

**UNIVERSITY OF KWAZULU-NATAL
SCHOOL OF LAW, HOWARD COLLEGE**

**A Consideration of the Guidelines for Competition in the South African
Automotive Aftermarket: How do they Impact Supply Chain Liability?**

by

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**This research proposal is submitted in pursuance of the requirements for the
degree of Master of Laws**

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2020

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DECLARATION REGARDING ORIGINALITY

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Date: 09 November 2021

ACKNOWLEDGEMENT

To my late father who always encouraged me to be the best version of myself.

To my mother who continues to provide me with guidance.

To my family for their unwavering support.

To my supervisor who has worked consistently and tirelessly to ensure that this study is of sound quality. Without your attentive, caring and considerate guidance, this work would not be possible.

As always, to God be the glory.

ABSTRACT

The South African automotive aftermarket consists of various role players: Original Equipment Manufacturers, original equipment suppliers, approved dealers, Original Equipment Manufacturer approved motor-body repairers, insurers, insurer approved motor-body repairers and Independent Service Providers. Due to the use of franchise agreements and exclusive arrangements between Original Equipment Manufacturers and approved motor-body repairers, participation in the automotive aftermarket has generally excluded Independent Service Providers.

This has led Independent Service Providers, particularly those who are Historically Disadvantaged Persons, and consumers to make complaints to the Competition Commission over the last ten years. These complaints have centred on the exclusion of Independent Service Providers from participation in the automotive aftermarket and their lack of access to original spare parts. The effect of these restrictive practices has been to limit consumer choice and expose them to the high prices of original spare parts in the automotive aftermarket, in breach of the provisions of the Competition Act 89 of 1998.

This Act regulates competition in South Africa and aims, amongst other goals, to provide consumers with choice as to service provider, ensure competitive pricing, and expand the spread of ownership in markets. The Competition Commission, as an administrative body created to ensure compliance with the Act, is empowered by s 79(1) thereof to indicate its policy stance on any matter falling within the ambit of the Act. In line with s 79(1), the Competition Commission has published the Guidelines for Competition in the South African Automotive Aftermarket.

The publication of the guidelines led to two questions which are the focus of this study: firstly, what impact will these guidelines have on supply chain liability in the automotive aftermarket during the in-warranty period and secondly, whether this impact will be to the benefit of consumers. In order to answer these questions, this study considers automotive supply chain liability before the publication of the Guidelines for Competition in the South African Automotive Aftermarket, the role of the Competition

Commission and its authority to publish these guidelines, the provisions of these guidelines and their impact on supply chain liability during the in-warranty period.

LIST OF ABBREVIATIONS

ACM	Automotive Component Manufacturers
America	the United States of America
CA	the Competition Act 89 of 1998
Constitution	the Constitution of the Republic of South Africa, 1996
CGA	the Counterfeit Goods Act 37 of 1997
CPA	the Consumer Protection Act 68 of 2008
Draft Guidelines	the 'Guidelines for Competition in the South African Automotive Aftermarket Industry' published in draft form as Government Notice 126 of Government Gazette 43015 of 14 February 2020 and open for public comment until 16 March 2020
Discovery	Discovery Health (Pty) Limited
FMCSA	Ford Motor Company Southern Africa (Pty) Limited
Geographic Area	a municipal, district, regional or provincial geographic area
Guidelines	the 'Guidelines for Competition in the South African Automotive Aftermarket' published as Government Notice 46 of Government Gazette 44103 of 29 January 2021
HDPs	Historically Disadvantaged Persons
ISPs	Independent Service Providers
Minister	the Minister of Trade and Industry and Constitutional Development
MPCA	the Maintenance and Promotion of Competition Act 96 of 1979
NAAMSA	the National Association of Automobile Manufacturers of South Africa
NADA	the National Automobile Dealers' Association
NCC	the National Consumer Commission
OEMs	Original Equipment Manufacturer
OESs	Original Equipment Suppliers
RMCA	the Regulation of Monopolistic Conditions Act 24 of 1955
SAA	South African Airways
SCA	the Supreme Court of Appeal
Toyota	Toyota South Africa Motors (Pty) Limited

CHAPTER 1

INTRODUCTION

1.1 Background and Introduction

The CA was enacted in South Africa to 'provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire'.¹ The CA provides for the establishment of the Competition Commission² which has the authority to 'investigate, control and evaluate restrictive business practices ... in order to achieve equity and efficiency in the South African economy'.³ One area in which the Competition Commission has experienced difficulty in carrying out its objective is that of the automotive aftermarket industry.

