GUIDELINES ON REPAIR, SERVICE, AND MAINTENANCE AFTERMARKETS.

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COMPETITION COMMISSION GUIDELINES ON REPAIR, SERVICE AND MAINTENANCE AFTERMARKETS

1 Preface

1. In 2021, the Commission released The Guidelines for Competition in South African Automotives Aftermarkets, which was subsequently amended in September 2024. The automotive guidelines were a response to several allegations of anti-competitive conduct concerning automotive repair and maintenance services. The alleged conduct was wide ranging and served to exclude Independent Service Providers (ISPs) from automotive repair, service, and maintenance markets consequently limiting competition and consumer choice in these markets.

2. The Commission subsequently observed that many of the issues identified in automotive aftermarkets are not unique to that sector. Similar concerns have emerged in relation to electronic devices, appliances, equipment and other durable goods that require repair and maintenance throughout their useful lives. The Commission is of the view that there is a need for guiding principles to support the pro-competitive development of these growing markets.

3. Industry participants have highlighted concerns regarding access to spare parts, repair information, diagnostic tools, software and technical support required to undertake repairs on appliance and electronic devices. Similar concerns emerged during focus group discussion commissioned by the Commission with ISPs operating in several repair markets. These are detailed in the Commission's Background Note on Repair, Service, and Maintenance markets. Industry participants argue that restrictions on access to these inputs may increase repair costs, reduce consumer choice, and inhibit participation by ISPs, many of whom are small and medium enterprises.

4. There is also growing concern, locally and abroad, about the negative environmental impact caused by the disposal of electronic devices and appliances that could have otherwise been repaired.[1] As purchases of electronic

[1] Moyo T, Sadan Z, Lötter A, Petersen J. Barriers to recycling e-waste within a changing legal environment in South Africa. S Afr J Sci.2022;118(Special issue: Waste as a Resource), Art. #12564. https://doi.org/10.17159/sajs.2022/12564

devices and appliances continue to grow, policymakers have become concerned that consumers do not have access to cost effective options for maintaining the lifespan of their devices. Other concerns include allegations that product design choices, software updates or aftermarket practices may shorten the useful life of products or reduce incentives to repair them.[2]

5. In response, policymakers and regulators have responded through adopting legal and regulatory instruments aimed at reducing the environmental impact of electronics consumption and extending the lifespan of electronic goods to promote sustainable consumption:

5.1. *Extended Producer Responsibility (EPR):* EPR shifts responsibility for managing products at the end of their life cycles away from consumers and municipalities to producers. This is done by using economic instruments to set incentives for the collection and recovery of materials at the end of their lifecycles. South Africa has had EPR regulations for Electrical and Electronic Equipment since 2021.[3]

5.2. *Eco-design Regulations:* Eco-design regulations improve the sustainability of products by improving their circularity, energy performance, recyclability and durability.[4]

5.3. *Right to Repair and Competition:* Right to Repair is a regulatory approach that aims to remove access barriers that may prevent repairs and maintenance required to extend product lifecycles when it is economically and technically feasible. These include legal obstacles and limitations on the availability of spare parts and information.

5.4. Regulators have also developed competition law frameworks aimed at protecting competition in aftermarkets and addressing restraints that restrict

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[2] Australian Government Productivity Commission (2021), "Right to Repair: Productivity Commission Inquiry Report", Available online: https://www.pc.gov.au/inquiries-and-research/repair/report/

[3] Organisation for Economic Co-operation and Development (2024), "Extended Producer Responsibility: Basic facts and key principles", Available online: https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/04/extended-producer-responsibility_4274765d/67587b0b-en.pdf; eWASA (n.d.), "Extended Producer Responsibility (EPR) in South Africa", Available online: https://ewasa.org/epr/

[4] European Commission (n.d.), "Ecodesign & sustainable products regulation — EU law on product requirements and labelling", available online: https://ec.europa.eu/info/green-deal/industry/industrial-standards/ecodesign-sustainable-products-regulation_en

access to spare parts, repair services, technical information and other inputs required for repair and maintenance. These developments reflect a growing recognition that effective competition in repair, service and maintenance markets may require competition law interventions in addition to other regulatory interventions.

6. These Guidelines are situated within the Competition and Right to Repair framework since they address the market conditions, practices, and conduct that may limit access to repairs, service, and maintenance. The Guidelines are informed by complaints and concerns raised by industry participants, developments in international repair, service and maintenance market regulation and law enforcement, and focus group discussions undertaken on behalf of the Commission with ISPs operating in South African repair and maintenance markets.

7. These Guidelines present the general approach that the Commission will follow to determine whether practices and conduct in repair, service, and maintenance markets amount to a contravention of the Act. These principles are not intended to be applied mechanically, nor are they exhaustive in terms of potentially anti-competitive conduct. The Commission will assess cases based on the specific complaint and facts of the case including the relevant market characteristics and commercial realities.

8. These Guidelines have been prepared in terms of section 79(1) of the Competition Act No. 89 of 1998, as amended ("Act") which provides that the Competition Commission ("Commission") may prepare Guidelines to indicate its approach on any matter falling within its jurisdiction in terms of the Act. In terms of section 79(4) of the Act these Guidelines are not binding, but any person interpreting or applying the Act must take them into account. They do not fetter the discretion of the Commission, the Competition Tribunal, or the Competition Appeal Court in the exercise of their respective discretion, nor do they bind them in their interpretation of the Act. Market participants should further note that, in terms of section 59(3)(h), the Competition Tribunal must consider whether conduct is substantially the same as conduct regarding which Guidelines have been issued by the Commission when determining an appropriate administrative penalty.

2 Definitions

9. **“Act”** means the Competition Act no. 89 of 1998, as amended.

10. **“Agreement”** means any consensus, contract, arrangement, understanding between two or more parties that purports to establish a relationship between them, whether or not legally enforceable, that the parties consider binding upon them.

11. **“Independent Service Provider (ISP)”** means a person or firm that provides repair, maintenance, servicing, refurbishment, calibration, diagnostics, installation or related after-sales services in respect of goods and that is not owned or controlled by, or acting on behalf of, the OEM.

