



Guidance Note

Competition Commission Amnesty Programme for Resale Price Maintenance

05th June 2017 [Amended 3rd October 2017]

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Disclaimer: This Guidance Note has been prepared as an aid to complement the recent amendments brought to the ‘CCM Guidelines 3 – Collusive agreements’ and assist enterprises to understand the terms, conditions and implementation of the Amnesty Programme for Resale Price Maintenance (‘RPM’). It is not intended to be directional in nature but informative.

In seeking to explain the law and the CCM Guidelines, it has been necessary to make generalisations as it is not possible to consider all the scenarios that may arise. The examples are for illustrative purposes only and do not limit the CCM’s assessment of whether a certain type of conduct falls under the prohibition of RPM.

This document does not represent legal advice. Sole reliance on this document does not necessarily guarantee successful outcome of any amnesty application made to the CCM in respect of an alleged RPM conduct. Specialist legal or other professional advice may be sought by enterprises considering applying for the CCM RPM Amnesty Programme.

I. Introduction

Purpose of the CCM Guidance Note

- 1.1. This Guidance Note (the 'Guidance Note') is issued by the Competition Commission of Mauritius ('CCM') in relation to the CCM's Amnesty Programme for Resale Price Maintenance ('RPM Amnesty'). The Guidance Note sets out the substantive and procedural requirements of the RPM Amnesty. The Guidance Note also explains how the CCM will handle applications for the RPM Amnesty.
- 1.2. This Guidance Note is not published pursuant to any statutory obligation and should not be read as if it were akin to a statutory enactment. Also, the purpose of this Guidance Note is not to address in advance every conceivable situation which might give rise to an infringement of the prohibition of RPM under the Competition Act 2007 (the 'Act'). However, in order to guide enterprises in identifying whether their conduct possibly qualifies as RPM, Section II below provides a brief outline of the elements of RPM under the Act and contains a few practical examples of conducts which may qualify as RPM.
- 1.3. For the assessment of whether a certain type of conduct falls under the prohibition of RPM, the circumstances of each individual case are of key importance. This Guidance Note is therefore by no means a substitute for a comprehensive self-assessment on the part of enterprises, which have to take into account the circumstances of their specific conduct.

The CCM RPM Amnesty: What does it offer?

- 1.1. The Act prohibits any agreement which involves RPM and severely sanctions enterprises engaged in such conduct through the imposition of financial penalties. Section 59 of the Act provides that the Commission may impose financial penalties to enterprises which are found to have participated in an agreement involving RPM and that such fines shall not exceed 10 per cent of the turnover of the enterprise in Mauritius during the period of the breach of the prohibition up to a maximum period of 5 years. Section 59 of the Act further provides that the Commission may grant immunity or leniency to any person in such circumstances as may be prescribed.
- 1.2. In that respect the Commission is offering a one-off RPM Amnesty. Effective as from **05th June 2017**, the CCM has put in place a temporary RPM Amnesty Programme **valid until 20th October 2017¹**. The RPM Amnesty is a window of opportunity being provided to **any enterprise** involved in RPM to come forward **during the limited amnesty period** and disclose its participation in any RPM conduct in exchange for **complete immunity from financial penalties**.
- 1.3. In so far as RPM conduct usually involves at least two parties sharing a vertical trading relationship, the CCM will also be providing immunity to subsequent applicants for the same conduct if the latter also meets all the conditions required under the CCM RPM Amnesty and such application is made within the validity period of the RPM Amnesty.
- 1.4. It is important to highlight that an enterprise will qualify for the RPM Amnesty only if it is involved in conduct that qualifies as RPM, as defined under the Act. As such, enterprises believing that they may be party to, for instance, a horizontal agreement to fix prices or share markets or a bid rigging arrangement may not avail themselves of the temporary RPM Amnesty.

¹ The Commission has extended the validity of the RPM Amnesty Programme (CCM 3 Guidelines - Amended 3rd October 2017) from 05th October 2017 to 20th October 2017.

They may however, apply for the CCM Leniency Programme² or the temporary CCM Amnesty for Cartel Initiators³, as may be applicable.

II. The Competition Act 2007 and Resale Price Maintenance

What amounts to 'Resale Price Maintenance'?