One of the reasons for this difficulty is that when consumers purchase vehicles, they are typically issued with a warranty by the vehicle manufacturer in respect of the vehicle.⁴ The warranty enables the consumer to claim from the vehicle manufacturer for equipment damage that occurs during ordinary, general use of the vehicle.⁵ In order to maintain this warranty, the consumer is generally required to comply with certain conditions which are found in the vehicle's warranty terms and conditions.⁶ One such term is that the service, maintenance or repairs of the vehicle must be conducted by

¹ Preamble to the CA.

² Section 19(1) of the CA.

³ Competition Commission 'Welcome to the Competition Commission South Africa' date unknown, available at <http://www.compcom.co.za>, accessed on 24 June 2020.

⁴ J McGuire 'Explained: Warranty vs Service Plan vs Maintenance Plan' 27 June 2018, available at https://www.cars.co.za/motoring_news/explained-warranty-vs-service-plan-vs-maintenance-plan/45186/?gclid=CjwKCAjw8pH3BRAXEiwA1pvMsbXuz-TpLeOllciNPmLEleWtHIYLQz2SE7eEV58E3w-_l9AbjFSU5BoCVWYQAvD_BwE, accessed on 13 June 2020. Similar terms can be found in the warranty terms and conditions of other vehicle manufacturers. The Nissan warranty terms and conditions, discussed in further detail in Chapter 4 of this study provide for a warranty in respect of the body of the vehicle and the parts of the vehicle. The warranty in respect of the parts provides that the holder of the warranty is entitled to replacement of parts during a service by and at cost to Nissan, provided they are installed by an authorized Nissan dealer during the in-warranty period. This means that such parts would similarly be original spare replacement parts or approved accessories that were manufactured by an OEM or OES for use in Nissan vehicles. The Nissan warranty terms and conditions can be found here: Nissan 'Warranty Conditions' 2020, available at <https://www.nissan.co.za/owners/nissan-assured/warranty-conditions.html>, accessed on 10 November 2020.

⁵ McGuire op cit note 4.

⁶ Mercedes-Benz 'Premium Drive Warranty and Maintenance Plan with Mercedes-Benz' date unknown, available at <https://www.mercedes-benz.co.za/passengercars/being-an-owner/service-and-maintenance.pi.html/being-an-owner/service-and-maintenance/maintenance-teaser/PremiumDrive>, accessed on 13 June 2020.

the approved dealer of the vehicle's OEM.⁷ An example of this is the Mercedes-Benz warranty terms and conditions.⁸ These provide that the Mercedes-Benz warranty is only in respect of 'genuine replacement parts and approved accessories supplied by itself against defects and faulty workmanship, inclusive of labour costs ... and only when and if installed by a Mercedes-Benz approved dealer'.⁹ When consumers fail to repair or maintain their vehicles using Mercedes-Benz original spare parts, labour or approved dealers, they are in breach of the warranty terms, rendering the warranties invalid.¹⁰ This will result in them having to incur the costs of future service, maintenance and repairs of their vehicles out of their own pockets.¹¹

In an effort to avoid the costs associated with breaching vehicle warranties, consumers conduct their service, maintenance and repair work at approved dealers. The range of approved dealers is customarily the 'franchised dealers'¹² of an OEM.¹³ Approved dealers are suppliers who have entered into exclusive agreements with OEMs to supply original spare parts or services approved by OEMs.¹⁴ This has had the consequence of preventing ISPs from accessing consumers as a customer base during the vehicle in-warranty period.¹⁵ This then prevents competition amongst service providers in the automotive aftermarket.¹⁶

Another reason why the Competition Commission has experienced difficulties regulating competition in the automotive aftermarket is that consumers who require motor-body repairs are restricted by OEMs¹⁷ and insurers¹⁸ regarding which service provider they may use. During the in-warranty period, approved motor-body repairers are appointed by OEMs but high capital investment requirements required to meet

⁷ Guideline 5.2 of the Guidelines.

⁸ Mercedes-Benz op cit note 6.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Guideline 5.2 of the Guidelines.

¹² McGuire op cit note 4.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ The Guidelines 3.

¹⁶ Ibid.

¹⁷ Guideline 6.1 of the Guidelines.