12. **“Maintenance”** means any activity undertaken to preserve, service, inspect, calibrate, update or maintain a product in working order, whether carried out on a preventative, corrective or routine basis.

13. **“Original Equipment Manufacturer (OEM)”** means an original equipment manufacturer as well as any legal person over which it has direct or indirect control including authorised representatives and importers.

14. **“Repair”** means any activity undertaken to diagnose, restore or return a product, component, system or functionality to working order following damage, failure, degradation or malfunction.

15. **“Repair inputs”** means any goods, services, information, software, tools, equipment, technical resources or other inputs required to provide repair, service or maintenance activities. Repair inputs may include technical information, service manuals, diagnostic tools, software, activation systems, passwords, schematics, specialised repair equipment and any other resources necessary to carry out repair, service or maintenance activities.

16. **"SMMEs"** means small business, micro business or medium-sized business as defined by the Minister in Government Gazette No.987 of 12 July 2019 or its successor in title, or business, as the context dictates and as defined by section 1 of the Act.

17. **“Spare parts”** means replacement components used to repair, maintain, or extend the life of electronic equipment, appliances, devices or other products and excludes counterfeit parts, grey goods and any parts that may not lawfully be sold or supplied in the Republic.

18. **“Tools”** means any implement, device, or piece of equipment used for the purpose of repairing, maintaining, or extending the life of electronic equipment, appliances, devices or other products.

3 Characteristics of repair and maintenance markets

19. Repair and maintenance services are aftermarkets – markets for goods and services purchased after the initial purchase of a product in the primary market.[5] Aftermarkets are distinct in that participation, whether as an ISP or consumer, is to a large extent determined by the OEM, which is active in the primary market. Depending on the commercial choices made by the OEM regarding its participation in the repair, service, and maintenance market, an OEM may have an incentive to restrict competition by preventing ISPs from providing repair and maintenance services to consumers. Conversely, competition in repair and maintenance markets can benefit consumers through supporting access to affordable and high-quality repairs, enabling markets for refurbished goods, and promoting innovations in repair and maintenance provision.

20. Repair and maintenance markets are often influenced by the installed base of products already purchased by consumers. Once a product has been purchased, consumers may face costs associated with replacing the product or switching to an alternative brand. As a result, competition in repair and maintenance markets may differ from competition in the primary product market.

21. There are three broad market configurations that repair and service markets can take, with differing implications for the nature of competition:[6]

    21.1. *A market for systems:* A system market is a market where the OEM good and the secondary market are defined as one single market. This will be the case where buyers account for the cost of secondary products and services when purchasing the primary product, a behaviour known as "whole life costing".[7] In systems markets, competition takes place in the primary market since consumers do not separate repairs from the primary purchase when

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[5] Bishop, S & Walker, M (2010) "The Economics of EC Competition Law: Concepts, Application and Measurement", para 6 – 022.

[6] Lang, J.T, (2011), "Practical aspects of Aftermarket in European Competition Law". Competition Policy International, Volume 7(1); *Eastman Kodak Co. v. Image Technical Services Inc.*, 504 U.S. 451 (1992);

[7] Lang, J.T, (2011), "Practical aspects of Aftermarket in European Competition Law". Competition Policy International, Volume 7(1); Federal Trade Commission and United States Department of Justice (2018), "Competition Issues in Aftermarkets", OECD Competition Committee Submission

making their purchasing decisions. This is typically limited to markets with sophisticated consumers such as large businesses.

21.2. *Multiple markets:* Multiple markets describe a situation where there is a distinct market for the primary and secondary products. Multiple markets arise where customers are restricted to using several secondary products that are compatible with the primary product or because of the high costs of switching to another primary product. Competition concerns are most common in multiple markets. This is most common amongst consumer products.

21.3. *Dual markets:* In dual markets, consumers can choose any combination of primary and secondary products since secondary products are compatible or perceived to be compatible with all primary products.

22. The extent of competition in repair and maintenance markets depends not only on market structure, but also on the commercial strategy adopted by OEMs and whether and/or how OEMs participate in aftermarkets:

22.1. OEMs may offer repairs and maintenance themselves or solely through a network of authorised affiliates:

22.2. OEMs may not participate at all in aftermarkets. In these cases, repairs and maintenance are provided by independent service providers (ISPs) or by consumers themselves.

22.3. Lastly, OEMs may participate in aftermarkets alongside independent suppliers of aftermarket goods and services.

23. Competition concerns in repair and maintenance markets do not arise because an OEM is active in the repair and maintenance market. Rather, competition concerns arise where the structure of the market and conduct of an OEM together limit the ability of ISPs to compete effectively or limit the ability of consumers to access repairs or choose between repair providers.

24. As such, the Commission is concerned with restrictions that have the effect of foreclosing competitors, raising barriers to entry and expansion, increasing consumer dependence on OEM-controlled channels or otherwise preventing or

lessening competition. The Commission is, however, alive to the fact that considerations such as intellectual property protection, consumer safety, and quality assurance may bear on whether a restriction is anti-competitive at all, and may may found a claim of technological, efficiency or other pro-competitive gain within the meaning of sections 5 and 8 of the Act. The assessment of any restriction will therefore be conducted having regard to the specific market circumstances and commercial realities of the case.

4 Objectives of these Guidelines

25. The purpose of these Guidelines is to outline practices and conduct that the Commission is likely to consider concerning repair and maintenance markets. Market participants are encouraged to engage with the Commission on measures that can contribute to increasing competition in repair markets and the inclusion of SMMEs and firms owned or controlled by historically disadvantaged persons in this market, as contemplated in sections 2(e) and 2(f) of the Act.

26. The Commission retains its rights to identify such conduct for enforcement action in this area and to exercise its powers under the Competition Act.

5 Legal Framework

27. Primary markets (where the purchasing of the good takes place) and repair and maintenance markets are vertically related to one another. As such, agreements between OEMs and repair and maintenance providers are within the scope of Section 5 of the Act, which relates to restrains between firms in a vertical relationship.

