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DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 7845

21 August 2026



Publication of Draft Guidance on Repair, Service, and Maintenance Aftermarkets.

21 August 2026

1. BACKGROUND

Notice is hereby given that the Competition Commission ("the Commission") has published the Guidance on Repair, Service, and Maintenance Aftermarkets on its website and is gazetted in terms of section 79 of the Competition Act, 89 of 1998, as amended ("the Act").

The Commission seeks to provide guidance on its analytical approach to investigations of restrictions in the repair, service, and maintenance aftermarkets for technology goods. The guidance note is accompanied by a background note, which discusses regulatory approaches to repair, service, and maintenance aftermarkets and presents the concerns that the Commission has identified in these aftermarkets.

The guidance note provides aims to provide guidance on how the Commission will define the relevant markets and assess market power. Further, the guidance explains the categories of conduct or restrictions in repair, service, and maintenance aftermarkets that may reduce or prevent competition and the justifications that the Commission may consider in its investigations and analysis of complaints.

2. INVITATION TO COMMENT

The public is invited to submit comments on these draft guidelines by 16h00 on 21 September 2026. Written submissions can be sent to repairguidance@compcom.co.za. All submissions will be reviewed, and a final guideline published by the Commission.

The draft Guidance on Repair, Service, and Maintenance Aftermarkets is available at <https://www.compcom.co.za>



***competition*commission**
south africa

GUIDELINES ON REPAIR, SERVICE, AND MAINTENANCE AFTERMARKETS.

Draft for Comment.

August 2026.

Published for public comment in terms of section 79(3) of the Competition Act No. 89 of 1998, as amended.

A copy of this draft may be obtained from www.compcom.co.za.

Written representations must be submitted to repairguidance@compcom.co.za by no later than 16h00 on 21 September 2026.

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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

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.

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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

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 anticompetitive effect 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 or 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 reparability, 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?

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

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

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

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 conduct¹⁷

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

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 as 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 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 CEHR 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.

DRAFT



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BACKGROUND NOTE: GUIDELINE ON REPAIR, SERVICE, AND MAINTENANCE AFTERMARKETS.

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August 2026.

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BACKGROUND NOTE TO THE COMMISSION'S GUIDELINE ON REPAIR, SERVICE, AND MAINTENANCE AFTERMARKETS.

1. Background and context

1. Electronic devices and appliances are a ubiquitous feature of modern life helping businesses and households to communicate, access information, and ease daily tasks. In South Africa, mobile phone ownership is nearly universal with 96.1% of households reporting that they own at least one mobile phone.¹ Household spending on technology and durables in the third quarter of 2024 was R 214 billion and South Africa's appliance or household durables market size is approximately R 69 billion.²
2. Consumer electronics purchases are set to continue growing, driven by demand for affordable high-quality devices, innovations in financing options to enhance affordability, and increased access to the internet driving demand for connected and smart devices in the home.³ For larger purchases, such as appliances and televisions, increases in disposable income drive consumers to purchase new products.⁴
3. This rising demand brings challenges for the industry and society. These include the effects of currency volatility on imported components or devices; high tariffs on imported raw materials; the risk of supply chain disruptions and growing electronic waste (e-waste), which is projected to reach 74.4 million tonnes globally per year by 2030.⁵ The Department of Forestry, Fisheries, and the Environment estimates

¹ Statistics South Africa (2023), "General Household Survey, 2023", Available online:

<https://www.statssa.gov.za/publications/P0318/P03182023.pdf>

² NielsenIQ (2024), "NIQ Retail Barometer: South Africans spend R214 billion on FMCG and durable goods in Q3 2024", Available online: <https://nielseniq.com/global/en/news-center/2024/niq-retail-barometer-south-africans-spend-r214-billion-on-fmcg-and-durable-goods-in-q3-2024/>; NIQ; Grand View Research (2024), "South Africa Household Appliances Market Report", Available online: (site's report summary) <https://www.grandviewresearch.com/industry-analysis/south-africa-household-appliances-market-report>

³ Birguid (2024), "South Africa Consumer Electronics Industry Analysis", Available online: https://birguid.co.za/wp-content/uploads/2024/08/Birguid_SA-consumer-electronics-industry-analysis_Executive-summary.pdf

⁴ Reuters (2025), "MTN South Africa aims to boost 4G adoption with budget smartphones", Available online: <https://www.reuters.com/business/media-telecom/mtn-south-africa-aims-boost-4g-adoption-with-budget-smartphones-2025-05-05/>

⁵ 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>; Birguid (2024), "South Africa Consumer Electronics Industry Analysis", Available online: https://birguid.co.za/wp-content/uploads/2024/08/Birguid_SA-consumer-electronics-industry-analysis_Executive-summary.pdf

that South Africa generates an estimated 300 000 tonnes of e-waste annually, which accounts for 5 – 8% of the country's municipal solid waste.⁶

4. Alongside these demand-side challenges that affect purchasing and disposal, there are also concerns about the supply-side behaviour of firms through the adoption of “planned obsolescence”.⁷ Advocates of this view of the strategies of manufacturers argue that products are intentionally designed to reduce their lifespans and compel consumers to purchase new replacement products.
5. The alleged strategies for planned obsolescence include designing products with weak points so that they break down after limited use; using software to reduce a product's performance over time; and designing products in a way that prevents repairs or upgrades.⁸ The evidence that planned obsolescence is a widespread and deliberate strategy is mixed. However, there have been regulatory findings and sanctions for behaviours that could be associated with the strategy in France, Italy, and Australia.⁹
6. Regardless of whether such a strategy exists, the trends of growing e-waste and the tendency to replace rather than repair are clear. Policymakers throughout the world have responded to the challenges posed by increased demand and consumption of electronics through policy instruments aimed at i) reducing the environmental impact of electronics consumption and disposal and ii) extending the lifespan of electronic goods to promote more sustainable consumption:

6.1. Extended Product Responsibility (ERP): EPR is a policy approach that uses economic instruments to set incentives for the collection and recovery of materials at the post-consumer stage of the product life cycle. EPR is characterised by shifting the responsibility for managing products at the end of

⁶ The Future of Sustainability (2023), “Surmounting mountains of E-waste”, Available online:

https://issuu.com/topcomedia/docs/esq_magazine_issuu/44?e=47&o=1

⁷ Australian Government Productivity Commission (2021), “Right to Repair: Productivity Commission Inquiry Report”, Available online: <https://www.pc.gov.au/inquiries-and-research/repair/report/>

⁸ Australian Government Productivity Commission (2021), “Right to Repair: Productivity Commission Inquiry Report”, Available online: <https://www.pc.gov.au/inquiries-and-research/repair/report/>

⁹ Kayali, L (2020), “Apple fined EUR25M in France for misleading consumers about slowed-down iPhones,” Available online: <https://www.politico.eu/article/apple-fined-e25m-in-france-for-misleading-consumers-about-slowed-down-iphones/>; BBC (2018), “Apple and Samsung fined by Italian authorities over slow phones”, Available online: <https://www.bbc.com/news/technology-45963943>

their life cycles to producers and away from municipalities and taxpayers.¹⁰ South Africa published S18 Regulations to the National Environmental Management: Waste Act on 5 November 2020. The regulations, which came into effect on 5 May 2021, made ERP mandatory for the Electrical and Electronic Equipment, Lighting, and Paper and Packaging Sectors. In March 2023, the legislation was extended to include portable batteries, lubricant oils, and pesticides.¹¹ The introduction of this legislation reflected similar developments in other regions such as the European Union, United Kingdom, Canada, Japan and some states of the United States.

6.2. Eco-Design Regulations: Eco-Design Regulations aim to improve the sustainability of products by improving their circularity¹², energy performance, recyclability and durability.¹³ Examples of jurisdictions with Eco-Design Regulations include the European Union and United Kingdom.

6.3. Right to Repair: Right to Repair is a regulatory approach that aims to remove access barriers to repairs that may prevent repairs and maintenance 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.

6.4. Right to Repair measures reflect the functioning of aftermarkets – markets for parts, repairs and services purchased *after* the initial purchase of a product from the Original Equipment Manufacturer (OEM). In these aftermarkets, consumers' ability to access parts and services may be determined to a large extent by the OEM itself. In some instances, OEMs may have an incentive to restrict consumers' ability to access these aftermarkets by preventing third parties from providing repair and maintenance services. These restrictions,

¹⁰ 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

¹¹ eWASA (n.d.), "Extended Producer Responsibility (EPR) in South Africa", Available online: <https://ewasa.org/epr/>

¹² Circularity refers to design and production practices aimed at reducing waste by making it easier to recycle products or their components.