¹⁸ The Guidelines 3 read with guideline 7.3 of the Guidelines.

This aspect of consumer complaints and the guidelines relating to it fall outside the scope of this mini-dissertation but have been noted for context.

their standards and specifications have resulted in the exclusion of ISPs from this market.¹⁹

In light of the above the Competition Commission has, over the last decade, received numerous complaints from consumers and members of the automotive aftermarket industry regarding anti-competitive practices.²⁰ These complaints relate to the fact that many service providers are prevented from entering into, and participating in, the supply of goods and services to consumers, particularly during the in-warranty period.²¹ It is alleged that this has had an adverse effect on consumers, as decreased competition has restricted consumer choice²² and exposed them to high prices.²³

To combat the difficulties experienced by industry members and consumers alike,²⁴ the Competition Commission has proposed the Guidelines.²⁵ The Guidelines were published in draft form on 6 February 2020 and were open for comment until 16 March 2020.²⁶ After consulting with, and receiving written submission from, various industry members,²⁷ the final version of the Guidelines was published in the Government Gazette on 29 January 2021.²⁸ The aim of the Guidelines, in respect of industry members, is to transform the automotive aftermarket²⁹ and promote competition in it.³⁰ In respect of consumers, the Guidelines aim to increase consumer choice in respect of service, maintenance, mechanical and motor-body repair work providers, to provide consumers with increased choice between the use of original and non-original spare parts³¹ and access to spare parts at decreased prices.³²

¹⁹ Guideline 6.1 of the Guidelines.

²⁰ The Guidelines 3.

²¹ Ibid.

²² Ibid.

²³ Guideline 10.7 of the Guidelines.

²⁴ The Guidelines 3.

²⁵ Competition Commission 'Guidelines' date unknown, available at <http://www.compcom.co.za/guidelines/>, accessed on 9 January 2021.

²⁶ GN 126 GG 43015 of 14/02/2020 40.

²⁷ Competition Commission 'Media Releases' 11 December 2020, available at <http://www.compcom.co.za/2020-media-releases/>, accessed on 9 January 2021.

²⁸ GN 46 GG 44103 of 29 /01/2021.

²⁹ The Guidelines 16.

³⁰ The Guidelines 4.

³¹ The Guidelines 18.

³² Guideline 10.7 of the Guidelines.

An example of a guideline that has been introduced by the Competition Commission to promote the inclusion of ISPs in the automotive aftermarket is guideline 5.4.1. This guideline calls for OEMs to ‘recognise and not obstruct a consumer’s choice to seek service, maintenance and mechanical repair work ... at a service provider of their choice’.³³ This guideline is presented as a step in the right direction for consumers as it will afford consumers more choice in who to approach for automotive aftermarket services through increased inclusion of ISPs in the automotive aftermarket.³⁴ It is believed that this will in turn allow consumers to access cheaper options.³⁵

While the benefits to consumers appear to be in line with the objectives of the CA as already discussed, industry sentiment casts doubt on whether the Guidelines will truly achieve their aims.³⁶ Having considered the Draft Guidelines, the Chief Executive of NAAMSA, Michael Mabasa, described them as ‘punitive and a dangerous retrogressive step that is counterproductive and will harm the economy’.³⁷

One manner in which the Guidelines could have a potentially punitive effect on manufacturers and other members of the supply chain in South Africa is that they may have an impact on supply chain liability. An example of this is seen in the context of guideline 5.4.1 of the Guidelines. A consideration of this guideline shows it to alter supply chain liability by increasing the involvement of ISPs in the automotive aftermarket during the in-warranty period.³⁸

While the increased involvement of ISPs in the automotive aftermarket during the in-warranty period provides consumers with more choice as to service provider,³⁹ it is not without its shortfalls. One such shortfall is that, where a consumer is supplied with or exposed to defective goods or services, the increased involvement of ISPs in the

³³ Guideline 5.4.1 of the Guidelines.

³⁴ Guideline 5.2 of the Guidelines.

³⁵ R Cokayne ‘You will soon be able to service your car anywhere’ 18 February 2020, available at <https://www.moneyweb.co.za/news/industry/you-will-soon-be-able-to-service-your-car-anywhere/>, accessed on 31 March 2020.

³⁶ Ibid.