- 2.1. The prohibition of collusive agreements under the Act also covers vertical agreements involving RPM under section 43 of the Act. RPM is a 'vertical' restriction because it involves a relationship between enterprises operating at different levels of the supply chain for instance, a supplier and a distributor; a wholesaler and a retailer; a manufacturer and a wholesaler. For simplicity, the parties to a RPM agreement are referred to as 'supplier' and 'dealer' (reseller).
- 2.2. RPM is defined as an agreement between a supplier and a dealer with the object or effect of directly or indirectly establishing a fixed, minimum price or price level to be observed by the dealer when reselling a product or service to his customers.
- 2.3. RPM is generally understood to mean any practice by which the suppliers and dealers come to an understanding that places restrictions on the prices that dealers charge⁴. The most common form of RPM occurs when a supplier agrees with its dealers on the minimum price level at which to sell the supplier's goods or services. In addition to directly establishing a fixed price, a minimum price or price level to be practised by the dealer, RPM may also involve other indirect pricing restrictions. For example, fixing the maximum discount which the dealer may offer.
- 2.4. RPM does not occur if the supplier **genuinely recommends** a non-binding minimum resale price or price level to his dealer **and** where the terms 'recommended price' appear next to the resale price.
- 2.5. The essence of RPM rests in the concept of an agreement or at least some form of coordination (commonly referred to as 'concerted practice') between the supplier and the dealer and which has the *object or effect*⁵ of directly or indirectly establishing a fixed price, a minimum price or price level to be practised by the dealer when reselling a product or service to his customers.

What amounts to an 'agreement'?

- 2.6. For there to be a RPM agreement within the meaning of the Act, it is sufficient to demonstrate a concurrence of wills between the supplier and its dealer(s) which establishes a price to be observed by the dealer. The form in which that concurrence of wills is manifested is irrelevant as long as it constitutes a faithful expression of the parties' intention. For example, an exchange of emails/facsimiles between a supplier and its dealer may suffice to qualify as 'agreement'.
- 2.7. Oral agreements, agreements which are not legally enforceable and gentlemen's agreements are all captured within the definition give to agreement under the Act. A policy which is imposed by one party ('unilateral policy') may also qualify as an agreement if it can be established that the unilateral policy receives the *acquiescence* of the other party.

² Please refer to [CCM 3 Guidelines on Collusive Agreements](#), Chapter 5.

³ Please refer to the CCM [Media Release of 01st March 2017](#).

⁴ OECD, 'Roundtable On Resale Price Maintenance' (2008), DAF/COMP(2008)37.

⁵ For more information on the assessment of 'object or effect' of an agreement, please refer to [CCM 3 Guidelines - Collusive Agreements](#).

2.8. When dealing with vertical restrictions, there are two ways for establishing acquiescence of a party. According to the European Commission's Guidelines on Vertical Restraints, '*[f]irst, the acquiescence can be deduced from the powers conferred upon the parties in a general agreement drawn up in advance. If the clauses of the agreement drawn up in advance provide for or authorise a party to adopt subsequently a specific unilateral policy which will be binding on the other party, the (explicit) acquiescence of that policy by the other party can be established on the basis thereof. Secondly, in the absence of such an explicit acquiescence, the Commission can show the existence of 'tacit acquiescence'. For that it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice*'⁶. It is to be noted that for there to be an RPM the agreement must not necessarily be on the resale price to be practised but it may be an agreement that eventually results in establishing the resale price.

Hypothetical Case Examples

2.9. This section provides some guidance on how to assess, under competition law, trading relationships that may involve RPM. The case examples that are used to illustrate occurrences of RPM have been simplified for presentation purposes and are marked in italics. In view of the diversity of RPM practices, it is not possible to provide a definite categorisation and an all-encompassing assessment.

Example 1

Agreement that *"The retailer (dealer) shall apply a shelf price of Rs 77.50 for the first quarter and the corresponding promotional price shall not be below Rs 70.50."*

Example 1 showcases the occurrence of a supplier establishing a fixed resale price of Rs 77.50 on the one hand and fixing the minimum resale (promotional) price of Rs 70.50 on the other hand.

Example 2

Agreement that *"The retail price shall consist of the purchase price plus a minimum mark-up of 18%."*

Here the RPM agreement occurs on a component of the resale price to be charged to the consumer i.e. the reseller's mark-up level. The fixing of the retailer's mark-up level will restrict price competition between resellers and deprive resellers of the opportunity to provide competitive offers to customers.

Example 3

Supplier X sends an email to its dealers A, B, C: *"As agreed during our last negotiations, the minimum retail price of Rs 227.50 will not be undercut as long as the main competitors A, B and C stick to the said price"*.

The fact that the application of a minimum resale price is attached to a condition (or may have been induced by retailers instead of being imposed by the supplier) does not call into question the collusive nature of the agreement between the supplier and its dealers (retailers).

⁶ European Commission, Notice on 'Guidelines on Vertical Restraints', paragraph 25.