¹³ 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

under certain circumstances, may lead to a lessening of competition, and consumer harm.

7. The Commission developed and released The Guidelines for Competition in South African Automotive Aftermarkets in 2021 in response to allegations of anti-competitive conduct in automotive repair, service, and maintenance aftermarkets. The conduct implicated several actors in the value chain including OEMs, insurers, and authorised auto repair, service, and maintenance providers. The Commission has subsequently observed that similar concerns have emerged regarding electronic devices, appliances, digital equipment and other durable goods.
8. The purpose of this background note is to a) illustrate the need for provisions and guidance targeted at the right to repair, b) discuss the economic principles underpinning how the Commission (and regulators in generally) would assess conduct in repair aftermarkets and c) review international experience on aftermarkets and instances where conduct may raise competition concerns. The background note is prepared in support of the Commission's Guideline on repair, service, and maintenance aftermarkets, a draft of which is to be published in the Government Gazette alongside this background note.

2. South African Repair, Service, and Maintenance Market Context

9. Repair requirements for goods supplied in South Africa are primarily governed by the Consumer Protection Act (CPA). The CPA provides consumers with the right to receive goods that are of an acceptable quality, fit for their intended purpose, durable for a reasonable period, and compliant with applicable standards.
10. The CPA provides consumers with an implied warranty for all goods sold and bought within South Africa. The implied warranty is in effect for six months from the date of delivery. Under the implied warranty, consumers may, in certain circumstances, return defective or unsafe goods and choose to have the goods repaired, replaced, or refunded. The CPA further provides a three-month warranty on replacement parts and the labour required to install those parts. These protections are statutory minimum obligations that apply to manufacturers,

importers, distributors, or retailers.¹⁴ However, manufactures, importers, distributors or retailers also apply express warranties that go beyond the scope of the implied warranty or apply for an extended period. Express warranties are part of the can be part of the competitive dynamics between manufacturers, importers, distributors or retailers.

11. Repair, service and maintenance aftermarkets also fall in the scope of the National Regulator for Compulsory Specification Act No. 5 of 2008 (The NRCS Act). This act provides that no person may import, sell or supply goods or services for which compulsory specifications apply unless they meet the relevant specifications and only where the good or services comply with the specification and bear the prescribed distinctive mark.
12. Furthermore, South Africa's Extended Producer Responsibility (EPR) framework established under the National Environment Management: Waste Act, 2008, seeks to promote more environmentally sustainable product life cycles. The EPR Regulations require producers to take responsibility for products throughout the post-consumer phase of the product lifecycle and seek to reduce waste through increased reuse, refurbishment, repair and recycling. The objectives of the EPR include supporting the development of secondary markets for the reuse, refurbishment, repair and recycling of products and components. In doing so, the EPR framework recognises the importance of secondary markets and circular economy activities that extend product lifespans and recover value from products and components.
13. Notwithstanding the existence of these frameworks, industry participants and right to repair advocates have expressed concerns that South Africa does not have a framework to support access to repairs after warranty periods lapse.¹⁵ These concerns have become salient as South African households deal with erratic electricity supply, which may damage their appliances and electronic goods.¹⁶ Industry participants have also reported facing challenges in accessing spare parts, repair information, diagnostic tools, software, technical support and other

¹⁴ Consumer Protection Act 68 of 2008, sections 55–57.

¹⁵ Ndlovu, N. (2024). "Pressure on South Africa to introduce 'right to repair' rules. Available online: [Pressure on South Africa to introduce 'right to repair' rules](#)

¹⁶ IT Web. (2026). Repair vs replace for home appliance: What you need to know. Available online: <https://www.itweb.co.za/article/repair-vs-replace-for-home-appliances-what-you-need-to-know/GxwQDM1DYQj7IPVo>

inputs required to undertake repairs.¹⁷ These restrictions, where they exist, limit an ISPs ability to compete and may reduce consumer choice and impact the effective functioning of repair and maintenance aftermarkets.

14. To better understand the challenges faced by ISPs in repair and maintenance aftermarkets, the Commission engaged an independent research agency to conduct a series of focus group discussions (FGDs) with ISPs across product categories.

14.1. *Factors that limit ISP participation in repair and maintenance aftermarkets* FGD participants reported facing several barriers that affected their ability to effectively provide repair and maintenance services. Across several products, respondents noted that access to parts and technical information was a challenge, especially for older or discontinued products. Further, participants reported that ISPs faced higher procurement costs for repair inputs, especially when compared to OEM authorised repairers. Other constraints reported included weaker supplier relationships, restricted access to information, all of which reduced their ability to compete with larger or authorised firms. A notable exception was the medical diagnostic equipment sector, where respondents considered restrictions to be largely driven by regulatory, safety and accreditation requirements given the life-critical nature of many devices.

14.2. *Challenges faced when undertaking repairs and maintenance:* FGD participants noted the increasing complexity of repairs stemming from product designs, software restrictions and the growing technical sophistication of products. Common issues raised included software locks, component restrictions, and the need for specialised tools to conduct repairs which raised the cost and time of repairs. Notably, participants stated that technical restrictions made repairs difficult even where physical access to a product is possible.

14.3. *Procurement of parts, manuals and diagnostic tools:* ISPs reported that they relied on informal channels, online marketplaces, supplier networks or

¹⁷ Ndlovu, N. (2026). "South Africa's right-to-repair vacuum". Available online: [South Africa's right-to-repair vacuum](#)

recycling for parts and other tools. This is because OEM supply channels were unavailable, inconsistent or difficult to access. Other procurement challenges report by respondents included parts shortages, discontinued products, fluctuating prices, and lengthy delivery times. Further, participants reported that access to technical documents, diagnostic software, and repair information can vary depending on the product or manufacturers. In instances where OEMs controlled access, ISPs reported relying on alternative information sources or informal networks.

14.4. *OEM support and communication:* FGD participants reported that OEM support and documentation is limited, inconsistent or depends on whether a repairer is authorised or not. Specially, technical support and guidance was often restricted leading to repairers relying on informal learning channels such as peer network and online forums. Where training and certification is available, participants expressed that it was expensive for ISPs. Further, participants raised the issue of inadequate communication about parts availability, product changes, stock shortages and pricing adjustments.

14.5. *Warranties and other regulatory requirements:* FGD participants also identified warranty conditions as a factor that may encourage consumers to use authorised repairers instead of ISPs. In the highly specialised medical diagnostic equipment sector, participation was also influenced by regulatory requirements designed to protect patient safety. As a result, manufacturers and regulators may require repairs to be undertaken by authorised or accredited providers where equipment is used in life-saving or life-critical contexts. The Commission notes that, while these requirements may affect the competitive position of independent repairers, they are governed by separate legal and regulatory frameworks and generally fall within the rights and obligations of manufacturers and the relevant regulators. Accordingly, these issues fall outside the primary scope of the guidance note, except insofar as they may affect access to repair inputs in out-of-warranty repair markets.

3. Economic framework for aftermarkets: repairs, service, and maintenance

15. Repair and maintenance services are aftermarkets – markets for goods and services purchased after the initial purchase of a product in the primary market.¹⁸

Aftermarkets are distinct in that participation, whether as an Independent Service Provider (ISP) or consumer, is 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.¹⁹

16. Robust competition in aftermarkets can benefit consumers in numerous ways:²⁰

16.1. Competition can ensure that consumers have access to affordable and high-quality repair and maintenance services for their goods.²¹

16.2. Competition could also contribute to extending product lifecycles and the development of markets for refurbished goods in support of sustainability principles.²²

16.3. Lastly, competition in repair and maintenance markets may also promote innovations in products that enhance the quality, convenience and variety of repair services on offer to consumers.²³

16.4. Conversely, where the functioning of aftermarkets is inhibited or restricted by the OEM, this can lead to poorer outcomes for consumers through high prices or limited choice for repairs, services, and maintenance.²⁴

¹⁸ Lang, J.T. (2011), "Practical aspects of Aftermarket in European Competition Law". Competition Policy International, Volume 7(1)

¹⁹ United States FTC and DOJ (2018), FTC submission_Aftermarkets.pdf

²⁰ Australian Government Productivity Commission (2021), "Right to Repair: Productivity Commission Inquiry Report", Available online: <https://www.pc.gov.au/inquiries-and-research/repair/report/>

²¹ Australian Government Productivity Commission (2021), "Right to Repair: Productivity Commission Inquiry Report", Available online: <https://www.pc.gov.au/inquiries-and-research/repair/report/>; 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>

²² European Union (2024), OJ_L_202401799_EN_TXT.pdf; European Commission (2023), CELEX_52023SC0059_EN_TXT.pdf.

