

An overhead photograph of a business meeting around a wooden table. Four people in business attire are visible. Two men in the center are shaking hands. One man on the left is clapping. The table is cluttered with papers, a pen, a glass of water, and a coffee cup. The text is overlaid on the image.

THE GEROUDIS NETWORK

COMPETITION COMMISSION ANNOUNCES
AN AMNESTY FOR RESALE PRICE
MAINTENANCE!

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Mauritius Competition Commission announces an Amnesty for Resale Price Maintenance!

This document is not to be considered legal advice. Each case revolves on its own facts. Please consult your advisors for proper assessment.

The Competition Commission of Mauritius has just launched an amnesty program open from 5th June to 5th October 2017 for companies which consider they have practices which may amount to resale price Maintenance.

Why bother?

In Mauritius resale price maintenance (RPM) is a per se prohibition and any agreement which provides for it is void and prohibited to that extent. There is comparatively no justification which is allowed under our law to justify RPM. In RPM cases, The Competition Commission of Mauritius (CCM) can impose financial penalties, for intentional or negligent breaches, which go up to 10% of turnover of offending party, and can extend back for a period of 5 financial years!

What does RPM mean and include?

The CCM defines RPM as “an agreement between a supplier and a dealer with the object or effect of directly or indirectly establishing a fixed or minimum price or price level to be observed by the dealer when reselling a product or service to his customers.” In short, Suppliers should not require resellers to stick to an agreed price or even to the price printed on the product packaging or to sell above a certain price.

This prohibition includes and extends to imposing conditions preventing resellers from discounting or making special offers or, for example, having agreed maximum discounts applicable between supplier and reseller.

Examples of situations which could, in general, be considered as RPM^[1]:

- 1. The retailer shall apply a shelf price of MUR 77.50 for the first quarter and the corresponding promotional price shall not be below MUR 70.50*
- 2. The retail price consists of the purchase price plus a minimum mark up of 18%*
- 3. Supplier X sends an email to dealers A, B, C “as agreed during our last negotiations, the minimum retail price of MUR 227,50 will not be undercut as long as main competitors A, B and C stick to the said price”*
- 4. A supplier informs its 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 supplier’s pricing policy.*
- 5. A supplier agrees with a reseller to grant the latter a 1.5 % rebate or ‘ristourne’ 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.*

When does RPM not apply?

There are two situations where RPM may not apply:

- A supplier may recommend resale prices to its resellers provided there is no mechanism to entice or make sure that the reseller sticks to the resale prices recommended, and pricing expressly contains the RRP notice.
- RPM may be permissible within an agency agreement or arrangement, in which one enterprise acts on behalf of another but does not take title of the goods or services. Care should be taken to make sure that the agency infrastructure is not such as made only to bypass the restrictions provided on law.
- Agreements may set a pricing ceiling preventing resellers from raising prices, are permitted.

Clarification: RPM restrictions apply to all companies, and not only to monopolies (e.g. those with more than 30% market share in their respective markets).

Criteria for Amnesty:

In order to benefit from the amnesty, a company needs to:

- **Admit its participation** in an agreement involving RPM
Provide to the CCM all information, documents, and evidence available to it regarding the RPM, and as required by the CCM;
Maintain continuous and complete co-operation until the conclusion of any action by the CCM in relation to the matter;
Offer undertakings that satisfactorily address the competition concerns of the CCM

Essentials:

Should a company consider amnesty, it should also consider the following risks:

1. For the Amnesty application:

- Whether there is an RPM issue;
- A proper impact assessment review of extent and scope of the RPM
- Full information and issues pack creation
- Undertakings to propose to the CCM as part of the solution and its impact on the business as well as likelihood of acceptance or amendment by the CCM

2. In addition to making the application, do consider:

- The risk of any third-party claims against the company for having to admit liability in order to obtain the amnesty.
- What else the CCM may find from the information required to be disclosed to them – e.g. the company is to make sure its house is in order.
- Some restraints contain both vertical and horizontal elements, such as a when a supplier also sells to customers directly making it a competitor and a supplier to the reseller. In such cases, assess and consider how the CCM may analyse this and risks for the company.

[1] Examples 1 to 5 taken from CCM guidance notes