Example 4

A supplier informs its dealers (resellers) that it will affix the resale price of its product on the product label. Neither does the product label mention that the affixed price is a 'Recommended price' nor do resellers negotiate the resale price with the supplier individually. Dealers purchase the products with the affixed resale price and do not show any resistance to the supplier's pricing policy.

In Example 4, the RPM is implemented implicitly (absent any written contract) and establishes a fixed price (determined unilaterally by the supplier). Although the RPM is likely to be characterised as an 'imposed' RPM from the part of the supplier, the resellers' is deemed to 'acquiesce' to the restrictive policy of the supplier (i.e. to affix a resale price as determined by the supplier) when the reseller purchases the products with the affixed price and neither contests nor undercuts the suppliers pricing policy.

Example 5

A supplier agrees with a dealer (retailer) to grant the latter a 1.5% rebate on the wholesale price, provided that the retailer adheres to the recommended minimum resale price. The rebate will be deducted from the amount invoiced to the retailer on a quarterly basis upon proof of implementation of the recommended resale price.

Example 5 showcases the use of incentives, such as "rebates", to influence or attempt to influence the retailer's decision-making. The retailer is still formally free to forego the incentives and to lower the retail price. However, the objective purpose of the rebate is to eliminate incentives for the retailer to engage in price competition. The fact that the reseller agreed to the policy, there is existence of agreement, which aims at establishing a minimum price.

What risks attach to conducts involving RPM under the Competition Act 2007?

- 2.10. The Act treats a vertical agreement involving RPM as a 'hard-core restriction' of competition. Any agreement between a supplier and a dealer that involves RPM, qualifies as collusive agreement under Sub Part I of Part III of the Act and thus violates the prohibition contained in the Act.
- 2.11. No consideration is required to be given to the economic strength of the parties to the agreement (for instance, their market shares) nor to the 'public benefits' or 'economic efficiencies' which may result from the RPM practice.
- 2.12. An enterprise found to be a party to a RPM agreement is liable to a financial penalty of **up to 10% of its turnover in Mauritius** during the period of the breach up to a **maximum period of 5 years**. For instance, if a RPM agreement is found to have existed from 2010 until 2013 inclusive, the parties' turnover for **four** consecutive years (2010, 2011, 2012 and 2013) will be taken into consideration for the purpose of calculating the quantum of the fine. In the case of a RPM agreement, **both the supplier and retailers may be fined if they are found to engage in RPM conduct**. In addition to fines, enterprises involved may be directed to implement certain measures to ensure that it ceases to be a party to the RPM.
- 2.13. RPM agreements which pre-date the coming into force of the Act but which nevertheless continued to exist (whether by object or effect) after the Act came into force, would still amount to a breach. However, determining the point in time at which RPM commences requires a case-by-case assessment.

What should I do if I am involved in a RPM conduct?

- 2.14. Enterprises, which are party to a RPM agreement, are strongly encouraged to take advantage of the CCM RPM Amnesty Programme. An enterprise, which is involved in RPM conduct stands to gain much by reporting its participation and applying for amnesty. As explained above, an enterprise that applies for the CCM RPM Amnesty and fulfils the conditions of the said programme will be given immunity and hence, will not have to incur any financial penalty for its participation therein.
- 2.15. The huge financial implications of infringing the RPM prohibition coupled with the damage caused to one's corporate image and reputation as a result of being found to infringe the law by far outweigh any concern that one may have about disclosing its participation.
- 2.16. The mere fact that an enterprise has voluntarily terminated a RPM agreement does not absolve the enterprise's liability nor precludes the need to apply for amnesty. Even though an enterprise might think that it is no longer party to a RPM agreement or that the agreement has been terminated, it can still be found to be in breach of the Act for the duration of the RPM agreement.
- 2.17. The RPM Amnesty is much broader and lenient as compared to the existing CCM Leniency programme. Even RPM conduct that would not have benefitted from the CCM Leniency Programme can now stand to benefit from immunity if disclosed during the amnesty period (as more fully explained below).

What happens once the CCM RPM Amnesty expires?