²³ Federal Trade Commission and United States Department of Justice (2018), "Competition Issues in Aftermarkets", OECD Competition Committee Submission

²⁴ Federal Trade Commission (2021), "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", Available online: https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf

17. Repair and service aftermarkets can be structured in different ways that influence the nature of competition within them.²⁵ These configurations are based on the business models or strategic choices of OEMs as well as the technical characteristics of primary products:

17.1. *A market for systems:* A systems 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”.²⁶ In systems markets, competition takes place in the primary market since consumers do not separate repairs from the primary purchase when making their purchasing decisions.

17.2. *Multiple markets:* Multiple markets describe a situation where there are distinct markets 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 where there are multiple markets.²⁷

17.3. The distinction between systems and multiple markets is central to competition analysis in aftermarkets. In some circumstances, competition in the primary market may constrain behaviour in secondary markets because consumers take account of the lifetime costs of ownership when purchasing the primary product. In other cases, customers may be effectively “locked-in” after purchasing the primary product, allowing an OEM to exercise market power in aftermarket products or services notwithstanding competition in the primary market. This distinction has featured prominently in competition law and economic analysis of aftermarkets.

²⁵ Lang, J.T, (2011), “Practical aspects of Aftermarket in European Competition Law”. Competition Policy International, Volume 7(1).

²⁶ 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

²⁷ Eastman Kodak Co. v Image Technical Services, 504 U.S. 451 (1992); Lang, J.T, (2011), “Practical aspects of Aftermarket in European Competition Law”. Competition Policy International, Volume 7(1);

17.4. *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.²⁸

18. Linked to the nature of the market is the strategy employed by the OEM for providing aftermarket services. The strategy used by the OEM will carry implications for the nature and extent of competition in these aftermarkets.²⁹ For example:

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

18.2. OEMs may not participate at all in aftermarkets. In these cases, repairs and maintenance are provided by ISPs or by consumers themselves.

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

19. The commercial decisions made by OEMs, as the suppliers of the primary product, may restrict the repair and maintenance options available to consumers. However, limited participation in repair and maintenance aftermarkets may not always mean harm to consumers.³⁰ A lack of an active aftermarket may also reflect a situation where there is a general lack of demand for maintenance or repairs such as a durable product that does not require regular repairs or maintenance or a product where replacement is cheaper than repairs.

Anti-competitive conduct in aftermarkets

20. Anti-competitive conduct in repair, service, and maintenance aftermarkets may arise where OEMs are active in the repair, service, and maintenance market (themselves or through authorised repairs) and face market conditions that confer

²⁸ Lang, J.T. (2011), "Practical aspects of Aftermarket in European Competition Law". Competition Policy International, Volume 7(1).

²⁹ Australian Government Productivity Commission (2021), "Right to Repair: Productivity Commission Inquiry Report", Available online: <https://www.pc.gov.au/inquiries-and-research/repair/report/>

³⁰ Federal Trade Commission and United States Department of Justice (2018), "Competition Issues in Aftermarkets", OECD Competition Committee Submission; Lang, J.T. (2011), "Practical aspects of Aftermarket in European Competition Law". Competition Policy International, Volume 7(1);

them with market power. Market conditions that may be associated with the existence of market power in aftermarkets include:

- 20.1. *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 customers is smaller relative to the number of existing customers. This is because new customers may be deterred by the knowledge (if it is available) of higher aftermarket prices and therefore choose competing and cheaper alternatives. On the contrary, existing customers may not be able to quickly switch in response to higher prices.³¹
- 20.2. *The ability to price discriminate in favour of new purchasers:* In instances where firms can credibly identify and separate new customers from existing customers, suppliers may have an incentive to charge lower prices to new customers to encourage their entry into the market and higher prices to existing customers who are “locked-in”.³²
- 20.3. *The size of switching costs:* Switching costs may discourage customers from changing to more affordable aftermarket suppliers in cases where the cost of switching is higher than the benefits or savings that flow from making the switch. Switching costs will typically be higher for complex and durable goods that are difficult to replace.³³
- 20.4. *The quality of information available to customers:* Market power in aftermarkets could be strengthened by whether consumers made their primary market purchases in possession of information about the need and price of aftermarket products. Where this information is not available, the link between the primary and aftermarket is weakened, creating the conditions for market power in the aftermarkets. Linked to the quality of information is whether customers have a sophisticated understanding of the market.³⁴

³¹ Bishop, S & Walker, M (2010) “The Economics of EC Competition Law: Concepts, Application and Measurement”, para 6 – 022;

³² Bishop, S & Walker, M (2010) “The Economics of EC Competition Law: Concepts, Application and Measurement”, para 6 – 023.

³³ Bishop, S & Walker, M (2010) “The Economics of EC Competition Law: Concepts, Application and Measurement”, para 6 – 024.

³⁴ Bishop, S & Walker, M (2010) “The Economics of EC Competition Law: Concepts, Application and Measurement”, para 6 – 025.

20.5. *The number of markets where the selling firm is active:* Firms that behave opportunistically in the supply of secondary market products or services could develop a reputation for doing so. In these instances, anti-competitive behaviour could negatively affect sales of its other products as well as of the primary market product. The importance of reputation may affect a firms incentive to engage in anti-competitive behaviour in the secondary market.³⁵

20.6. *The strength of system competition:* There is often a link between the degree of competition in primary market and that in the secondary market. As consumers typically purchase a combination of the primary and secondary products, it will be the total cost of these that is important. It is, therefore, possible for manufactures to earn low margins in the primary market and higher margins in the secondary market.³⁶

21. Importantly the OEM need not be present in the secondary market in order to have market power given the potential ability of the OEM to dictate the specific conditions and market dynamics in the secondary market.

22. Following from this are several categories of behaviours that can be undertaken in aftermarkets with the effect of impeding competition:

22.1. **Anti-competitive tying:** Tying is when the sale of one product (the tying product) by a firm is conditional on the customer also purchasing a second product (the tied product) from the same firm. OEM restrictions on aftermarket parts or services such as requiring customer to use only OEM (or OEM-authorized) parts and repairers may be perceived as an attempt to engage in anti-competitive tying.³⁷ This conduct may be explicitly stated by the manufacturer or implicitly through the OEMs refusing to sell products

³⁵ Bishop, S & Walker, M (2010) "The Economics of EC Competition Law: Concepts, Application and Measurement", para 6-026.

³⁶ Bishop, S & Walker, M (2010) "The Economics of EC Competition Law: Concepts, Application and Measurement", para 6-027.

³⁷ Hilti AG v Commission (Case C-53/92 P, 1994).

separately of a bundle of other, unrelated goods or by voiding warranties where the customer does not use the OEM in the aftermarket.³⁸

22.2. Refusals to deal: An OEM could also harm competition in the aftermarket by refusing to supply products to downstream competitors in the aftermarket. In practice, these refusals can take on various forms: refusing to disclose technical information required by competitors to effectively compete; price discrimination aimed at raising aftermarket rivals' costs; refusals to supply spare parts or unreasonable delays in doing so; or any other conduct aimed at raising rivals' costs.³⁹

22.3. Intellectual property restrictions: Repair and maintenance services may require divulging information and parts that are proprietary and protected by a patent or another intellectual property (IP) right creating potential risks for the OEM. While the protection of IP rights can provide an incentive for firms to innovate, IP restraints that extend beyond protecting the rights of an IP holder, and ultimately prevent competition, may warrant scrutiny.⁴⁰

22.4. Design and marketing choices: Design-related restrictions may include software locks, digital authentication systems, embedded diagnostics, restrictions on interoperability, and other technological measures that increase the cost or complexity of repairs by ISPs. Such restrictions may have legitimate objectives, including safety, cybersecurity, or quality assurance, but may also have the effect of limiting competition where they unnecessarily restrict independent repair activities.

³⁸ Organisation for Economic Co-operation and Development (2017), "Competition Issues in Aftermarkets", Available online: https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/04/competition-issues-in-aftermarkets_a9413c03/82258734-en.pdf

³⁹ Organisation for Economic Co-operation and Development (2017), "Competition Issues in Aftermarkets", Available online: https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/04/competition-issues-in-aftermarkets_a9413c03/82258734-en.pdf; European Commission, Hugin/Liptons Decision (1977); Hugin v Commission (Case 22/78, 1979); CEHR v Commission (Case T-712/14, 2017).