28. Section 5 of the Act prohibits agreements between firms operating at different levels of the value chain, if they have an anti-competitive effect:

> *5. Restrictive vertical practices prohibited.— (1)An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or*

other pro-competitive, gain resulting from that agreement outweighs that effect.

(1) The practice of minimum resale price maintenance is prohibited.

(2) Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided—

(a) the supplier or producer makes it clear to the reseller that the recommendation is not binding; and

(b) if the product has its price stated on it, the words "recommended price" appear next to the stated price.

29. There may be instances where the goods covered by these Guidelines are supplied by subsidiaries, distributors, or importers, that may not meet the criteria of dominance for the application of Part B of the Act:

6. Restrictive application of Part.—(1) The Minister, in consultation with the Competition Commission, must determine—

(a) a threshold of annual turnover, or assets, in the Republic, either in general or in relation to specific industries, below which this Part does not apply to a firm; and

(b) a method for the calculation of annual turnover or assets to be applied in relation to that threshold.

(2) The Minister may make a new determination in terms of subsection (1) in consultation with the Competition Commission.

(3) Before making a determination contemplated in this section, the Minister, in consultation with the Competition Commission, must publish in the Gazette a notice—

(a) setting out the proposed threshold and method of calculation for purposes of this section; and

(b) inviting written submissions on that proposal.

(4) Within six months after publishing a notice in terms of subsection (3), the Minister, in consultation with the Competition Commission, must publish in the Gazette a notice—

> *(a) setting out the threshold and method of calculation for purposes of this section; and*
>
> *(b) the effective date of that threshold.*

30. Section 8 of the Competition Act prohibits a dominant firm from engaging in exclusionary conduct, including anti-competitive tying arrangements, where the conduct has anti-competitive effects that are not outweighed by any technological, efficiency, or other pro-competitive justification:

> *8. Abuse of dominance prohibited. —(1) It is prohibited for a dominant firm to —*
>
> > *(a) charge an excessive price to the detriment of consumers or customers;*
> >
> > *(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;*
> >
> > *(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anticompetitive effect of that act outweighs its technological, efficiency or other procompetitive gain; or*
> >
> > *(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other procompetitive gains which outweigh the anticompetitiveeffect of its act—*
> >
> > > *(i) requiring or inducing a supplier or customer to not deal with a competitor;*
> > >
> > > *(ii) refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible;*

(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;

(iv) selling goods or services at predatory prices;

(v) buying up a scarce supply of intermediate goods or resources required by a competitor; or

(vi) engaging in a margin squeeze.

(2) If there is a prima facie case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable.

(3) Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include—

(a) the respondent's price cost margin, internal rate of return, return on capital invested or profit history;

(b) the respondent's prices for the goods or services—

(i) in markets in which there are competing products;

(ii) to customers in other geographic markets;

(iii) for similar products in other markets; and

(iv) historically;

(c) relevant comparator firm's prices and level of profits for the goods or services in a competitive market for those goods or services;

(d) the length of time the prices have been charged at that level;

(e) the structural characteristics of the relevant market, including the extent of the respondent's market share, the degree of contestability of the market, barriers to entry and past or current advantage that is not due to the respondent's own commercial efficiency or investment, such as direct or indirect state support for a firm or firms in the market; and

(f) any regulations made by the Minister, in terms of section 78 regarding the calculation and determination of an excessive price.

31. Section 9 prohibits dominant firms from engaging in price discrimination that is likely to substantially lessen competition or impede the ability of SMMEs and HDP-owned firms to participate effectively in a market:

9. Price discrimination by dominant firm as seller prohibited.—(1) An action by a dominant firm, as the seller of goods or services, is prohibited price discrimination, if—

(a) it is likely to have the effect of—

(i) substantially preventing or lessening competition; or

(ii) impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively;

(b) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and

(c) it involves discriminating between those purchasers in terms of—

(i) the price charged for the goods or services;

(ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services;

(iii) the provision of services in respect of the goods or services; or

(iv) payment for services provided in respect of the goods or services.

(1A) It is prohibited for a dominant firm to avoid selling, or refuse to sell, goods or services to a purchaser that is a small and medium business o r a firm controlled or owned by historically disadvantaged persons in order to circumvent the operation of subsection (1) (a) (ii).

(2) Despite subsection (1), but subject to subsection (3), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of subsection (1) is not prohibited price discrimination if the dominant firm establishes that the differential treatment—

(a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from—

(i) the differing places to which goods or services are supplied to different purchasers;

(ii) methods by which goods or services are supplied to different purchasers; or (iii) quantities in which goods or services are supplied to different purchasers;

(b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or

(c) is in response to changing conditions affecting the market for the goods or services concerned, including—

(i) any action in response to the actual or imminent deterioration of perishable goods;

(ii) any action in response to the obsolescence of goods;

(iii) a sale pursuant to a liquidation or sequestration procedure; or

(iv) a sale in good faith in discontinuance of business in the goods or services concerned.

(3) If there is a prima facie case of a contravention of section (1) (a) (ii)—

(a) subsection (2) (a) (iii) is not applicable; and

(b) the dominant firm must, subject to regulations issued under section 9 (4), show that its action did not impede the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to participate effectively.

(3A) If there is a prima facie case of a contravention of subsection (1A), the dominant firm alleged to be in contravention must show that it has not avoided selling, or refused to sell, goods or services to a purchaser referred to in subsection (1A) in order to circumvent the operation of subsection (1) (a) (ii).

(4) The Minister must make regulations in terms of section 78—

(a) to give effect to this section, including the benchmarks for determining the application of this section to firms owned and controlled by historically disadvantaged persons; and

(b) setting out the relevant factors and benchmarks for determining whether a dominant firm's action is price discrimination that impedes the participation of small and medium businesses and firms controlled or owned by historically disadvantaged persons.

32. Market participants should note that Part B of Chapter 2 of the Act, which contains the prohibitions on abuse of dominance in sections 8 and 9, does not apply to a firm whose annual turnover or assets in the Republic fall below the threshold determined by the Minister in terms of section 6 of the Act. Conduct by such a firm remains subject to section 5 where it arises from an agreement between parties in a vertical relationship.