³⁷ D Droppa ‘Right to Repair ruling is a “big win” for consumers’ 20 February 2020, available at <https://www.timeslive.co.za/motoring/news/2020-02-20-right-to-repair-ruling-is-a-big-win-for-consumers/>, accessed on 31 March 2020.

³⁸ Guideline 5.4.1 of the Guidelines.

³⁹ Ibid.

automotive aftermarket may cause an increase in claims by consumers being rejected by OEMs.⁴⁰

These and other potential shortfalls of the Guidelines as they relate to supply chain liability will be considered more fully below. For present purposes it is sufficient to note that while the implementation of the Guidelines may promote competition in the automotive aftermarket,⁴¹ its implications for supply chain liability may limit some of the positive outcomes of such competition.⁴²

South African supply chain liability is regulated by the CPA.⁴³ The promulgation of the CPA in 2008 saw the introduction of legislation which aims to provide ‘for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions’.⁴⁴ The CPA, through s 61, imposes a modified strict liability regime on producers, importers, distributors and retailers.⁴⁵ In other words, all those involved in the supply chain are liable for harm to consumers caused through the supply of, or exposure of consumers to, defective products⁴⁶ unless they are entitled to rely on one of the defences which are set out in s 61(4).

While the law on supply chain liability is codified in the form of s 61 of the CPA, the implementation of the Guidelines may alter the application thereof. It accordingly becomes necessary to consider the Guidelines that have been created to address a competition concern, together with the CPA. This will help determine whether the

⁴⁰ Guideline 5.4.8 of the Guidelines.

⁴¹ The Guidelines 18.

⁴² Guideline 5.4.1 of the Guidelines.

⁴³ Section 61 of the CPA.

⁴⁴ Section 3(1)(g) of the CPA.

⁴⁵ Naude and de Stadler in T Naude & E de Stadler ‘The Consumer Protection Act 68 of 2008’ in J du Plessis et al *The Law of Contract in South Africa* (3 ed) 429 are of the view that strict liability exists only in respect of producers and importers. Where a consumer relies on the presence of a defect in the goods, whether or not liability arises will be determined by considering the reasonable expectations of the consumer. This means that the liability in those circumstances cannot be regarded to constitute strict liability in the strictest sense. This is evident in the discussion of s 61 of the CPA in Chapter 2. The view adopted by Naude and Stadler is also consistent with the discussion by Van Eerden regarding the requirement to consider the reasonable expectations of a consumer when seeking to impose liability in terms of section 61(1)(b) of the CPA. See E A van Eerden *Guide to the Consumer Protection Act 2 ed* (2013) 391 in this regard.

⁴⁶ Section 61(1) of the CPA.

Guidelines potentially conflict with the primary aim of the CPA, that is, protecting consumers.⁴⁷

In analysing the impact of the Guidelines on supply chain liability, this study aims to shed light on whether the implementation of the Guidelines could have adverse consequences for South African consumers. These are considerations that the Competition Commission, the NCC, members of the automotive aftermarket and consumers are all required to be aware of in order to account for the impact of the implementation of the Guidelines on consumers.

The study will consider the following:

1. the promulgation of the Guidelines and their main aims;
2. the criticisms levelled against the Guidelines which impact the supply chain liability of OEMs during the in-warranty period in order to determine why critics are of the view that they will have an overall detrimental effect; and
3. the impact of implementing the Guidelines on supply chain liability in respect of OEMs during the in-warranty period and whether this has any detrimental implications for consumers.

1.2 Statement of Purpose

The purpose of this study is to consider the potential impact that the Guidelines may have on supply chain liability during the in-warranty period and whether this impact will be detrimental to the interest of consumers.

In order to achieve the stated purpose, this study will consider the manner in which warranties in the automotive industry typically operate. It will also consider the implications this has had for the liability of members of the supply chain, briefly in terms of the common law of contract and the common law of delict, and more comprehensively in terms of s 61 of the CPA. This study will also consider the changes to the automotive aftermarket proposed by the Guidelines in respect of OEMs, the

⁴⁷ Section 3(1)(a) of the CPA.

impact, if any, this will have on the liability of members of the supply chain during the in-warranty period and the significance of this for consumers.