⁴⁰ Organisation for Economic Co-operation and Development (2017), "Competition Issues in Aftermarkets", Available online: https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/04/competition-issues-in-aftermarkets_a9413c03/82258734-en.pdf; Australian Government Productivity Commission (2021), "Right to Repair: Productivity Commission Inquiry Report", Available online: <https://www.pc.gov.au/inquiries-and-research/repair/report/>; Federal Trade Commission (2021), "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", Available online: https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf

4. Interventions in repair, service, and maintenance aftermarkets

23. Internationally, approaches to interventions in repair, service, and maintenance aftermarkets fall into three categories:

23.1. **Competition law and policy** where the aim is to remove restrictions that impair competition and harm consumers through higher prices or limited choice. The potential problems discussed above are typically the subject of competition law interventions.

23.2. **Sustainability regulations** focused on Right to Repair as a complementary tool to other policies aimed at more environmentally sustainable production and consumption.

23.3. **Consumer protection** which is more narrowly focused on ensuring that warranty terms do not restrict consumer choices through being overly restrictive.

24. These approaches are not mutually exclusive and share many common elements regarding the repair, service, and maintenance obligations placed by OEMs on ISPs. Below we provide an overview of interventions in other jurisdictions related to the right to repair.

3.1 Competition Law and Policy

25. There have been several investigations into the state of competition in repair and maintenance aftermarkets by competition authorities and other policymakers.

3.1.1 Selected international case precedent on repair, service and maintenance aftermarkets.

26. The legal and economic approach to the analysis of repair, service and maintenance aftermarkets has been developed through several important decisions in the United States and the European Union. These cases form the foundation for how competition authorities, practitioners and courts assess market definition, market power and anti-competitive conduct in aftermarkets. They also illustrate the circumstances under which restrictions on access to spare parts,

technical information, repair services and complementary products may raise competition concerns.

27. Hugin Kassaregister AB v Liptons (1977 and 1979)

27.1. *Hugin / Liptons* concerned Hugin's refusal to supply spare parts for Hugin cash registers to Liptons, which was an independent repair, maintenance, service, reconditioning and rental provider of Hugin cash registers. Consequently, Liptons purchased spare parts from Hugin and had done so since the late 1950s developing a substantial business servicing and reconditioning Hugin machines.⁴¹

27.2. Liptons was appointed as the main agent to sell Hugin cash registers in England, Scotland, and Wales with the right to service and repair cash registers in 1969. At this point, the commercial relationship was between the Hugin's importer and Lipton. In 1972, a newly created Hugin subsidiary entered the England, Scotland, and Wales market and following the expiry of the original agency agreement in May 1972 supplies of Hugin parts ceased to Lipton ceased in October 1972.⁴²

27.3. The impugned conduct was Hugin's policy to supply Hugin spare parts within their own distribution and service network through:⁴³

27.3.1. Refusing to supply spare parts to Liptons for the servicing and repair of Hugin cash registers.

27.3.2. Refusing requests by Liptons to purchase spare parts from Hugin and its subsidiaries.

27.3.3. Preventing subsidiaries and distributors in other European Union member states from supply spare parts outside the Hugin distribution network.

⁴¹ Hugin/Liptons, Commission Decision 78/68/EEC, OJ 1978 L 22/23, paras 7–17

⁴² Hugin/Liptons, Commission Decision 78/68/EEC, OJ 1978 L 22/23, paras 7–17

⁴³ Hugin/Liptons, Commission Decision 78/68/EEC, OJ 1978 L 22/23, paras 18–29, 42–46.

27.3.4. Maintaining a policy that made spare parts available to Hugin companies and authorised dealers only for their own use and not for resale.

27.4. Hugin's justification for their conduct was that cash registers, being technically complex products, required specialist knowledge, training, manuals and service support. Unrestricted third-party repairs, Hugin argued, could be result in inferior work that risked damaging Hugin's reputation and goodwill. Hugin also argued that spare parts were an integrated component of its maintenance and service business and not a separate product.⁴⁴

27.5. In its assessment, the Commission treated Hugin spare parts as a distinct market arguing that Hugin spare parts were not substitutable with parts made by competing manufacturers. The Commission's reasoning did not account for lifecycle costs; consumers' ability calculate the lifecycle cost at the time of purchase; or Hugin's competitive position in the primary market. Rather, it was based on technical exclusivity and dependence. The Commission therefore concluded that at the moment of purchase, a consumer became dependent on Hugin for spare parts and repair and maintenance of their matching. This dependence granted Hugin market power through a dominant position in the market for Hugin spare parts and associated maintenance and repairs.⁴⁵

27.6. The Commission found that Hugin's refusal to supply prevented independent firms from competing in the maintenance, repair and reconditioning of Hugin cash registers as spare parts were indispensable for doing so. Customers of Hugin cash registers found to have been deprived of their freedom to choose alternative service providers, forcing them to rely on Hugin and its authorised network for maintenance and repairs. Hugin's conduct was also found to have restricted competition in related markets for i) maintenance and repair services; ii) reconditioned Hugin cash registers; and iii) rental markets for Hugin cash registers.⁴⁶

⁴⁴ Hugin/Liptons, Commission Decision 78/68/EEC, OJ 1978 L 22/23, paras 51–58.

⁴⁵ Hugin/Liptons, Commission Decision 78/68/EEC, OJ 1978 L 22/23, paras 31 – 41, 59 – 68.

⁴⁶ Hugin/Liptons, Commission Decision 78/68/EEC, OJ 1978 L 22/23, paras 69–79.

27.7. The Court of Justice of the European Communities overturned the Commission's decision on the basis that Article 86 of the TFEU only applied to conduct capable of affecting trade between Member States. The Court however held most of the principles applied by the Commission in the original decision. A key divergence between the Court and Commission concerned whether and how end-users participated in the markets for services and parts. Whereas the Commission reasoned that purchasers of Hugin cash registers participated in the spare parts markets, the Court held that end-users purchased maintenance and repair services with technicians then being the customers for spare parts. However, the Court agreed that there was a separate market for Hugin spare parts.⁴⁷

27.8. In conclusion, the Court largely accepted the Commission's aftermarket economics and dominance analysis, however it overturned the decision because the Commission failed to establish the requirement under Article 86 that the conduct affected trade between Member States.

28. *Eastman Kodak co. v. Image Technical Services Inc.*, 504 U.S. 451 (1992)

28.1. Eastman Kodak concerned Kodak's efforts to restrict independent service organisations from offering repair services to customers and steering customers towards Kodak's service. The primary market was the market for photocopiers and micrographic equipment with the aftermarkets being the markets for parts and service. The impugned conduct was wide-ranging with evidence showing that Kodak:⁴⁸

28.1.1. Sold replacement parts only to customers who used Kodak's service or serviced their own equipment.

28.1.2. Restricted OEMs from selling compatible parts to Independent Service Organisations (ISOs).

28.1.3. Placed pressure on equipment owners and distributors not to supply parts to ISOs.

⁴⁷ Hugin Kassaregister AB v. Commission, Case 22/78 [1979] ECR 1869, paras 15–23, 31–42.

⁴⁸ Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451 (1992), 458–463.

28.1.4. Restricted access to used machines and other alternative sources of spare parts.

28.2. Kodak argued that it was subject to systems competition as competition in the equipment market constrained parts and service prices since customers engaged in lifecycle costing when making their purchasing decisions. As such, Kodak argued that it was constrained by competition in the primary market, which prevent it from exercising market power in aftermarkets despite its high market share in the parts and services market. Accordingly, Kodak argued that it could not exercise market power in aftermarket as it would lose equipment sales.⁴⁹

28.3. The Supreme Court rejected Kodak's reasoning holding that a lack of market power in the primary market does not necessarily preclude market power in derivative aftermarkets and that in some circumstances, a single brand can constitute a relevant market.⁵⁰

28.4. In coming to this conclusion on the relevant markets, the Supreme Court had asked what were the commercial realities faced by Kodak equipment owners. Specifically, the Supreme Court asked whether these commercial realities warranted treating Kodak parts as a distinct market and Kodak service as a distinct market. The Court held that there was sufficient evidence to conclude that Kodak-specific aftermarkets could constitute relevant antitrust markets. Kodak parts were not interchangeable with other manufactures parts and Kodak equipment owners did not have substitutes once they have purchased Kodak machines.⁵¹

28.5. In response to Kodak's assertion that it was subject to systems competition, the Supreme Court examined whether customers could accurately calculate lifecycle cost when purchasing Kodak's equipment. Lifecycle pricing in this instance was found to be difficult since consumers lacked crucial information on future repair costs; future parts prices; future

⁴⁹ Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451 (1992), 465-477.