- 2.18. Once the amnesty offer expires, the CCM will be intransigent in its detection of and enforcement against RPM conduct.
- 2.19. However, enterprises may still benefit from the CCM Leniency Programme, **under limited circumstances**. The CCM 3 Guidelines provide that enterprises which come forward with information that enables or assists the CCM to determine that a breach of (...) section 43 **where RPM facilitates a cartel**, may receive substantial reductions in, or complete immunity from, financial penalties levied by the CCM for that cartel. In other words, enterprises involved in a RPM that does **not** facilitate a cartel cannot benefit from leniency even if they come forward and apply for leniency before an investigation has commenced.
- 2.20. In the event that a RPM conduct qualifies for leniency, only the first enterprise to apply for leniency may benefit from immunity if an investigation has not yet been launched. If an investigation has already been launched, then the first enterprise may benefit up to 100% reduction in fines under the existing Leniency programme depending on the level of information already available to the CCM and the stage of the investigation among others. **In any event, an enterprise that initiated the cartel, or took steps to coerce other enterprises into participating in the cartel cannot benefit from either immunity or leniency, unless an Amnesty for Cartel Initiators Programme is being run by the CCM.** (Please refer to Chapter 5 of CCM 3 Guidelines and the Amnesty for Cartel Initiators Programme which expires on 31st August 2017)
- 2.21. The CCM RPM Amnesty Programme is therefore a **one-off opportunity** for **any** enterprise involved in RPM, irrespective of the nature or form of the RPM conduct, to come forward and provide evidence of such conduct in order to assist the CCM in detecting and enforcing the Act against RPM conducts, and benefit from immunity from fine.

III. Conditions to be fulfilled under the CCM RPM Amnesty

What conditions need to be satisfied to benefit from the CCM RPM Amnesty?

2.22. Any enterprise involved in a RPM conduct, be it the supplier or the dealer, may benefit from immunity from financial penalties, on the condition that it applies for the CCM RPM Amnesty Programme and complies with **all** the following conditions:

- Condition a. it admits its participation in, and informs the CCM about the RPM;
- Condition b. it provides the CCM with all the information, documents and evidence available to it regarding the RPM, **as required by the CCM**;
- Condition c. it **maintains continuous and complete co-operation** until the conclusion of any action by the CCM in relation to the matter; **and**
- Condition d. it provides the CCM with **undertakings** (“commitments”) that satisfactorily address all the concerns that the CCM has regarding the adverse harm to competition.

Note: Applications must be received by the CCM by latest 20th October 2017, after which the CCM will not entertain any RPM Amnesty application. (CCM 3 Guidelines [Amended 3rd October 2017]).

2.23. Potential amnesty applicants are advised to ensure that they or their legal adviser be familiar with the conditions of amnesty under the present CCM RPM Amnesty.

What procedures should I follow in order to apply for immunity under the CCM RPM Amnesty?

2.24. An enterprise wishing to take advantage of the CCM RPM Amnesty Offer must contact the CCM. There are several channels through which contact can be made. Under the RPM Amnesty Programme, the enterprise can apply for the immunity either:

- i. directly, in which case any person representing the enterprise must have the authority to represent the enterprise;
- ii. through a legal adviser; or
- iii. through the assistance of the Mauritius Chamber of Commerce and Industry (‘MCCI’).

2.25. Application for amnesty must be made in writing. An enterprise applying for immunity under the CCM RPM Amnesty Offer must submit all information, documents and evidence available to it regarding the existence and activities of the reported RPM conduct.

2.26. Once an application secured, the CCM will liaise directly with the applicant to guide it through the rest of the process. The CCM will engage with the applicant with respect to ongoing co-operation, information to be submitted and nature of undertakings to be offered. Undertakings may however be offered at any stage after an enterprise has submitted its application. In any event, the CCM will engage with the applicant regarding the undertakings.

MCCI collaboration with the CCM in the context of the CCM RPM Amnesty

2.27. The MCCI is collaborating with the CCM for the purpose of disseminating the CCM RPM Amnesty Programme and will also act as facilitator during the period of the amnesty.

2.28. Enterprises, whether or not a member of the MCCI, who wish to obtain further information on the provisions of the law relating to RPM or the RPM Amnesty, may direct their queries to the

MCCI. The MCCI will be in a position to provide first-hand information and guide the enterprise in its application process, should it choose to apply for the CCM RPM Amnesty.

- 2.29. Whereas the CCM-MCCI collaboration aims to render the CCM RPM Amnesty programme more widely accessible to enterprises and facilitate their application process, this does in no way impinge on the discretion of enterprises to contact the CCM directly.

IV. Frequently Asked Questions

Q. I am not sure if my conduct qualifies as a 'RPM conduct', what should I do?

- A. The CCM recognises that enterprises and individuals will want and need to consider carefully the decision of whether to apply for amnesty under the present CCM RPM Amnesty.

For this reason, potential applicants or their legal representative may approach the CCM for **non-binding guidance on a confidential basis**. Confidential guidance may involve a discussion on a **no-names** basis about a given set of circumstances (even 'hypothetically') to assist an enterprise in situating whether a particular situation qualifies for the CCM RPM Amnesty.

