

Statement of Preliminary Issues

HP New Zealand: Application seeking Authorisation for Resale Price Maintenance

8 April 2021

Introduction

1. On 22 March 2021, the Commerce Commission (the Commission) registered an application (the Application) from HP New Zealand (HP) seeking authorisation to engage in resale price maintenance (RPM) in relation to its proposed arrangements for its HP online stores and prospective HP online marketplace stores (collectively, the HP Stores).
2. HP intends to supply HP products to a third-party distributor, who will sell the HP products direct to customers and receive payments from customers through HP's new eCommerce platform.
3. HP intends to control the product and marketing strategies and specify the prices at which the third party will sell the HP products to consumers. The RPM conduct will only apply to products sold by the third-party distributor through the HP Stores (the Proposed Conduct).¹ HP's existing distribution network, which consists of various authorised distributors, resellers and retailers, will continue without change.
4. The Commission will authorise the Proposed Conduct if it is satisfied that the conduct will result, or be likely to result, in such a benefit to the public that the conduct should be permitted.
5. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant authorisation.²
6. We invite interested parties to provide comments on the likely benefits and detriments of the Proposed Conduct. We request that parties who wish to make a submission do so by 22 April 2021.

¹ A public version of the Application is available on our website at: <https://comcom.govt.nz/case-register/case-register-entries/hp-new-zealand>

² The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

The applicant

7. HP is a member of the HP group. Its US-listed parent company, HP Inc., is a manufacturer of HP-branded technology products including desktop computers, notebooks, printers and related accessories and supplies (ink cartridges, toners, etc.).
8. HP imports, distributes and supplies HP products in New Zealand through its network of authorised distributors, retailers and resellers for resupply to a variety of customers. Such customers include large corporate and government end-users, small-to-medium businesses and individual/home consumers.
9. HP does not currently sell direct to consumers in New Zealand. If the Commission authorises the Proposed Conduct, the target audience of the HP Stores will be small-to-medium businesses, individual/home consumers and students.

Our framework

10. The Commerce Act 1986 prohibits RPM. Under the Commerce Act, RPM occurs when a supplier of goods enforces, or tries to enforce, a minimum price at which the reseller must on-sell those goods. RPM prevents resellers from setting their prices independently and can lead to increased prices for consumers. It is a form of anti-competitive behaviour and, unless authorised by the Commission, is unlawful under the Commerce Act.³
11. A person can apply to the Commission for authorisation to engage in RPM if they consider that the conduct will result, or be likely to result, in such a benefit to the public that the conduct should be permitted. Our approach to assessing the benefits and detriments of anti-competitive arrangements is set out in our Authorisation Guidelines.⁴
12. Before we consider an application to authorise RPM, we must first be satisfied that the proposed conduct amounts to RPM. If we are satisfied, we will assess the benefits and detriments arising from the proposed conduct.
13. The Commission will authorise RPM if it is satisfied that the conduct will result, or be likely to result, in such a benefit to the public that the conduct should be permitted.
14. Benefits and detriments must arise from the proposed conduct. To determine whether benefits and detriments are specific to the conduct, we assess:
 - 14.1 what is likely to occur in the future without the proposed conduct ('the counterfactual'); and

³ For more information, see the Commerce Commission, *Resale Price Maintenance Fact Sheet*, July 2018. Available on our website at: <https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/resale-price-maintenance>

⁴ Commerce Commission, *Authorisation Guidelines*, December 2020. Available on our website at: <https://comcom.govt.nz/business/merging-or-acquiring-a-company/authorising-anti-competitive-transactions-that-will-likely-benefit-new-zealand>

- 14.2 what is likely to occur in the future with the proposed conduct ('the factual').
15. Once we have identified all likely benefits and detriments, we assess the value of those benefits and detriments. When making that assessment, we consider how the conduct may affect:
- 15.1 allocative efficiency – whether the conduct would raise or lower prices; and whether it would reduce or improve quality, choice or other elements of value to consumers;
 - 15.2 productive efficiency – whether the conduct could improve or worsen production processes; and
 - 15.3 dynamic efficiency – whether the conduct could assist or hinder innovation in products or processes.
16. The Commission is not limited to considering efficiencies. New Zealand courts have recognised that efficiencies are not the only benefits and detriments which are relevant to the Commission's assessment. For example, benefits or detriments can relate to matters such as the environment, health, media or social welfare. Ultimately, the Commission therefore seeks to assess what benefits accrue to the public in the circumstances of any given case.⁵
17. Our decision whether to grant authorisation is informed by a balancing exercise of the quantitative and qualitative benefits and detriments. Having assessed the value of benefits and detriments, if we are satisfied that the benefits of the agreement likely outweigh the detriments, we will grant authorisation. If we are not satisfied, we will not grant authorisation.⁶