⁵⁰ Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451 (1992), 481-486

⁵¹ Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451 (1992), 481-482.

service prices; breakdown rates; and downtime costs over the equipment's lifespan.⁵²

28.6. Furthermore, the evidence suggested that switching costs were also found to be prohibitively high. Kodak equipment involved large sunk investments and customers bought complimentary products that only worked with Kodak equipment. These realities showed that once purchased, Kodak customers were locked into Kodak services and sparts allowing Kodak to exploit its position in the aftermarket without a corresponding loss of equipment sales.⁵³

28.7. The Supreme Court ultimately held that Kodak failed to show that competition in primary market for equipment constrained equipment in the aftermarkets.⁵⁴

29. *Hilti AG v Commission (1994)*

29.1. Hilti AG, a Liechtenstein-based manufacturer of power-actuated fastening (PAF) systems used in the construction industry. Hilti AG's product range included nail guns, cartridge strips, cartridges, and nails. A complete PAF system therefore consisted of the nail gun as well as compatible nails and cartridge strips used to fasten construction materials. Several independent manufactures produced and distributed nails that were compatible with Hilti's nail guns and since the 1960s other independent manufacturers manufactured nails designed specifically for use in Hilti nails gun. Some specialised in the exclusive production of these nails. In its investigation, the European Commission found that Hilti had engaged in a range of practices intended to hinder the entry and expansion of independent producers who were capable of producing nails compatible with Hilti nails.⁵⁵

29.2. Hilti's conduct included:⁵⁶

⁵² Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451 (1992), 473–477

⁵³ Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451 (1992), 476–477

⁵⁴ Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451 (1992), 476–477

⁵⁵ Hilti AG v Commission, Case C-53/92 P [1994] ECR I-667, paras 7–16, 67–73

⁵⁶ Hilti AG v Commission, Case C-53/92 P [1994] ECR I-667, paras 11–16, 74–90.

- 29.2.1. Tying nails and cartridges to Hilti nail guns by representing that only Hilti consumables should be used with Hilti tools, thereby treating the PAF system as closed.
- 29.2.2. Levering its posting in cartridge strips by refusing to sell cartridge strips to customers who purchased nails from independent manufacturers.
- 29.2.3. Pressuring distributors and customers not to deal with competing nail manufacturers.
- 29.2.4. Using intellectual property and regulatory complaints to discourage independent producers from manufacturing or marketing nails that were compatible with Hilti nail guns.
- 29.2.5. Seeking to ensure that users of Hilti nail guns would purchase Hilti nails rather than compatible alternatives offered by independent rivals.
- 29.3. In its justification of the impugned conduct, Hilti argued that the relevant market was a systems market as Hilti's nail guns, nails, and cartridge strips formed an indivisible fastening system. These products therefore could not be viewed as separate products. Consequently, Hilti argued that it was constrained in the broader market for construction fastening systems, which included alternative fastening methods including drilling and screwing systems. Based on its description of the market, Hilti submitted that it was constrained from exercising market power.⁵⁷
- 29.4. The Commission and the Court, on subsequent appeal, rejected Hilti's argument that the market was a broad market including all fastening systems. Rather, separate product markets existed for i) nail guns; ii) cartridge strips and cartridges; and iii) nails. In reaching this conclusion, the Court had regard to several facts on the commercial realities in these markets:⁵⁸
- 29.4.1. Cartridge strips and nails were specifically manufactured and purchased for use with a single brand of nail gun.

⁵⁷ Hilti AG v Commission, Case C-53/92 P [1994] ECR I-667, paras 32–39.

⁵⁸ Hilti AG v Commission, Case C-53/92 P [1994] ECR I-667, paras 41–56.

29.4.2. Independent producers had a long history of manufacturing nails specifically designed for Hilti tools, which was indicator of a separate market for compatible nails.

29.4.3. European Community competition law permitted independent manufacturers to produce compatible products provided that doing so did not infringe on intellectual property rights.

29.4.4. PAF systems had unique technical characteristics, making them the preferred fastening solution in many construction applications. Users regarding alternatives as impractical substitutes with market share analysis confirmed the limited substitutability between systems.

30. *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission (2017)*

30.1. This case concerned several Swiss luxury watch manufacturers that progressively stopped supplying spare parts to independent watch repairers. The complaint was brought an industry association representing independent watch repairers, the Confédération européenne des associations d'horlogers-réparateurs (CEAHR). The independent repairs alleged that manufacturers were using “selective repair systems” and restrictions on access to spare parts to foreclose competition in the repair and maintenance of prestige watches.⁵⁹

30.2. The alleged conduct included:⁶⁰

30.2.1. Progressively refusing to supply spare parts to independent watch repairers and limiting access to spare parts to authorised repairers within their repair networks.

30.2.2. Establishing exclusive repair systems where repairers could only obtain authorisation if they met specific requirements related to training, experience, equipment, tools, stockholding and premises.

⁵⁹ *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission*, Case T-712/14 [2017] ECLI:EU:T:2017:748, paras 1–17, 27–35.

⁶⁰ *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission*, Case T-712/14 [2017] ECLI:EU:T:2017:748, paras 12–15, 17–18, 21–23.

30.2.3.Restricting authorised repairers from reselling spare parts to unauthorised independent repairers.

30.2.4.Creating authorised repair networks and in-house repair centres with access to brand-specific spare parts, technical information, and specialised tools required to service luxury watches.

30.3. In justification of their conduct, the manufacturers argued that as sophisticated products, prestige watches required specific expertise to ensure high-quality repairs and the proper functioning of the watches. Repairers, therefore, needed to possess the necessary training, experience, tools, equipment and technical knowledge to offer repairs. Manufacturers further contented that prestige watches were becoming more complex and technically sophisticated, which justified limited access to spare parts only to those repairers who met stringent technical and professional standards. Other justifications for limiting repairs to authorised dealers included the need to maintain uniform and high repair standards, preventing counterfeiting and preserving the quality, reliability, brand image and exclusivity of the watches.⁶¹

30.4. The Commission's assessment found that the market for prestige watches constituted the primary market with the markets for repair services and spare parts being the secondary market or aftermarkets. The complainants argued that manufacturers held market power in the repair services and spare parts markets because they were controlled by each manufacturer. The General Court accepted that separate aftermarkets could exist for repair services and spare parts associated with particular watch brands.⁶²

30.4.1. There was limited substitutability between the repair services for different watch brands. Therefore, repair services could be considered brand-specific markets.

⁶¹ *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission*, Case T-712/14 [2017] ECLI:EU:T:2017:748, paras 18, 21, 60–70.

⁶² *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission*, Case T-712/14 [2017] ECLI:EU:T:2017:748, paras 13–16, 121–125.

- 30.4.2. Spare parts were generally brand-specific and therefore not interchangeable across manufacturers.
- 30.4.3. In cases where viable substitutes existed, consumers preferred original branded parts to preserve the value of the watches.
- 30.5. Despite finding that separate markets existing and that dominance could not be ruled out, the Commission and Court found that the conduct did not contravene Articles 101 or 102 for the following reasons:⁶³
- 30.5.1. The repair systems established by manufacturers were not closed from competition since manufacturers did not reserve repairs exclusively to themselves. Rather, independent repairers could become authorised repairs provided they met objective criteria relating to: i) training; ii) experience; iii) equipment; iv) tools; v) stock of these spare parts; and vi) premises.
- 30.5.2. Competition in the repair markets still existed on several dimensions, specifically between authorised repairers and between authorised repairers and manufacture in-house repairs.
- 30.5.3. Independent repairers were allowed to join authorised networks, provided they met the criteria and there was evidence that many had done so. Further, authorised repairers could also often repair multiple brands and were not prohibited from doing so.
- 30.6. The Commission and Court found that the manufacturer's objective justifications were plausible and held that preserving product and ensuring proper use are recognised justifications for qualitative systems. The Court also accepted counterfeiting and technical complexity as legitimate justification.⁶⁴
- 30.7. It is important to note that the Court distinguished these factors from mere prestige by referring to an earlier decision in *Pierre Fabre Dermo-*

⁶³ *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission*, Case T-712/14 [2017] ECLI:EU:T:2017:748, paras 17, 21–24, 94–98, 106–111.

⁶⁴ *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission*, Case T-712/14 [2017] ECLI:EU:T:2017:748, paras 60–70, 73–81

Comsetique, which held that preserving image is not, by itself, a legitimate objective capable of justifying restrictions of competition.⁶⁵

30.8. Regarding the Article 101 infringement of cartel conduct by the manufacturers, the Commission rejected this theory as the evidence showed that manufacturers acted independently, adopted different policies, and did not act simultaneously.⁶⁶

31. These decisions collectively demonstrate that competition concerns in repair, service, and maintenance markets are most likely to arise where consumers are locked in and where OEMs have the ability to restrict access to spare parts, technical information, repairs services or complementary products or services. Further, the decisions highlight that an assessment of anti-competitive conduct in these markets requires careful consideration of the commercial realities such as switching costs, interoperability, information asymmetries and potential efficiency justifications.