6 Scope of these Guidelines

33. The scope of these Guidelines is repair and maintenance services that fall outside of implied warranty protections mandated by law and express warranties offered

by original equipment manufacturers (OEMs). Repair and maintenance activities may fall outside of the aforementioned protections because the applicable warranty period has expired or because the damage, defect or failure is not covered by warranty.

34. The Guidelines do not seek to amend, replace or diminish existing rights and obligations under applicable legislation, regulations, technical standards, or requirements established by relevant regulators and standard-setting bodies. Rather, the purpose of these Guidelines is to promote competitive, transparent and accessible repair and maintenance for damage and defects that occur outside the scope of statutory or implied warranty or express manufacturer warranty protections for which consumers must make decisions and bear the costs of repairs. In these cases, the policies, commercial decisions and conduct of OEMs may have an appreciable effect on competition, consumer choice and participation by independent service providers (ISPs) in repair, maintenance, and service markets.

35. These Guidelines are aimed at goods where there may be consumer benefits from expanding their lifespans or where consumers experience challenges in accessing repair services in respect of price or otherwise, specifically:

35.1. *High-cost durable goods:* These are goods that consumers purchase infrequently and at a high price. The economic consequences of barriers to repair and maintenance for these goods are costly as they may result in consumers purchasing replacement products before the goods reach the end of their lifespans.

35.2. *Goods with existing, but imperfect repair markets:* Many consumer goods can be successfully repaired, yet consumers may have a low willingness or ability to find repair products resulting in them opting for replacement over repairs.

35.3. *Technical goods characterised by rapid innovation:* Many electronics are characterised by frequent software and hardware upgrades. In these cases, repair and maintenance tools and processes may change with each upgrade, which may raise barriers to repair and maintenance outside of the OEMs authorised networks.

36. These Guidelines do not apply to automotive aftermarkets, which are dealt with in the Commission's Guidelines for Competition in the South African Automotive Aftermarket. Motor vehicles and their spare parts, tools and repair inputs accordingly fall outside the scope of these Guidelines.

37. Apart from the products in automotive aftermarkets which are covered by the Commission's Guidelines for Competition in the South African Automotives Aftermarket, the products covered by these guidelines are not restricted. Based on experience in other jurisdictions and the Commission's own work and research, it is expected that OEMs in markets for the following products may find these guidelines relatively more applicable:

37.1. Mobile phones, tablets and electronics (including gaming consoles);

37.2. Audiovisual equipment (including televisions);

37.3. White goods (washing machines, tumble driers, etc) and related appliances;

37.4. Medical equipment and devices.

37.5. Back-up water and electricity systems.

38. Repair, service and maintenance markets are regulated concurrently by a number of instruments. The National Regulator for Compulsory Specifications Act No. 5 of 2008 ("the NRCS Act") provides at section 14(1) and (2) that no person may import, sell or supply a commodity, product or service to which a compulsory specification applies except in accordance with that specification, and only where the commodity, product or service complies with the specification and bears the prescribed distinctive mark.

39. Conduct that is required by, or that is reasonably necessary to give effect to, a compulsory specification, a condition attaching to a letter of authority, or a directive issued under section 15 of the NRCS Act, will not be characterised by the

Commission as a restriction of competition for the purposes of these Guidelines. A firm relying on this paragraph should identify the specific instrument relied upon and demonstrate that the conduct does not extend beyond what that instrument requires. Conduct that goes beyond what is required, or that uses a regulatory requirement as a means of foreclosing ISPs, remains subject to assessment under the Act.

40. These Guidelines do not require or encourage any person to facilitate access to counterfeit spare parts, to parts that have been illegally sourced, or to parts that may not lawfully be sold or supplied in the Republic. References in these Guidelines to access to spare parts are to parts that are legitimate, traceable and lawfully available for sale in the aftermarket.

41. The Consumer Protection Act No. 68 of 2008 (“the CPA”) applies concurrently with the Act in repair, service and maintenance markets. Provisions of particular relevance include section 15 (pre-authorisation of repair or maintenance services), section 54 (right to demand quality service), section 55 (right to safe, good quality goods, including compliance with applicable standards), section 56 (implied warranty of quality), section 57 (warranty on repaired goods), section 61 (liability for damage caused by goods) and section 67 (return of parts and materials). Section 2(9) of the CPA provides that, where its provisions are inconsistent with those of another Act, both apply concurrently to the extent that it is possible to comply with one without contravening the other, and failing that, the provision extending the greater protection to the consumer prevails. Nothing in these Guidelines derogates from a consumer’s rights under the CPA.

42. Consistent with sections 3(1A), 21(1)(h) and 82(1) of the Act, the Commission will engage the National Regulator for Compulsory Specifications, the National Consumer Commission and any other regulatory authority exercising jurisdiction over the relevant product category in matters where the conduct under investigation engages that authority’s regulatory framework.

7 Approach to defining the relevant market and assessing market power

43. In defining the relevant market(s) the Commission will consider whether repairs, servicing and related activities constitute a separate, distinct market to the primary market or form part of a systems market that includes the primary market and the aftermarket. The Commission will also consider whether aftermarkets are brand-specific or not.

44. In conducting this assessment, the Commission will have regard as to the prevailing commercial realities faced by firms and consumers. The analysis may consider the following non-exhaustive market factors to determine whether there is a systems market or a separate secondary market:[8]

44.1. *The ability of consumers to foresee future repair and maintenance costs*: Are customers business or consumer users? Do customers have access to information regarding repairability, expected product lifespan, servicing requirements and lifecycle costs at the point of purchase? Are repair restrictions, spare parts policies or servicing arrangements disclosed in advance? Do customers have a history of purchasing similar products? Does the product require regular servicing and maintenance?

44.2. *Switching costs once the primary product has been purchased:* What are the costs of replacing the primary product? What ancillary costs such as retraining, reconfiguration, compatibility adjustments or operational disruptions, would be incurred to support switching? How large are these ancillary costs relative to the cost of the product? Would switching be economically feasible in response to higher prices for repairs and servicing?

44.3. *Brand-specificity of spare parts or repair services:* Are spare parts, diagnostic tools, software, technical information or servicing capabilities specific to a particular OEM brand? Are third-party substitutes technically and commercially viable?