Market definition

18. We define markets in the way that we consider best isolates the key competition issues that arise from the proposed conduct. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.⁷
19. In the Application, HP submitted that the relevant markets can broadly be defined as the 'personal computer' and 'print product' markets for retail supply, with possible product segmentations. We will test HP's submissions and explore any other relevant market definitions that may be of value for our assessment of the Proposed Conduct.

Without the conduct

20. We will consider what the parties would do if the Proposed Conduct did not go ahead. To establish that, we will consider the evidence on whether the

⁵ *Authorisation Guidelines* above n3 at [37] and [38].

⁶ *Authorisation Guidelines* above n3 at [45].

⁷ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

counterfactual is best characterised by the status quo, or whether the parties would seek alternative options.

21. Until recently, HP sold a range of HP products online through an HP-branded store. It did so under a “fully outsourced” model with one of its resellers, Acquire Co (NZ) Ltd (Acquire).⁸ HP had minimal involvement in the management of the store: Acquire, for example, decided the product range(s) and retail prices for the HP products listed on the store.
22. We will explore:
 - 22.1 whether HP would implement a similar distribution model to the one it previously had with Acquire;
 - 22.2 whether HP could implement the Proposed Conduct without necessarily controlling the retail pricing of HP products in the HP Stores;
 - 22.3 whether, by means of any alternative arrangement, HP would achieve reasonably comparable outcomes to the Proposed Conduct; and
 - 22.4 HP’s submitted counterfactual, that being the cessation of any online retail presence of HP in New Zealand, and an overall loss of competition and choice for New Zealand consumers.
23. The Commission may be required to consider multiple counterfactuals to determine all likely benefits and detriments relevant to its authorisation assessment.

Preliminary issues

24. At this this stage of our investigation, our focus is to identify and assess the detriments and benefits that are likely to arise from the Proposed Conduct (and to the extent to which it is practicable, quantify the likely detriments and benefits).
25. In the Application, HP submits that the Proposed Conduct will not give rise to any detriments, and that even modest public benefits will therefore justify authorisation being granted. HP anticipates limited supply chain impacts, that its distributors and resellers will similarly not be affected, and many significant competitors will remain in the market.⁹
26. HP further submits that the Proposed Conduct will produce many benefits for customers of the HP Stores. HP claims the main benefits of the Proposed Conduct will be:
 - 26.1 improved user experiences for customers of the HP Stores, and in particular, the HP online store;

⁸ At [2(a)] and [3.3(i)] of the Application.

⁹ At [2(e)] of the Application.

- 26.2 wider ranges of payment options that enhance customer choice for customers of the HP online store;
 - 26.3 fast delivery times for customers of the HP Stores; and
 - 26.4 wider ranges of delivery options for customers of the HP Stores.¹⁰
27. We will consider if the Proposed Conduct could have any effects on competition that would create likely benefits or detriments. For example, we will assess how, if at all, the conduct could affect competition between resellers of HP products. We will also assess if it could affect competition between HP's products and rival brands.

Next steps in our investigation

28. The Commission is currently scheduled to make a decision on whether or not to authorise the Proposed Conduct by 10 September 2021. However, this date may change to an earlier date as our investigation progresses.¹¹
29. Prior to making our final decision we will publish a draft determination and seek submissions on the draft. The draft determination sets out our preliminary view on whether we are likely to grant an authorisation, and the reasons for that view.
30. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above. This may impact our investigation timeline.

Making a submission

31. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "HP RTP Authorisation" in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on 22 April 2021.
32. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.
33. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.

¹⁰ [7] of the Application.

¹¹ The Commission maintains a case register on our website at <https://comcom.govt.nz/case-register> where we update any changes to our deadlines and provide relevant documents.