3.1.1 Regulations and guidelines on vertical restraints

32. The approach to aftermarket restrictions in both the European Union and the United Kingdom reflects principles developed through competition-law enforcement and case law. These principles have subsequently been codified in block exemption regulations and associated guidance governing vertical agreements, repair markets and spare parts distribution.

European Commission

33. In the European Union, restrictions that prevent end users, independent repairers, wholesalers or service providers from obtaining spare parts are treated as a hardcore restriction. Access to spare parts by end users, independent repairs, wholesalers and service providers is covered by the European Commission's Regulations and Guidelines on Vertical Agreements. The European Commission accepts that some vertical arrangements such as exclusive distribution, selective

⁶⁵ *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission*, Case T-712/14 [2017] ECLI:EU:T:2017:748, paras 65–67.

⁶⁶ *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission*, Case T-712/14 [2017] ECLI:EU:T:2017:748, paras 19, 126–132.

distribution and authorised dealer networks may have positive effects such as improving distribution, quality control, incentivising investment and customer services. As such, qualifying vertical agreements may benefit from a block exemption under the Vertical Block Exemption Regulation (VBER).⁶⁷

34. The VBER creates a safe harbour for vertical agreements where both the upstream and downstream firms hold market shares of 30% or less and the agreement does not contain hardcore restrictions – serious restrictions of competition.⁶⁸ If an agreement contains a hardcore restraint, it falls outside of the VBER safe harbour and must be assessed individually under Article 101 TFEU. Hardcore restraints include:

34.1. Resale price maintenance.⁶⁹

34.2. Restrictions on passive sales to customers outside designated territories.⁷⁰

34.3. Restrictions that prevent effective use of the internet for sales.⁷¹

34.4. Restrictions on cross-suppliers in selective distribution systems.⁷²

34.5. Restrictions on access to spare parts by end users, independent repairers, wholesalers, or service providers.⁷³

35. The European Commission does not consider authorised repair networks as inherently problematic and distinguishes between controlling the quality of repairs through authorised networks and excluding independent repairs from competing. Therefore, restrictions that prevent end users, independent repairers, wholesalers or service providers from obtaining spare parts are treated as a hardcore restriction that falls outside of the VBER.

36. The Guidelines further acknowledge that restrictions may arise indirectly through restricting the supply of technical information, diagnostic information, specialised

⁶⁷ European Commission (2022), *Guidelines on Vertical Restraints*, para 12 – 17;

⁶⁸ European Commission (2022), Vertical Block Exemption Regulations, Article 3.

⁶⁹ European Commission (2022), Vertical Block Exemption Regulations, Article 4(a)

⁷⁰ European Commission (2022), Vertical Block Exemption Regulations, Article 4(b) – (d).

⁷¹ European Commission (2022), Vertical Block Exemption Regulations, Article 4(e)

⁷² European Commission (2022), Vertical Block Exemption Regulations, Article 4(e)

⁷³ European Commission (2022), Vertical Block Exemption Regulations, Article 4(f)

equipment or other inputs that are necessary for repairers to use their spare parts effectively.

37. In addition to the general VBER framework, the European Commission has adopted a sector-specific regime for motor vehicles. The Motor Vehicle Block Exemption Regulation (MVBBER) and supplementary guidelines reflect the Commission's view that repair, maintenance and spare-parts aftermarkets in the motor vehicle sector are particularly vulnerable to foreclosure. The additional provisions under the MVBBER include:

37.1. Stronger protection for access to spare parts: The MVBBER places particular emphasis on preserving competition in motor vehicle spare-parts and repair aftermarkets and protecting the ability of independent operators to compete with authorised networks.⁷⁴

37.2. Technical information: The supplementary guidelines recognise that access to technical information, diagnostic tools, software, training and repair data may be necessary for independent repairers to compete effectively.⁷⁵

37.3. Competition constraints: The MVBBER recognises that competition in the primary market for vehicle sales may not constrain conduct in repair and maintenance markets.⁷⁶

38. Under the European Commission's approach to hardcore restraints, parties found to be restricting access to spare parts may demonstrate that the agreement qualifies for an individual exemption under Article 101(3) TFEU. Doing so requires that they meet all of the following cumulative requirements:

38.1. The agreement generates efficiencies.

38.2. Consumers receive benefits that outweigh the harms of the restriction.

38.3. The restriction is indispensable.

⁷⁴ European Commission (2022), Motor Vehicle Supplementary Guidelines, para 59 – 61.

⁷⁵ European Commission (2022), Motor Vehicle Supplementary Guidelines, para 62 – 68.

⁷⁶ European Commission (2022), Motor Vehicle Supplementary Guidelines, para 10 – 17.

38.4. Competition is not eliminated by the restriction.

39. If the parties are unable to satisfy the requirements for an individual exemption under Article 101(3), the agreement remains prohibited under Article 101(1). The restrictive provisions may be deemed unenforceable and may expose the parties to enforcement action, including the imposition of administrative fines.

United Kingdom

40. In the United Kingdom, agreements that prevent or restrict end users, independent repairers, wholesalers and service providers from obtaining spare parts directly from the manufactures of those spare parts are also treated as hardcore restrictions.⁷⁷ The Competition and Market Authority (CMA) Vertical Agreements Block Exemption Order (VABEO) 2022 exempts qualifying vertical agreements from the Chapter 1 prohibition in the Competition Act 1998. This prohibition prohibits agreements and concerted practices “*which have as their object or effect the prevention, restriction or distortion of competition within the UK and which may affect trade within the UK*”.⁷⁸

41. The VABEO established a safe harbour for vertical agreements where the supplier and buyer each hold market shares of 30% or less and where the agreement does not contain hardcore restrictions.⁷⁹ The hardcore restrictions prohibited by VABEO are the same as those prohibited by the VBER.⁸⁰ The guidance also recognises that restrictions on repair market competition may arise through indirect means, such as limiting access to technical information, diagnostic information, specialised equipment or other inputs required by independent repairers.

42. The CMA similarly does not regard authorised repair networks as inherently problematic and distinguished between arrangements that are required for maintaining quality standards and those that foreclose independent operators. The presence of a hardcore restriction, such as restrictions on repairs, does not

⁷⁷ Competition and Markets Authority (2022), Vertical Agreements Block Exemption Order, Section 8.

⁷⁸ Competition and Markets Authority (2022), Vertical Agreements Block Exemption Order, para 1.1 – 1.10

⁷⁹ Competition and Markets Authority (2022), Vertical Agreements Block Exemption Order, para 3.1 – 3.15

⁸⁰ Competition and Markets Authority (2022), Vertical Agreements Block Exemption Order, para 8.2

automatically render an agreement unlawful. Rather, the agreement no longer enjoys the VABEO safe harbour and requires an individual assessment.

43. The parties may demonstrate that the agreement generates sufficient efficiencies and benefits to justify the restriction. The parties must generally demonstrate that:

43.1. The agreement contributes economic benefits.⁸¹

43.2. Consumers receive a fair share of the resulting benefits.⁸²

43.3. The restriction is indispensable to achieving those benefits.⁸³

43.4. The statement does not eliminate competition in respect of a substantial part of the products concerned.⁸⁴

44. Where these requirements cannot be satisfied, the agreement remains prohibited under the Chapter I prohibition of the Competition Act 1998. The restrictive provisions may be unenforceable and may expose the parties to CMA enforcement action, including financial penalties.

3.1.2 Regulatory interventions

45. In addition to individual enforcement cases, regulatory authorities have undertaken market inquiries and regulatory interventions to assess and improve the functioning of repair, service and maintenance aftermarkets. Unlike competition cases, which examine the conduct of firms, these inquiries examined broader market features and sought to identify structural barriers to effective competition and opportunities for policy reform.

Australia

46. *Productivity Commission of Australia*: The Australian Productivity Commission undertook an inquiry into the Right to Repair in Australia. The scope of the inquiry was to examine the costs and benefits of strengthening the right to repair in Australia. The scope further included an assessment of the legal, regulatory, and

⁸¹ Competition and Markets Authority (2022), Vertical Agreements Block Exemption Order, para 10.30(a)

⁸² Competition and Markets Authority (2022), Vertical Agreements Block Exemption Order, para 10.30(b)

⁸³ Competition and Markets Authority (2022), Vertical Agreements Block Exemption Order, para 10.30(c)

⁸⁴ Competition and Markets Authority (2022), Vertical Agreements Block Exemption Order, para 10.30(d)

non-regulatory frameworks and their impact on consumers ability to repair faulty products.