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[8] Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451 (1992); Lang, J.T, (2011), "Practical aspects of Aftermarket in European Competition Law". Competition Policy International, Volume 7(1); Australian Competition & Consumer Commission (2021), "Agricultural Machinery Market Study 2021", available online: https://www.accc.gov.au/by-industry/agriculture/agricultural-machinery-market-study-2021; Australian Government Productivity Commission (2021), "Right to Repair: Productivity Commission Inquiry Report", Available online: https://www.pc.gov.au/inquiries-and-research/repair/report/

45. In practice, regulators and courts have generally analysed repair, service and maintenance markets separately from the market for the primary product given that the conditions for a systems market, such as full life assessment, low switching costs and generic parts, are rarely met. Accordingly, the Commission will generally proceed on the basis that separate primary and secondary markets exist. However, the Commission will consider the commercial realities faced by respondents and other market participants in assessing whether a systems-market approach may be appropriate. Where a party contends that competition in the primary market constrains conduct in repair, service and maintenance markets, the Commission will expect that contention to be supported by evidence demonstrating that a systems-market approach is appropriate in the circumstances. Nothing in this paragraph alters the onus of proof or the standard of proof prescribed by the Act.

46. In assessing market power, the Commission may, in addition to the factors above consider:[9]

46.1. *Market shares in the relevant markets:* Market shares are a starting point in analysis of market power but are less informative in repair markets than in conventional markets. Based on the facts of the case and the market context, a firm may be found to have market power even in instances where it faces competition in the primary market. Market power is more likely where the firm has a substantial share of primary market and a correspondingly high share of the repair, spare parts, or servicing market associated with the primary market.

46.2. In assessing the significance of these shares, the Commission may consider the size of the installed base of the primary product, the extent to which products continue to generate revenues from repairs, maintenance, software updates, servicing, or replacement parts over their lifespan, and the proportion of customers that continue to own or use the product beyond the warranty period.

46.3. *The ratio of "locked-in" consumers to new purchases*: There is a higher likelihood of anti-competitive behaviour in instances where the number of new

[9] Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451 (1992); Hugin Kassaregister AB v Commission, Case 22/78 [1979] ECR 1869; Hugin/Liptons, Commission Decision 78/68/EEC [1977]

customers is smaller relative to the number of existing customers. This would suggest that once consumers purchase the primary product, they are locked-in and unable to switch to another primary product in order to avoid anti-competitive conduct of the OEM. [10]

46.4. *The degree of substitutability between the repair and maintenance options for different brands*: Market power may be present where repair and maintenance providers cannot feasibly operate across brands. Consumer preferences regarding their willingness and able to switch between repair providers may also affect substitutability.

46.5. *Barriers to entry and expansion*: Market power is more likely in cases where rival repairers cannot enter the market or expand in response to higher prices or degradations in service quality. Common sources of barriers in repair markets include intellectual property restrictions, software locks, use of proprietary tools and technology and complex accreditation requirements.

46.6. *Control over access to spare parts, diagnostics, software or technical information*: Market power is more likely where access to key repair inputs (e.g. parts, diagnostic tools, manuals, software) that are indispensable for repairs are controlled by the OEM and cannot be replicated or obtained from alternative sources.

46.7. *Countervailing buyer power:* Market power may be restrained where customers are credibly able to constrain a firm's conduct. Such constraints may take the form of quickly switching suppliers, self-supplying repair services, negotiating favourable terms, or sponsoring entry. The potential for reputation harm for firms active in several markets may also be considered as a countervailing factor to market power.[11]

47. The Commission notes that an OEM need not be present in the secondary market in order to be considered to have market power in the secondary market given the

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[10] Bishop, S & Walker, M (2010) "The Economics of EC Competition Law: Concepts, Application and Measurement", para 6 – 022;

[11] Bishop, S & Walker, M (2010) "The Economics of EC Competition Law: Concepts, Application and Measurement", para 6-026.

potential ability of the OEM to dictate the specific conditions and market dynamics in the secondary market.

8 Restrictions of competition in repair and maintenance markets

48. The Commission notes that there are several models that OEMs can use to provide repair and maintenance services for their primary products. While the choice of repair and maintenance model remains a commercial decision for OEMs, the Commission may investigate OEMs, distributors, authorised repairers and other market participants where it identifies conduct that raises barriers to entry or expansion for ISPs, increases repair and maintenance costs, or limits consumer choice.[12]

49. In addition to the degree of market power (as discussed above), the likelihood of a harm to competition may also be heightened where there are parallel networks of such constraints since the agreements have broad coverage and therefore a higher cumulative effect. In these instances, individual agreements with limited coverage may contribute to the cumulative effect of a substantial lessening or prevention of competition in the aftermarket.

8.1 Restrictions on access to spare parts

50. Access to spare parts is a central condition for effective competition in repair, service and maintenance markets. International case law, guidelines and regulations recognise this concern by treating agreements that prevent or restrict access to spare parts by independent repairers, service providers, wholesalers and end-users as serious restrictions of competition. Competition authorities have treated restrictions on spare parts as a serious category of restriction under the vertical restraints framework, including where the restriction operates indirectly through limits on access to technical information or specialised equipment necessary for the effective use of spare parts.[13]

[12] European Commission (2022), *Guidelines on Vertical Restraints*, para 18 – 22; Competition and Markets Authority (2022), Vertical Agreements Block Exemption Order, para 2.7; 10.
[13] Competition and Markets Authority (2022), Vertical Agreements Block Exemption Order, para 8.78; European Commission (2022), *Guidelines on Vertical Restraints*, para 114.

51. Accordingly, agreements, practices or arrangements that restrict access to spare parts, including through exclusive supply arrangements, refusals to supply, discriminatory supply terms, or indirect restrictions that limit the practical usability of spare parts, will attract close scrutiny by the Commission of both the conduct and the justifications offered by the respondents. The Commission’s assessment will focus on whether the justifications are sufficient to counter the harm to competition arising from the restrictions.

