RPM conduct where there are grounds to believe that the agency agreement has been designed to conceal an RPM conduct.

Discounts and RPM

A manufacturer gives discounts to its resellers (such as supermarkets and hypermarkets) on the condition that they do not sell the manufacturer's products below the normal wholesale price. Does that amount to RPM?

Yes, this may amount to RPM because by the conduct, the manufacturer (the supplier) is setting a minimum price in exchange for discounts.

A supplier has agreements with resellers that require them not to discount the supplier's products by more than 10% of the recommended price. The recommended price is not binding. Does that amount to RPM?

In this case, the recommended price in itself is not illegal, but by setting the maximum discount that the reseller can give, the supplier has indeed set a price floor (or a minimum price), which may qualify as RPM.

A supplier usually recommends a non-binding resale price to resellers. However, where the resellers sell the supplier's products at a very low price during promotional periods, the supplier's salesperson would call the resellers and inform them that the reseller cannot discount that much and must increase the resale price. Otherwise the supplier will stop supplying the resellers. Does that amount to RPM?

In the present circumstance, where the reseller agrees to increase the resale price or is otherwise forced to do so following the supplier's intervention (whether or not through the intermediary of the supplier's salesperson), the conduct would amount to RPM even if it only occurred during a short period of time (such as during promotional offers).

The fact that the supplier coerced the resellers into reviewing their pricing policy under threat of discontinuation of supply, could constitute an aggravating factor.

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Market Share

Should a supplier and his resellers who individually have market shares below 30% be worried about RPM?

RPM prohibition applies to any enterprise irrespective of their market share. Therefore, it will also apply to smaller resellers and suppliers.

RPMs not implemented or discontinued

A supplier has a contract with its resellers that contains the following clause: 'the reseller shall apply a mark-up between 10% and 20%. In case of deviation the supplier may stop supplying the reseller.' However, the supplier has never implemented the clause. Does that amount to RPM?

Yes. Where the resellers have signed a contract that contains the above clause, this implies that they have explicitly agreed to the supplier directly establishing a price level to be observed when reselling the product. The fact that the supplier has neither implemented nor enforced the specific clause does not suffice to exempt it from being characterised as RPM.

Setting the minimum mark-up limit would amount to setting a minimum price.

A supplier had concluded a contract with its resellers back in 2008 that contained an RPM clause. Since June 2012, the supplier has amended its contract and is told that the contract now complies with the Competition Act. Does the supplier still face legal risks after the contract was amended?

RPM is prohibited under the Competition Act which came into force in November 2009. The fact that the supplier engaged in RPM after coming into force of the Act would constitute an offence as from November 2009 to June 2012. The supplier may be fined for that period even it has ceased to engage in that conduct after June 2012.

The CCM can also assess whether the understanding between the supplier and the reseller on the RPM continued after the agreement was changed.

Price of own products

Does a reseller breach the Competition Act when it establishes the resale price of its own products (such as bakery in supermarkets, or in-house brands)?

RPM occurs between a supplier and his reseller in the resale of the supplier's goods or services. RPM cannot occur in the event of a producer (supplier) selling its own products or in-house brands directly to the consumer.

Here, the producer (supplier) and the reseller are one and the same person and the producer will decide on his own pricing policy.

Does the prohibition of RPM apply to the resale of services (whether professional or otherwise)?

*Yes, the scope of the RPM prohibition extends to the resale of services. The Competition Act explicitly defines resale price maintenance to mean any agreement between a supplier and a dealer (reseller) that directly or indirectly establishes a fixed or minimum price (or price level) to be observed by the reseller when reselling a product or **service** to his customers. The Act in turn defines services to include professional service but excludes the rendering of any service under a contract of employment*

However, RPM will only apply to those services which are sold by suppliers to resellers for resale. It does not apply to direct sales of services to consumers (end users).

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