46.1. To assess whether competition in Australian repair markets was being restricted to the detriment of consumers, the inquiry's framework considered the level of competition in repair markets. This assessment included whether measures such as concentration, barriers to entry, and profit margins indicated a lack of competition and whether there were specific instances of manufacturers restricting competition through limits on third party access to repair supplies or relevant information.

46.2. The assessment of whether repair restrictions harmed consumers focused on i) the extent to which consumers are locked-in to the repair markets making switching to an alternative manufacturer costly or difficult; ii) the extent to which consumers can estimate repair costs and factor them into purchasing decisions in the primary market; iii) the size of the repair market relative to the primary market since a larger repair market would strengthen the manufacturer's incentive to limit competition; iv) whether manufacturers have financial ties to the repair market since these ties could provide financial benefits to restricted competition; v) whether primary market competition leads to lower prices that compensate consumers for restricted competition in the repair market; vi) any adverse non-price outcomes for consumers; and vii) whether the risks from third party repairs are limited.

46.3. The Inquiry concluded that *"there is no evidence of a systemic competition problem across all product repair markets."*⁸⁵ However, the inquiry identified several markets where manufacturer restrictions may restrict competition and cause consumer harm as a result.

46.3.1. *Agricultural machinery:* The inquiry found that manufacturers and dealer restrictions on repairs were harming owners through higher prices for repairs, reduced access and choice, and financial risk stemming from repair delays.

⁸⁵ Australian Government Productivity Commission (2021), "Right to Repair: Productivity Commission Inquiry Report", Available online: <https://www.pc.gov.au/inquiries-and-research/repair/report/>

46.3.2. *Mobile phones and tablets:* While the inquiry found evidence of harm in this market, it concluded that it was insufficient to justify policy or regulatory intervention. The inquiry recommended that the Australian Competition and Consumer Commission (ACCC) undertake a market study.

46.3.3. *Medical devices:* The inquiry concluded that regulations aimed at reducing safety risks may themselves encourage repair restrictions. These regulations may generate harms through delays and higher repair costs. The inquiry recommended that the government conduct a review of device regulations to assess the balance between repair access and safety.

46.3.4. *Prestige watches:* The inquiry noted that while repair barriers from overseas manufacturers (e.g. restrictions on spare parts, refusals to provide repair equipment and components, and restrictions on supplying information) are unlikely to lead to substantial consumer harms, these practices may have a damaging effect on the viability of small independent watch repair businesses.

47. *ACCC Farm Machinery Inquiry:* The ACCC's inquiry examined competition and fair-trading issues in the markets for the direct sale of agricultural machinery and for after-sales services such as repairs.⁸⁶ The inquiry investigated whether manufacturer-imposed warranty limitations and technological restrictions could impede competition in the aftersales market. Furthermore, the control over and use of the data generated from machinery and other sources on farms was highlighted as an emerging issue. Lastly, the inquiry also probed the existence of franchise agreements that include geographical restrictions on competition through assigning an area of responsibility or prime marketing area to agricultural machinery dealerships.⁸⁷

47.1. The inquiry found that general consumer guarantees did not apply to machinery purchases since these were not ordinarily used for personal,

⁸⁶ 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>

⁸⁷ 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>

domestic or household purposes. It also found that many warranties have significant limitations that are not fully understood by customers and that reportedly failed to consider the cost and complexity of operating and maintaining machinery. Regarding access to tools, technical information and parts, the inquiry found that farmers and independent repairs had limited access or no access to the diagnostic software tools required to carry out repairs. Lastly, concerns were raised regarding the interoperability between brands or between older and newer machinery as well as a lack of clarity on how consumer data is used.⁸⁸

47.2. To remedy the adverse findings on the state of competition in the aftersales market, the inquiry made several recommendations:⁸⁹

47.2.1. The inclusion of agricultural machinery in the existing motor vehicle service and repair information sharing scheme, which mandates access to diagnostic, repair, and service information on fair and reasonable commercial terms and in real time to promote competition among vehicle repairers. At the time of the inquiry, only passenger and light goods vehicles were covered by the scheme.

47.2.2. The inclusion of agricultural machinery in any broader right to repair scheme that Australia may adopt in the future.

47.2.3. Manufacturers and dealers provide clear and concise information to purchasers about warranties at the earliest opportunity in the sales process and before the point of sale.

47.2.4. Manufacturers and dealers provide information on how the data generated by farm machinery could be used and aggregated by manufacturers at the earliest opportunity in the sales process and before the point of sale.

⁸⁸ 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>

⁸⁹ 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>

47.2.5. Manufacturers continue to adopt ISO data standards to promote interoperability across brands.

47.2.6. Developing guidance materials to assist purchasers of agricultural machinery to understand their business and consumer rights.

South Africa

48. *Competition Commission of South Africa Automotive Aftermarket Guidance*: The Guidelines for Competition in the South African Automotives Aftermarkets have been in effect since July 2021. These guidelines emerged in response to several allegations of anti-competitive conduct in the automotives aftermarket value chain. The alleged conduct included exclusionary agreements or arrangements between OEMs and approved motor-body repairers; the exclusion of ISPs from the markets for service and maintenance and Mechanical Repairs for In-Warranty Motor Vehicles; unfair work allocation by insurers; restrictions on the sale of original spare parts to ISPs; high entry barriers for small and medium enterprises (SMEs) and historically disadvantaged individuals (HDIs); and lack of competition and consumer choice in the sale and fitment of spare parts. The objectives of the guideline are to correct for these adverse market features and enhance participation by SMEs and HDIs in the automotive aftermarkets value chain.

48.1. The guidelines serve to enable ISPs to provide in-warranty service, maintenance and repair work if consumers choose to make use of their services. Consumers are also permitted to choose between original and non-original spare parts for the duration of the in-warranty period. In the case of damage from using non-OEM parts, OEMs may not unilaterally void a warranty but should assess the damage and liability at their own cost. The guidelines further include measures to ensure that ISPs have access to spare parts and to the information and technical training required to serve consumers. However, this access may be made subject to training from the OEMs at a reasonable cost.

48.2. Other measures covered by the guidelines include measures to improve transparency in the appointment of repair service providers by insurance companies; unbundling the price of value-added service and maintenance

plans from vehicle prices to allow consumers to exercise greater choice; restrictions on ISPs on-selling OEM parts to third-parties; measures to establish fair and transparent processes for selecting approved dealers by OEMs; and a prohibition on anti-competitive information sharing between market participants.

3.2 Sustainability measures

49. Other jurisdictions have pursued regulatory interventions aimed at promoting durability, repairability and sustainable consumption. These measures are motivated by environmental objectives but address some the same issues as those identified in competition cases and inquiries namely, access to parts, repair information, software, and ISPs.

50. The European Union (EU) and United Kingdom's (UK) respective repair directives are part of each jurisdictions' Eco-Design Regulations.^{90 91} The Eco-Design Regulations include interventions that outline requirements for more sustainable product design and requirements for consumers to have more information concerning a good's durability and repairability at the point of sale. In both jurisdictions, these regulations apply to a specific set of goods.⁹² As such, the enforcement of a specific right to repair is therefore limited to those goods. Lastly, both regulations address only products that are out of warranty or beyond the seller's legal guarantee period.⁹³

European Union

51. *European Union Repair Directive*: The EU Repair Directive requires manufacturers to provide spare parts, repair and maintenance information as well as any related software tools, firmware, or auxiliary items. Manufacturers are prohibited from

⁹⁰ Directive 2024/1799 of the European Parliament and the Council of 13 June on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directive (EU) 2019/7771 and 2020/1828.

⁹¹ United Kingdom (2021), "The Ecodesign for Sustainable Products Regulations 2021 (UK SI 2021/745) — contents", Available online: <https://www.legislation.gov.uk/ukSI/2021/745/contents/made>

⁹² European Union: Household washing machines, household washer-dryers, household dishwashers, refrigerators, electronic displays (including televisions), welding equipment, vacuum cleaners, servers and data storage products, mobile phones, cordless phone and slate tablets, household tumble dryers, goods incorporating lights means of transport batteries.

United Kingdom: Household washing machines, household washer dryers, refrigerators, electronic displays, welding equipment, electric motors.