52. *Excessive pricing of spare parts and related tools.*

52.1. Where an OEM is dominant within the meaning of the Act, the Commission may assess whether prices charged for spare parts constitutes excessing pricing in terms of the Act. In accordance with the Act, the dominant OEM will bear the onus of proving that the prices charged for spare parts is reasonable if there is a *prima facie* case of abuse of dominance. The Commission's assessment of whether a price is excessive will be guided by the provisions the Act, excessive pricing principles and will have regard to the specific facts and commercial realities of the market under investigation.

53. *Exclusionary conduct relating to spare parts*

53.1. The Commission will regard restrictions that prevent or materially limit ISPs, wholesalers, service providers or end-users from obtaining spare parts as a serious category of restriction in repair, service and maintenance markets. The restrictions include, but are not limited to, refusals to supply; supply on discriminatory terms; margin squeeze; and anti-competitive tying and bundling of spare parts.

53.2. Depending on the market context and product characteristics, the Commission will regard restrictions on tools and software required for the effective installation and use of spare parts as indirect restrictions of access to spare parts. Examples of these restrictions include:

53.2.1. *Mandating proprietary tools where commonly available alternatives are feasible:*[14] Requirements for the use of proprietary tools may restrict an ISPs ability to provide repair services even where spare parts are available. Examples of these restrictions include, but are not limited to, requiring repairs to be performed using OEM-specific diagnostic tools where commonly available alternatives could reasonably perform the same function; restricting access to software unless OEM-approved hardware is used; and requiring proprietary connectors, interfaces or programming devices to undertake routine repair and maintenance activities.

53.2.2. *Software restrictions targeting independent repairers:*[15] Restrictions on software, firmware or other technological protection measures will be considered as indirect restrictions on spare parts even where tools and spare parts are available. Examples this conducts includes, but is not limited to, software that prevents replacement parts from functioning without OEM activation, use of warning messages following ISP repairs, restrictions on software and firmware required to complete repairs or test for functionality once repairs are completed.

53.2.3. *Security and safety systems:* The Commission recognises that certain components, software and activation systems are integral to the security of a product or to the safety of its users, including anti-theft and immobilisation systems, authentication and encryption systems, and components the failure of which may directly or indirectly endanger life or limb. Conditional supply, accreditation requirements or activation controls that are confined to such components will not ordinarily be treated as an indirect restriction on access to spare parts, provided that they are applied on objective, transparent and non-discriminatory terms, and that an ISP meeting the OEM's accreditation requirements is afforded access on terms

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[14] Right to Repair: Productivity Commission Inquiry Report", Available online: https://www.pc.gov.au/inquiries-and-research/repair/report/; Agricultural Machinery Market Study 2021", Available online: https://www.accc.gov.au/by-industry/agriculture/agricultural-machinery-market-study-2021

[15] Right to Repair: Productivity Commission Inquiry Report", Available online: https://www.pc.gov.au/inquiries-and-research/repair/report/; Agricultural Machinery Market Study 2021", Available online: https://www.accc.gov.au/by-industry/agriculture/agricultural-machinery-market-study-2021

no less favourable than those offered to the OEM's own authorised service providers. Access of this kind remains subject to the OEM's intellectual property and data privacy rights.

53.3. *Restrictive agreements affecting access to spare parts*

53.3.1. *Exclusivity agreements and supply restrictions for repair inputs:*[16] Exclusivity agreements between an OEM's supplier of repair inputs and spare parts and the OEM may restrict an ISPs ability to access spare parts. These restrictions may in-turn affect consumer choices for repair and maintenance services. Exclusive agreements are more likely to harm competition where an OEM (itself or through an authorised party) is a significant player in the repair and maintenance market or where there is similar parallel conduct.

53.3.2. *Retail price maintenance:* OEMs may not prescribe the minimum retail prices for spare parts and related software and tools and repair and maintenance services.

54. Restrictions of the kind described above will be treated by the Commission as a priority for investigation and enforcement, on the basis that they are, by their nature, capable of substantially preventing or lessening competition by foreclosing ISPs, increasing consumer dependence on OEM-controlled repair channels, and limiting consumer choice. Whether that effect in fact arises in a given case remains a matter to be established on the evidence.

55. Accordingly, where the Commission identifies an agreement, practice or arrangement that restricts access to spare parts, including through exclusive supply arrangements, refusals to supply, discriminatory supply terms, or indirect restrictions that limit the practical usability of spare parts, it will expect the firm concerned to advance and substantiate its justification for the restriction at an early stage of the investigation. The Commission will expect that justification to address why the restriction is reasonably necessary and proportionate to the objective pursued, and to identify the technological, efficiency or other pro-competitive gains

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[16] Hilti AG v. Commission, Case C-53/92 P [1994] ECR I-667; Hugin Kassaregister AB v. Commission, Case 22/78 [1979] ECR 1869

said to outweigh the anti-competitive effect. This paragraph reflects the Commission's evidential expectations in the conduct of an investigation. It does not alter the allocation of the onus of proof under sections 5 and 8 of the Act, nor the standard of proof prescribed by section 68.

8.2 Other anti-competitive conduct[17]

56. Other forms of conduct may also affect competition in repair, service and maintenance markets. The competitive significance of such conduct will generally depend on the specific facts of the case, including the characteristics of the relevant market, the commercial realities facing consumers and ISPs, the extent of foreclosure, and any pro-competitive or efficiency justifications.

57. Conduct that may raise competition concerns includes practices that:

    57.1. Foreclose or disadvantage rival ISPs.

    57.2. Discourage or penalise consumers from seeking out the services of ISPs.

58. In many instances, these practices rely on similar mechanisms to one another. The Commission is not obliged to categorise conduct according to any of these categories and will be guided by the evidence in each case when establishing the nature of the harm(s) that has (have) taken place.

8.2.1 Practices that foreclose or disadvantage ISPs

59. OEMs may also foreclose or disadvantage ISPs through restrictions on access to repair inputs other than spare parts.

60. The Commission's assessment of an OEM or related party's conduct regarding a repair input will be based on the commercial realities of the market and the technical features of the product(s) under investigation. As such, the Commission will have regard to the evidence of OEMs and ISPs on whether repair and

[17] For the avoidance of doubt, restrictions relating to access to spare parts are addressed in section 8.1. References to repair inputs in section 8.2 refer to repair inputs other than spare parts and as defined in Section 2.

maintenance services can or cannot be provided competitively without the inputs under investigation, or under any other restrictive terms applied by the OEM.