1.3 Rationale

The CPA regulates supply chain liability in the form of s 61.⁴⁸ However, the implementation of the Guidelines will impact the manner in which that liability will operate in the supply chain in future. An alteration of the operation of supply chain liability as a result of the implementation of the Guidelines may be so detrimental to consumers that it negates the positive impact of facilitating increased competition in the automotive aftermarket facilitated by the Guidelines. Industry members have called the Guidelines a 'regressive step'⁴⁹ while the Competition Commission views them as 'a win for consumers'.⁵⁰ These opposing views reveal a potential conflict between the stated objectives of the Guidelines and the adverse effect on supply chain liability to the detriment of consumers that their implementation could bring about.

This study will consider the manner in which the Guidelines alter the operation of supply chain liability in the automotive aftermarket and the adverse effect on consumers this may bring about. It accordingly has the potential to increase the Competition Commission and the NCC's awareness of the impact of the implementation of the Guidelines. It also has the potential to alter the opposing stance that the automotive aftermarket has taken on whether the Guidelines should be implemented at all.⁵¹

1.4 Research Questions

The primary aim of this mini-dissertation is to answer the question whether the Guidelines introduced by the Competition Commission can be said to benefit consumers. In order to answer this question, the following sub-questions will be considered:

⁴⁸ Section 61 of the CPA.

⁴⁹ Cokayne op cit note 35.

⁵⁰ Ibid.

⁵¹ Jonckie 'Automotive aftermarket guidelines: beneficial to consumers?' 6 March 2020, available at <https://www.roadsafety.co.za/2020-03/automotive-aftermarket-guidelines-beneficial-to-consumers/>, accessed on 6 November 2020.

1. How does product liability operate in the South African automotive supply chain?
2. What is the basis on which Competition Commission has prepared the Guidelines?
3. What do the Guidelines provide and what has been the response to them from the automotive aftermarket?
4. What is the impact of the Guidelines on supply chain liability and will the implementation of the Guidelines ultimately benefit consumers?

Given the view that the proposed Guidelines will be beneficial to consumers, as detailed earlier in the chapter, it is important to determine whether there will be any adverse consequences for consumers in the automotive aftermarket as a result of imposing them. Where such adverse consequences are identified, the Competition Commission, together with the NCC and automotive aftermarket members, could take steps to account for and mitigate such consequences. In so doing, the Competition Commission could more effectively fulfil its purpose, namely to 'promote employment and advance the social and economic welfare of South Africans'⁵² and 'provide consumers with competitive prices and product choices'.⁵³ Similarly, the NCC could be better placed to meet its objective of 'establishing a consumer market that is fair, accessible'⁵⁴ and serves to benefit consumers overall.⁵⁵

1.5 Methodology

This study will follow a doctrinal research methodology. Accordingly, reference will be made to authoritative sources of the law in order to determine the answers to the various research questions posed above. In so doing, the study will fulfil its purpose, as also detailed above. The sources referred to shall include existing rules in the form of legislation, principles and precedents derived from the common law, and scholarly articles written and peer-reviewed by legal academics.⁵⁶ The sources will be analysed,

⁵² Competition Commission South Africa 'About Us' date unknown, available at <http://www.compcom.co.za/about-us-2/>, accessed on 1 April 2020.

⁵³ Ibid.

⁵⁴ Section 3(1)(a) of the CPA.

⁵⁵ Ibid.

⁵⁶ P Chynoweth 'Legal Research' in Knight & Ruddock (eds) *Advanced Research Methods in the Built Environment* (2008) 32.

patterns in them identified and conclusions made through the use of deductive reasoning.⁵⁷

1.6 Chapter Breakdown

This study will be divided into six chapters.

Chapter 1 has considered the background of competition in the South African automotive aftermarket and the issues it has raised for ISPs and consumers. The chapter has also set out the purpose of the study together with its rationale. The research questions which the study seeks to answer have been posed and the research methodology for answering those questions described.

Chapter 2 will explore the operation of the automotive aftermarket in South Africa and the implicated legal principles. This will include:

1. a description of the operation of the supply chain in the South African automotive industry, including the automotive aftermarket;
2. a consideration of the types of warranties that consumers are typically issued within the automotive aftermarket; and
3. how product liability is regulated in terms of s 61 of the CPA.

This chapter will accordingly elaborate on the problem of ISPs being excluded from participation in the automotive aftermarket during the in-warranty period due to restrictive in-warranty terms as briefly referenced in Chapter 1.

In Chapter 3, the study will establish the role of the CA in promoting economic development and providing consumers with increased choice and competitive prices in the South African automotive aftermarket. This will be done by discussing the CA, the establishment of the Competition Commission and its authority to issue the Guidelines.