⁹³ United Kingdom (2021), "The Ecodesign for Sustainable Products Regulations 2021 (UK SI 2021/745) — contents", Available online: <https://www.legislation.gov.uk/ukSI/2021/745/contents/made>; Directive 2024/1799 of the European Parliament and the Council of 13 June on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directive (EU) 2019/7771 and 2020/1828.

using techniques or contractual clauses that impede the repair of goods covered by reparability requirements. Furthermore, information on the obligation to repair and related services must be made available to the market for the entire duration of the repair obligation. Lastly, repair prices must not be so high as to disincentivise consumers from exercising their right to have their goods repaired.

51.1. To facilitate competition in the repair market, the Directive includes a voluntary repair information form that ISPs may choose to provide customers. This form captures the defect details, repair price, and repair duration and is valid for 30 days. This 30-day period allows customers to shop around for more affordable repair options.

51.2. To further encourage repairs, the European Commission (EC) maintains a list of repairs providers and refurbished goods retailers in member states. Member states are required to take at least one measure to promote repairs. Lastly, sellers may loan consumers equivalent goods for the duration of the repairs. The directive includes a 12-month guarantee extension from the date when it came into effect.

United Kingdom

52. UK Eco-design for Energy-Related Products and Energy Information Regulations:

These regulations include provisions aimed at extending the life of certain products by making manufacturers, authorised representatives, and importers legally obliged to make spare parts available for the products for a period of between 7 to 10 years after the last unit of the model has been placed on the market. The exact duration of the obligation depends on the product in question.

52.1. Under the regulations spare parts must be replaceable using commonly available tools and without causing permanent damage to the equipment or the components thereof. Manufacturers must make repair and maintenance information available to professional repairers and publish the process for becoming a professional repairer on the manufacturer's website. Professional repairers must: (i) demonstrate technical expertise for repairs, and (ii) insurance for liability arising from their activities. Professional repairers must

be provided with the required maintenance information within one working day of having made the request.⁹⁴

3.3 General consumer protection

53. The United States' recent approach to the Right to Repair is focused on protecting the rights of consumers under the Magnuson-Moss Warranty Act (MMWA) at the federal level. At the same time, several states have passed right to repair laws intended to protect consumers' right to choose where they repair their products. Unlike the MMWA, the state laws often cover a subset of goods, which differs according to state.

United States of America

54. *United States report to Congress*: At the direction of the United States Congress, the Federal Trade Commission (FTC) gathered evidence on the types of repair restrictions that consumers and repairers had encountered.⁹⁵ The FTC also solicited responses and justifications for these restrictions from manufacturers. This process was motivated by a concern about the manufacturers' potential to limit repairs by consumers and repair shops and how those limitations could raise costs, limit choice and impact consumers' rights under the MMWA. The MMWA prohibits *"warrantors or consumer products from conditioning warranties on a consumer using any article or service which is identified by brand name unless the article or service is provided for free or the warrantor obtains a waiver from the Commission."*⁹⁶

54.1. Based on the evidence gathered, the FTC found that repair restrictions diluted the effectiveness of the above provision of the MMWA and *"steered consumers into manufacturers repair networks or to replace products before the end of their useful lives"*.⁹⁷ These issues included access to information,

⁹⁴ United Kingdom (2021), "The Ecodesign for Sustainable Products Regulations 2021 (UK SI 2021/745) — contents", Available online: <https://www.legislation.gov.uk/uksi/2021/745/contents/made>

⁹⁵ Federal Trade Commission (2021), "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", Available online: https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf

⁹⁶ Federal Trade Commission (2021), "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", Available online: https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf

⁹⁷ Federal Trade Commission (2021), "Nixing the Fix: An FTC Report to Congress on Repair Restrictions", Available online: https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf

manuals, spare parts and tools. To take this forward, the FTC committed to considering reinvigorated regulatory and law enforcement options alongside consumer education.

54.2. As a follow-up, the FTC issued a Policy Statement on Repair Restrictions imposed by Manufacturers and Sellers.⁹⁸ The Policy Statement noted that unlawful repair restrictions have not been a priority area for enforcement, therefore the FTC would commit more resources to combating these practices through prioritizing investigations under the MMWA and the Federal Trade Commission Act. The FTC urged the public to submit complaints to assist with better enforcement of the MMWA and its regulations. It further committed to scrutinising repair restrictions for violations of antitrust laws and to consider whether restrictions could constitute unfair acts or practices under the FTC Act. Lastly, the FTC committed to using an interdisciplinary approach to the issue by using resources from throughout the agency and collaborating with state law enforcement agencies and policymakers to ensure compliance and update laws and regulations.⁹⁹

54.3. In addition to the federal initiatives spearheaded by Congress and the FTC, several states¹⁰⁰ have passed right to repair laws (see Annexure 1) covering a variety of products and imposing different requirements onto manufacturers. While they differ in product coverage, all these laws emphasize fair and reasonable access to repair materials for owners and independent repairs; many ban practices that tie warranties or device functional to the use of OEM parts or service providers; some specify mandatory support durations and prohibit design or software practices that impede independent repairs.

5. Conclusion

55. International experience shows that concerns in repair, service and maintenance aftermarkets have been addressed using a combination of competition law

⁹⁸ Federal Trade Commission (2021), "Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers", Available online:

https://www.ftc.gov/system/files/documents/public_statements/1592330/p194400repairrestrictionspolicystatement.pdf

⁹⁹ Federal Trade Commission (2021), "Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers", Available online:

https://www.ftc.gov/system/files/documents/public_statements/1592330/p194400repairrestrictionspolicystatement.pdf

¹⁰⁰ California, Colorado, Maine, Massachusetts, Minnesota, New York, Oregon, Washington

enforcement, market inquires, sustainability regulation and consumer protection measures. While these instruments differ, they seek to address a common set of barriers to pairs such as restrictions on access to parts, technical information, diagnostic tools and software in order to open the market to allow for more choice and lower prices. Taken together, these instruments and interventions suggest that broader Right to Repair framework may have far reaching benefits for society spanning economic inclusion and environmentally sustainability.

56. Competition law has played an important role in developing the analytical framework for assessing repair restrictions. The cases reviewed above have been instrumental in shaping principles concerning market definition, the assessment of market power, and the assessment of anti-competitive conduct. The Commission has taken these lessons and applied in developing its Guidelines on Competition in Repair, Service, and Maintenance Markets. The purpose of the guidance to improve the functioning of repair markets and lower barriers to entry and expansion for SMMEs in line with the objectives of the Act.

57. Through encouraging the pro-competition development of repair, service, and, maintenance markets, the Commission's Guidelines will contribute to facilitating broader economic participation and supporting South Africa's sustainability goals by extending product lifespans, encouraging more efficient use of electronic devices and appliances as well as more affordable repair and servicing options for consumers.

6. Annexure 1: Details of State-level Right to Repair Laws in the USA

State	Law/Act Name	Scope & Coverage	Key Requirements & Features
Massachusetts	Right to Repair Law (2012, amended 2020)	Automobiles (including vehicles with telematics)	Full access to service/repair info, tools, software for owners and independent repairers; open data platform for telematics
Maine	Right to Repair Law (2023)	Automobiles (new vehicles from 2025)	Wireless access to diagnostic data via interoperable, owner-authorized platforms; penalties for denying access
New York	Digital Fair Repair Act	Digital electronic devices (excluding motor vehicles, gaming consoles, medical devices, home appliances)	OEMs must provide same diagnostic/repair info, parts, tools to consumers and independents as to authorized providers
Colorado	Consumer Right to Repair Powered Wheelchairs Act Consumer Right to Repair Agricultural Equipment Act Consumer Right to Repair Digital Electronic Equipment Act	Powered wheelchairs, agricultural equipment, all electronic devices (from July 2021)	Manufacturers must provide parts, tools, software, documentation on fair terms; bans on software locks impeding repairs

State	Law/Act Name	Scope & Coverage	Key Requirements & Features
Minnesota	Digital Fair Repair Act	Electronic products (from July 2021), home appliances, enterprise electronics	Manufacturers must offer documentation, parts, tools to public/independents on fair terms; bans on warranty voiding for repairs
California	California Right to Repair Act	Electronics and appliances (devices \$50–\$99.99: 3 years support; >\$100: 7 years support)	Replacement parts, tools, documentation must be available on fair terms; bans on design practices impeding repairs
Oregon	Right to Repair (Consumer Electronic Equipment) Law	Consumer electronics (retroactive to 2015; smartphones from 2021)	Access to spare parts, tools, manuals, diagnostics; bans on software tying components; certification allowed for sensitive parts
Washington	Right to Repair Act Mobility Equipment Repair Act	Digital electronic products (from 2021), powered wheelchairs	Manufacturers must provide parts, tools, documentation on equitable terms; bans on software preventing repairs