61. Potential anti-competitive practices involving repair inputs that the Commission may assess include the following:[18]

61.1. *Margin Squeeze:*[19] Where an OEM supplies repair inputs to ISPs while simultaneously competing with those ISPs in downstream repair, service or maintenance markets, competition concerns may arise where the relationship between the price charged for repair inputs and the OEM's own downstream repair prices results in anti-competitive effect.

61.2. In assessing such concerns, the Commission may consider whether the pricing structure, forecloses effective participation by ISPs, or otherwise substantially prevents or lessens competition in the repair market. The Commission's assessment will be guided by the specific facts and commercial realities of the market under investigation.

61.3. *Tying, bundling and conditional supply arrangements:*[20] The Commission may consider whether repair inputs are supplied only on condition that purchasers also acquire additional goods or services, or refrain from dealing with competing suppliers. Where such arrangements are present, the Commission may consider whether they increase the costs faced by ISPs, restrict access to repair inputs, or otherwise foreclose competing repair and maintenance providers.

61.4. *Price discrimination:* Where an OEM is dominant within the meaning of the Act, the Commission may assess whether price differences amount to anti-competitive price discrimination under section 9 of the Act. In undertaking this assessment, the Commission will consider whether the conduct relates to equivalent transactions involving goods or services of like grade and quality and whether the requirements of section 9(1) have been satisfied, including

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[18] *Eastman Kodak Co. v. Image Technical Services Inc.*, 504 U.S. 451 (1992); Hilti AG v. Commission, Case C-53/92 P [1994] ECR I-667; Hugin Kassaregister AB v. Commission, Case 22/78 [1979] ECR 1869; CEAHR v. Commission, Case T-712/14 (2017).

[19] *Eastman Kodak Co. v. Image Technical Services Inc.*, 504 U.S. 451 (1992)

[20] Hilti AG v. Commission, Case C-53/92 P [1994] ECR I-667; *Eastman Kodak Co. v. Image Technical Services Inc.*, 504 U.S. 451 (1992).

whether the conduct is likely to substantially prevent or lessen competition or impede the ability of small and medium businesses or firms owned or controlled by historically disadvantaged persons to participate effectively in the market. The Commission will also have regard whether differential prices are permitted under section 9(2).

61.5. *Restrictive accreditation or certification requirements:*[21] Accreditation and certification requirements can serve as a barrier to entry for ISPs in cases where they are required by OEMs for the provision of repair and maintenance services. While accreditation or certification is not on its own anti-competitive, where it is required, the Commission will consider whether it is consistent with legitimate quality, safety, or technical considerations. Further, the Commission will also assess whether conditionalities or prerequisites for accreditation or certification are proportional to these quality, safety, or technical considerations or serve as barrier to entry and expansion by ISPs. Depending on the facts of an investigation, restrictive accreditation or certification requirements may be assessed under sections 5 (where there are agreements between OEMs and repairers) or 8 of the Act.

61.6. *Discriminatory non-price terms or conditions of supply:*[22] An OEM may attempt to foreclose ISPs through attaching conditionalities on their supply of repair inputs or providing them on poorer terms than it does to other ISPs and its authorised repair and maintenance providers. Discriminatory terms and conditions of supply may unfairly disadvantage ISPs or limit their ability to provide timely and cost-effective repair and maintenance services. Harm to competition is more likely where the OEM or their authorised party has a substantial share of the repair market. Depending on the facts of an investigation, discriminatory non-price terms or conditions of supply may be assessed under sections 5 (where there are agreements between OEMs and repairers) or 8 of the Act. The Commission will assess such conduct having regard to the extent of any competitive harm, the commercial rationale for the

[21] CEAHR v. Commission, Case T-712/14 (General Court, 2017).

[22] Hugin/Liptons, Commission Decision 78/68/EEC (1977); Hugin Kassaregister AB v. Commission, Case 22/78 [1979] ECR 1869

conduct, and the specific facts and circumstances of the market under investigation.

61.7. *Lack of price transparency:*[23] Cost transparency allows ISPs to determine the costs of the repair and maintenance services that they offer to consumers. The extent to which ISPs can reasonably determine the cost of essential repair inputs may be determined by, i) access to price lists; ii) itemised quotes with unit price information; iii) itemised invoices with clear disclosures of discounts or rebates where applicable. Refusal to provide this information may limit an ISP's ability to compete effectively. A lack of transparency may be particularly harmful to competition where this information is only provided to repair and maintenance providers with whom the OEM has economic ties or who have been authorised by the OEM to provide repair and maintenance services. OEMs may not prescribe minimum prices for repair and maintenance services.

8.2.2 Practices that discourage or penalise consumers for using independent service providers

62. Competition concerns may arise from conduct that acts as a barrier to consumer obtaining repair and maintenance services from ISPs thereby weakening the competitive constraints in the repair and maintenance markets.

63. Conduct that the Commission may assess as likely to result in a substantial lessening or prevention of competition includes, but is not limited to, the following:

63.1. *Rendering repair uneconomic relative to replacement*:[24] The Commission considers that consumers may be harmed by commercial practices that artificially raise the relative cost of repair and maintenance and thereby reduce the consumer incentives to repair the products. Examples of practices that the Commission may investigate include higher repair prices relative to that of a replacement product, decisions to discontinue supplying

[23] *Eastman Kodak Co. v. Image Technical Services Inc.*, 504 U.S. 451 (1992)

[24] Australian Government Productivity Commission (2021), "Right to Repair: Productivity Commission Inquiry Report", Available online: https://www.pc.gov.au/inquiries-and-research/repair/report/; *Eastman Kodak Co. v. Image Technical Services Inc.*, 504 U.S. 451 (1992).

repair and maintenance services for goods that are still available in the primary market; declaring repairs economically unviable when repairs may be feasible.

