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RPM and strong inter-brand competition – Tooltechnic coming to Europe?

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On 20 April 2015, the Dutch competition authority ACM published Guidelines on its enforcement priorities with respect to vertical restraints. The document contains a number of case studies intended to illustrate the types of cases that the ACM would or would not consider priorities for its enforcement. One case study is closely modelled on the Australian Tooltechnic case, in which the ACCC authorised the use of RPM. The Dutch authority implicitly endorses the ACCC's evaluation of this case.

In the Tooltechnic case, decided in December 2014, Australia's Competition and Consumer Commission ("the ACCC") granted authorisation, subject to some monitoring requirements, to Tooltechnic Systems to engage in minimum resale price maintenance ("RPM") in marketing its premium Festool brand of power tools.

The Festool power tools are complex products, used mainly by professionals. They require a number of retail services, including technical advice, product demonstrations, customer training etc. However, retailers who provided these services were increasingly losing out to competitors who chose a simpler no-frills model, and the problem of free-riding was exacerbated by the increased accessibility of on-line sales.

Following a detailed examination, the ACCC accepted that this free-rider risk was impacting many full-service retailers and that the distortions arising from this problem were likely to result in an increasing problem of under-provision of retail services.

RPM is one of the ways in which the free-riding problem can be addressed. Tooltechnic had chosen RPM after considering after judging that other approaches, such as imposing detailed contractual obligations on retailers, granting exclusive retailer territories, or restricting on-line sales permissions, would be unworkable or less effective. While the ACCC also considered these alternative options in detail, it ultimately agreed with Tooltechnic's assessment.

The ACCC considered that on the facts of the case, these efficiencies would likely outweigh any anticompetitive effects. As Tooltechnic's brands only accounted for around 10% of the Australian market, Tooltechnic is subject to vigorous inter-brand competition. As a result, if Tooltechnic were to set retail prices at an overly high level, it would lose customers to rivals. The ACCC also dismissed the commonly cited concern that RPM could give rise to collusion since it found the supplier and retail markets in question not prone to collusion to begin with. A more detailed

discussion of the case is available here.

The case study in the ACM Guidance Paper is closely modelled on the Australian case (the relationship is acknowledged in a footnote). In the case study, the ACM stresses the role of inter-brand competition in the assessment. The ACM concludes the case study by stating that "if interbrand competition is strong, ACM assumes that RPM is positive for consumers". The ACM goes on to state that as a result, the ACM would not prioritise this case.

The facts in the Tooltechnic case were relatively clear-cut. In many other cases, competition authorities are likely to remain inherently suspicious of RPM. The ACM also stresses this point by stating that even seemingly similar cases may be assessed differently in practice. Yet, it is very interesting to see that the ACCC's effects-based decision is starting to be reflected in guidance given by European regulators.

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