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# Resale price maintenance – beware familiar pitfalls

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## Introduction

Resale price maintenance (RPM) constitutes a violation of Japan's competition law (the Anti-monopoly Act). Similar restrictions exist in other jurisdictions worldwide, and RPM is considered a classic type of competition and antitrust law infringement. Yet, the Japan Fair Trade Commission (JFTC) regularly dawn raids and punishes companies for conducting RPM. In recent cases, those companies have tended to be subsidiaries of multinational groups. While RPM incurs no criminal charges, and no administrative fines are levied on first-time offenders, companies can suffer significant reputational damage, particularly with respect to their supply chains, business partners and consumers.

This article looks at cases in which the JFTC has issued cease-and-desist orders to multinational groups for RPM.

## Key cases

### *Baby goods*

On 1 July 2019, Aprica Children's Products received a cease-and-desist order from the JFTC on the grounds of RPM. The Japanese company was part of the Newell Rubbermaid Group and sold baby products, such as seats and carriers. On 18 April 2018, the JFTC carried out a dawn raid on the company, as well as Combi, a national competitor.

The company had forced its retailers to sell its Aprica, Graco and Baby Jogger-branded baby goods to consumers at a proposed sales price which it determined.

To locate retailers which sold or planned to sell these products for less than the proposed sales price, via the Internet or through store discounts, the company regularly surveyed retailers' prices, either directly or through its wholesalers, and welcomed complaints of low-pricing retailers from other retailers and wholesalers.

If the company learned that a retailer was selling the products for less than the proposed sales price, it demanded that the retailer increase its prices accordingly. If the retailer refused, the company used measures such as suspending delivery, either directly or through its wholesalers, to prevent other retailers from doing the same.

### *Camping equipment*

On 15 June 2016 Coleman Japan received a cease-and-desist order from the JFTC for RPM. This Japan subsidiary imported and sold Coleman camping equipment. The company was dawn raided on 17 March 2015.

Around August of each year, the company set a rule for retailers on how to sell its camping gear over the next year. The sales rule provided that:

- the retail price had to be at or above the minimum price determined by the company for each product; and
- discount sales by retailers would be permitted only when:
  - the objective was to conduct either discount sales for all products, including other companies' products, or sales of store inventories;
  - the discount sales did not begin before a date designated by the company;
  - the discount was not advertised in any leaflets; and
  - certain products were excluded.

The company, either directly or through its wholesalers, forced retailers to follow this rule. With respect to its current retailers, the company demanded that they follow the rule when discussing purchases for the next year. With respect to new retailers, the company demanded that they follow the rule from the start of the business relationship.

If the company learned that a retailer was not following this rule, through complaints from other retailers or otherwise, it repeatedly demanded that the retailer follow the rule until it did so.

### *Shoes*

On 2 March 2012 Adidas Japan received a cease-and-desist order from the JFTC for RPM. This Japan subsidiary imported and sold shoes and other sporting goods. The company was dawn raided on 12 April 2011.

For sales of its Reebok-branded Easytone shoe, the company, either directly or through its wholesalers, forced retailers to sell at the following prices:

- for models released before November 2010, at or above the minimum discounted price determined by the company (10% less than the list price); and
- for models released in or after November 2010, at the list price determined by the company.

The company updated retailers of the latest list price for each Easytone model by distributing catalogues that prescribed such prices either directly or through a wholesaler. If the company learned that a retailer was selling below the directed prices, through complaints from other retailers or otherwise, it threatened to impose penalties and used measures such as reclaiming inventory and suspending delivery.

#### **Cease-and-desist orders**

When the JFTC issues a cease-and-desist order, it orders the infringing party to:

- officially confirm (by resolution of the board or a similar body) that it has ceased performing such illegal acts and that it will not repeat such acts in future;
- notify this resolution to its retailers and wholesalers, make an announcement to general consumers and enforce strict compliance among its employees;
- prohibit such illegal acts in future;
- prepare a competition law compliance programme with respect to its dealings with retailers and wholesalers (with prior JFTC approval);
- conduct regular training for sales staff and regular audits by legal staff (with prior JFTC approval), in accordance with its competition law compliance programme; and
- immediately report to the JFTC with respect to the above points.

#### **Takeaways**

When the JFTC issues a cease-and-desist order, this is widely reported on by the national media. For example, many TV networks – including NHK, the Japanese public broadcaster – will report on the JFTC order in their evening news programmes and most national daily newspapers will print a lengthy article about the JFTC order and the illegal actions taken by the company. Regular business persons with no particular interest in competition law will take note of the situation, as will educated consumers. Thus, significant harm to the reputation of the company and its brands could ensue from RPM.

The best way to prevent RPM is likely to stick with the proven method of raising awareness by regularly conducting effective competition law compliance training in Japan; this is what JFTC orders require in cases of infringement. It is easy for competition law training to be deprioritised in favour of other important issues, such as anti-corruption training. Japanese compliance may not be at the top of an Asia-Pacific legal director's to-do list. However, when the JFTC begins its investigation, a lack of internal resources in the region will not be a good excuse.

RPM typically occurs when a trusted brand's product can no longer easily sustain its premium price in the market. It is also worth noting that wholesalers are mentioned in the above JFTC cases as related parties. In certain circumstances, it may be easy to succumb to market pressure and perform illegal acts, involving wholesalers in the plot. Companies should stay vigilant with regard to RPM and avoid the familiar pitfalls.

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