Chapter 4 will consider the Guidelines to determine the steps to be taken by members of the automotive aftermarket to ensure the inclusion of ISPs, particularly those who

⁵⁷ Ibid.

are HDIs and the promotion of consumer choice as to service provider. Thereafter, the chapter will consider the criticisms of the Draft Guidelines made by members of the automotive aftermarket to determine their validity. If such criticisms are found to be valid, it will be determined whether the Guidelines make adequate provision, if any, for them.

In Chapter 5, the study will establish the impact of the Guidelines on supply chain liability during the in-warranty period. In particular, the study will consider the altered operation of supply chain liability during the in-warranty period as a result of the implementation of s 61 of the CPA.

Finally, Chapter 6 will set out the study's conclusion on whether imposing the Guidelines can be said to be detrimental to the interests of consumers.

1.7 Conclusion

The Competition Commission has been privy to complaints from both automotive aftermarket members and consumers in respect of restrictive and uncompetitive business practices in the South African automotive aftermarket.⁵⁸ These complaints have shed light on the automotive aftermarket's lack of inclusiveness of ISPs which has limited consumer choice as to service provider⁵⁹ and exposed them to high costs.⁶⁰ In seeking to address these complaints, the Competition Commission has published the Guidelines.⁶¹

By exploring the potential impact on supply chain liability during the in-warranty period that these Guidelines may have, this study aims to illustrate any adverse impact that the Guidelines may have on consumers. In so doing, the study seeks to answer the question whether the implementation of the proposed Guidelines can be said to be for the benefit of consumers.

⁵⁸ The Guidelines 3.

⁵⁹ *Ibid.*

⁶⁰ Guideline 10.7 of the Guidelines.

⁶¹ The Guidelines 3.

CHAPTER 2

THE SOUTH AFRICAN AUTOMOTIVE SUPPLY CHAIN AND THE OPERATION OF LIABILITY THEREIN

2.1 Introduction

In Chapter 1 of this study, two questions were posed: firstly, whether the promulgation of the Guidelines by the Competition Commission would have an impact on liability in the South African automotive supply chain during the in-warranty period and secondly, whether this impact, if any, would be detrimental to consumers. In order to understand the potential impact that the Guidelines may have on automotive supply chain liability during the in-warranty period in South Africa, it is necessary to establish how liability in the South African automotive supply chain currently operates.

The South African automotive industry follows the international practice of organising role players into supply chains before managing the operation of the overall supply chain.⁶² As supply chains consist of various companies cooperating with one another to produce an end product for consumers, problems with any one part of the supply chain can lead to difficulties for the supply chain overall.⁶³ An example of this is where members of the supply chain produce defective components which result in a defective product in the hands of an end consumer. Where this occurs, members of the supply chain may incur liability.

This chapter will consider what constitutes the automotive supply chain in South Africa together with how liability typically arises therein, with particular emphasis being placed on the operation of liability in the South African automotive aftermarket.

2.2 The South African Automotive Supply Chain

Lysons and Farrington define a supply chain as a 'network of organisations that are involved ... in the different processes and activities that produce value in the form of

⁶² JA Badenhorst-Weiss & MJ Naude 'Supplier-customer relationships: weaknesses in the South African automotive supply chains' (2012) 6(1) *Journal of Transport and Supply Chain Management* 92.

⁶³ JA Badenhorst-Weiss & MJ Naude 'Supply chain management problems at South African automotive component manufacturers' (2011) 15(1) *South Africa Business Review* 74.

products and services in the hands of the final customer or consumer'.⁶⁴ Accordingly, a supply chain would include all those direct and indirect participants involved in getting the products and services to consumers through all stages.⁶⁵

The South African automotive industry complies with the supply chain approach⁶⁶ and consists of four key role players.⁶⁷ These are ACMs,⁶⁸ OEMs,⁶⁹ OESs⁷⁰ and the automotive aftermarket.⁷¹

The first role players are ACMs such as Aunde (Pty) Limited and G.U.D Holdings which manufacture automotive components for use by OEMs.⁷² They perform the most advanced work on automotive components before supplying them to OEMs.⁷³ They are regarded as an important part of the South African automotive supply chain as their performance influences that of OEMs.⁷⁴

The second role players are OEMs which use components supplied by ACMs to assemble vehicles.⁷⁵ OEMs typically conclude long-term franchise agreements with approved dealers who sell vehicles to consumers.⁷⁶ These franchise agreements must be consistent with the provisions of s 7 of the CPA and regulation 2 of the Regulations to the CPA which set out the requirements for franchise agreements.