Any person seeking confidential guidance on the CCM RPM Amnesty should call the CCM on 211 2005 and clearly state that his call relates to the CCM RPM Amnesty Offer. Once the purpose of the call has been assessed, the call will be transferred to a relevant CCM officer with whom the case may be discussed. Such discussion is however not binding on the CCM.

Q. I wish to apply for the CCM RPM Amnesty but it will take time to compile all the associated documentary evidence, can I still apply?

- A. Where a potential applicant has not yet compiled all the documents, information and documents relating to the alleged RPM conduct, he can still apply for RPM Amnesty and submit all the information and documentary evidence that is in his possession at the time of his application. The information submitted at that time must however, be material or at least must contain sufficient details about the RPM conduct and the products/services concerned. The CCM will engage in discussion and then set a deadline to perfect application.

Q. I am being forced to practise the pricing policy of my supplier but I fear reprisals from my supplier if I whistle-blow?

- A. A dealer that is forced, coerced or otherwise induced to agree to a pricing restriction should understand that it is also party to a RPM agreement but may not necessarily be fined for the breach, depending on the circumstances of the case.

The Act provides for protection for informers under section 51A. A dealer may make a request to be treated as an informer so that his identity and the information provided by the dealer will be treated as confidential between the Commission and the informer. Any matter relating to the information provided by an informer will be privileged and **will not be disclosed in any proceedings before the Commissioners or any Court, tribunal or other authority, where such status has been formally provided to the information provider under section 51A of the Act**. Moreover, the conduct of the supplier may also be reviewed by the CCM under other sections of the Act without engaging any liability arising under the Act for the informer.

Q. At what point in time will I be informed of the outcome of my application?

- A. The Executive Director may, prior to submitting his report to the Commissioners, inform the applicant of whether the Executive Director intends to recommend the grant of immunity to

him. However, any such recommendation will be indicative, non-binding and made on a 'no prejudice basis'.

A binding decision will be issued by the Commissioners after taking cognizance of the report of the Executive Director on the matter. The CCM will need to be and remain satisfied that the conditions for the grant of immunity have been and continue to be met, namely the continued acceptance of participation in the RPM activity, the information requirements set out above, the requirement of continuous and complete cooperation.

V. Information Checklist

2.30. Amnesty applicants must provide the CCM with all information, documents and evidence available to them regarding the reported RPM activity.

2.31. The below-referred checklist identifies specific information that will be required depending on the nature of the application, but this should not be interpreted as a limitation on the requirement to provide all relevant information that the CCM may require from the enterprise:

| | Information regarding RPM Conduct | Other required information |
|---|---|--|
| Non-binding Confidential Guidance (No-names basis) | <ul style="list-style-type: none"> <input type="checkbox"/> Sufficient details of the conduct to enable the CCM to give the guidance required. <input type="checkbox"/> No disclosure requirement in respect of the details of the caller; or identity of the enterprise(s); or the market concerned involved at this point. | - |
| Application for Immunity | <ul style="list-style-type: none"> <input type="checkbox"/> Written application; + <input type="checkbox"/> Identity of the enterprise(s) involved + <input type="checkbox"/> Details of the relevant sector/goods/services involved; + <input type="checkbox"/> Date of commencement of RPM conduct; + <input type="checkbox"/> Nature of the RPM activity; + Either <input type="checkbox"/> All documents, information, evidence relating to RPM conduct in support of application; Or otherwise <input type="checkbox"/> Documents, information, evidence available to the applicant <u>at the time of his application.</u> | <ul style="list-style-type: none"> <input type="checkbox"/> Name and telephone number of the person making the application for immunity + <input type="checkbox"/> <i>In case of representative of enterprise:</i> Confirm that the representative has authority and power to act and bind the applicant enterprise; Or <input type="checkbox"/> <i>In case of legal adviser:</i> Confirm that the legal adviser has instructions to apply for immunity, if it is available; + <input type="checkbox"/> Confirm that the enterprise admits its participation in the reported RPM conduct; + <input type="checkbox"/> Confirm that the enterprise understands that such an application will entail a commitment to maintain complete and continuous cooperation with the CCM in any subsequent action/ investigation; + Either <input type="checkbox"/> Confirm that information, documents and evidence |

| | | |
|--|--|---|
| | | <p>provided with application represents all information, documents for the purpose of application;</p> <p>Or</p> <ul style="list-style-type: none"><input type="checkbox"/> Confirm that information, documents and evidence provided with application represents information, available to applicant <u>at the time of application</u>; and<input type="checkbox"/> Provide details of the timing at which the applicant will perfect his application by providing the remaining information, documents, evidence. |
|--|--|---|