63.2. *Disadvantaging consumers who seek repairs from ISPs:*[25] Competition in repair markets may be weakened through practices that make it more affordable for consumers to use OEM repairs relative to ISPs without a sound commercial rationale. Examples of conduct that the Commission may investigate include providing discounts, rebates or loyalty incentives that are conditional on consumers using OEM repair services.

63.3. *Raising switching costs or reinforcing consumer dependence on OEM repair channels:*[26] OEM conduct may limit consumer choices where it raises the costs, inconvenience, and risks associated with switching to ISP repairs. The Commission may investigate conduct that includes restricting access to repair and service records, requiring customers to amend subscriptions, licences or software settings when changing repair providers, creating contractual barriers to switching such a long-notice periods and excessive cancellation fees when switching to ISPs.

63.4. *Warranty terms that affect the use of ISPs:*[27] The Commission distinguishes between repairs or maintenance undertaken pursuant to a valid warranty and repairs or maintenance undertaken at the consumer's expense outside the scope of a warranty. The Commission further recognises that OEMs are legally compelled to offer implicit warranties and may also offer explicit warranties that extend beyond the scope of an implicit warranty. OEMs may impose conditions that are reasonably necessary to administer their obligations under these warranties. Warranty restrictions that are limited to the administration of valid warranty claims are unlikely to raise competition concerns.

[25] Hugin/Liptons, Commission Decision 78/68/EEC (1977); Hugin Kassaregister AB v. Commission, Case 22/78 [1979] ECR 1869; Australian Competition & Consumer Commission (2021), “Agricultural Machinery Market Study 2021”, Available online: https://www.accc.gov.au/by-industry/agriculture/agricultural-machinery-market-study-2021

[26] *Eastman Kodak Co. v. Image Technical Services Inc.*, 504 U.S. 451 (1992); Right to Repair: Productivity Commission Inquiry Report”, Available online: https://www.pc.gov.au/inquiries-and-research/repair/report/;

[27] CEAHR v. Commission, Case T-712/14 (General Court, 2017);
Right to Repair: Productivity Commission Inquiry Report”, Available online: https://www.pc.gov.au/inquiries-and-research/repair/report/; Agricultural Machinery Market Study 2021”, Available online: https://www.accc.gov.au/by-industry/agriculture/agricultural-machinery-market-study-2021

63.5. Competition concerns may arise where warranty provisions and contractual provisions have the effect of extending restricting consumer choices beyond what is necessary for administering the warranty and when a consumer bears the responsibility for the repair.

9 Justifications for certain restrictions in repair and maintenance markets

64. As part of its assessment of conduct that is likely to have the effect of substantially preventing or lessening competition, the Commission will consider a respondent's justifications for the impugned conduct. Consistent with sections 5 and 8 of the Competition Act, conduct that restricts competition may nevertheless be permissible where the efficiency, technological, pro-competitive or other benefits arising from the conduct can be shown to outweigh any anti-competitive effects. The Commission will assess such claims on a case-by-case basis having regard to the specific market circumstances and evidence presented.

65. In assessing the justifications advanced by a respondent, the Commission may consider, among other factors:

65.1. Whether the agreement is indispensable to the attainment of any claimed technological, efficiency, or other pro-competitive gains.

65.2. Whether the objectives of the restriction could be achieved through less restrictive means.

65.3. Whether it can be shown that consumers stand to benefit from the technological, efficiency, or other pro-competitive gains.

66. Where restrictions fail to meet these minimum requirements, they are unlikely to justify conduct that has been found to substantially prevent or lessen competition. Even where these minimum requirements are the met, the Commission will assess whether the anti-competitive effects of the restrictions outweigh the potential benefits advanced by the respondents.

67. The Commission may have regard to whether a restriction is required by law, regulation, compulsory specifications, or other statutory obligations. Where a restriction is required to comply with such requirements, the Commission is unlikely

to find that it gives rise to an anti-competitive effect, a substantial lessening of competition, or an impediment to SMME / HDP participation. Examples may include, but are not limited to:

67.1. *Protection of intellectual property:*[28] Certain restrictions may be required for OEMs to protect intellectual property rights and prevent the unauthorised use, reproduction or disclosure of patents, trade secrets, copyrighted material and other proprietary information. The Commission may consider whether the restrictive measures go beyond what is required for the protection of those rights and have the effect of restricting competition in repair and maintenance markets.

67.2. The Commission may consider intellectual property justifications with reference to the specific components, systems, or repair activity for which the intellectual property has been claimed. Intellectual property restrictions on a particular component, system, or repair activity may not ordinarily justify restrictions on the repair, servicing, maintenance or replacement of unrelated components, which themselves are not subject to intellectual property rights.

67.3. *Regulatory standard compliance:*[29] Restrictions that are put in place to ensure compliance with compulsory specifications, statutory requirements and standards are, on their own, unlikely to raise competition concerns. However, the Commission may investigate whether the restriction extends beyond what is reasonably necessary to achieve compliance, or whether less restrictive alternatives are reasonably available.

68. Where the impugned conduct is of the type that is *prima facie* likely to have the effect of substantially preventing or lessening competition, by foreclosing ISPs, increasing consumer dependence on OEM-controlled repair channels, and limiting consumer choice, the Commission will apply a higher evidentiary standard to any claimed justification.

[28] CEAHR v. Commission, Case T-712/14 (General Court, 2017).
[29] Right to Repair: Productivity Commission Inquiry Report", Available online: https://www.pc.gov.au/inquiries-and-research/repair/report/; Agricultural Machinery Market Study 2021", Available online: https://www.accc.gov.au/by-industry/agriculture/agricultural-machinery-market-study-2021

10 Conclusion

69. These Guidelines serve to assist OEMs (and related parties) and ISPs to understand the types of practices and conduct that may raise competition concerns. The Guidelines are based on economic and legal principles established through international regulatory enforcement and the Commission's experience. The Guidelines may also be used by OEMs to assess whether their current and future practices may raise competition risks, the necessity of such practices, and the impact that they may have on competition.

70. It is important to reiterate that the conduct discussed in these Guidelines is not exhaustive. The Commission retains its discretion to consider other types of conduct on a case-by-case basis.