In terms of these franchise agreements, approved dealers will agree to operate as franchisees of specific OEMs, for example a franchisee will agree to operate as a Ford

⁶⁴ K Lysons & B Farrington *Purchasing and Supply Chain Management* (7th ed) (2006) 91.

⁶⁵ Badenhorst-Weiss & Naude op cit note 63 at 73.

⁶⁶ JA Badenhorst-Weiss & AS Tolmay 'Supply chain relationships between first and second tier suppliers in South African automotive supply chains – a focus on trust' (2015) 9(1) *Journal of Transport and Supply Chain Management* 1.

⁶⁷ MJ Naude 'Supply chain challenges in the South African automotive sector: do location, size and age matter?' (2013) 16(4) *South African Journal of Economic and Management Sciences* 408.

⁶⁸ Badenhorst-Weiss & Naude op cit note 63 at 81.

⁶⁹ Ibid.

⁷⁰ Badenhorst-Weiss & Naude op cit note 63 at 82.

⁷¹ Ibid.

⁷² Badenhorst-Weiss & Naude op cit note 63 at 81.

⁷³ N LeMarco 'Difference between tier 1 and tier 2 companies' 31 January 2020, available at <https://smallbusiness.chron.com/difference-between-tier-1-tier-2-companies-25430.html>, accessed on 1 July 2020.

⁷⁴ Badenhorst-Weiss & Naude op cit note 63 at 71.

⁷⁵ The Guidelines 10.

⁷⁶ Guideline 8.2 of the Guidelines.

approved dealer.⁷⁷ The approved dealer will receive vehicles for sale as well as original spare parts for use in service, maintenance and repair work during the in-warranty period from the OEM.⁷⁸ These arrangements between OEMs and approved dealers are responsible for the exclusion of ISPs from the automotive aftermarket during the in-warranty period, as complained of to the Competition Commission by ISPs.⁷⁹

The third role players are OESs which supply automotive parts and accessories for sale through OEMs.⁸⁰ Vehicle accessories are those additions to a vehicle used for aesthetic or safety purposes.⁸¹ They include items such as floor mats, seat covers and pet barriers.⁸² They are distinguished from the fourth role players which are the automotive aftermarket⁸³ where spare parts, tools and components are sold to consumers and service, maintenance and repair work is conducted on vehicles.⁸⁴ In contrast to OESs, vehicle components in the automotive aftermarket are made for use specifically after the sale of a vehicle and may be produced by OEMs or ISPs.⁸⁵

This chapter will focus on liability of OEMs under s 61 of the CPA for harm suffered by consumers in the automotive aftermarket in respect of vehicles during the in-warranty period.

2.3 Liability in the Automotive Aftermarket

South African automotive industry members may assume liability willingly⁸⁶ or such

⁷⁷ Badenhorst-Weiss & Tolmay op cit note 66 at 3.

⁷⁸ Guideline 8.2 of the Guidelines.

⁷⁹ The Draft Guidelines 2.

⁸⁰ Badenhorst-Weiss & Naude op cit note 63 at 82.

⁸¹ Easy Lifting 'Types of common car accessories and their use' 22 May 2017, available at <https://www.easy-lifting.com/types-common-car-accessories-use/>, accessed on 18 August 2020.

⁸² Ibid.

⁸³ Masterparts 'Aftermarket vs OEM car parts – what's the difference?' 8 May 2018, available at <https://www.masterparts.com/blog/aftermarket-vs-oem-car-parts-what%E2%80%99s-difference>, accessed on 7 August 2020.

⁸⁴ The Guidelines 10.

⁸⁵ Masterparts op cit note 83.

⁸⁶ Jaguar Land Rover Limited '5 Year Care Plan' date unknown, available at <https://www.landrover.co.za/ownership/warranty.html#:~:text=Land%20Rover%20Care%20gives%20you,year%20period%2C%20whichever%20comes%20first.&text=It%20is%20important%20to%20entrust,the%20value%20of%20your%20vehicle>, accessed on 27 June 2020.

liability may be imposed on them in terms of the law.⁸⁷ Accordingly, liability in the South African automotive supply chain may also arise in terms of the common law of contract,⁸⁸ the common law of delict,⁸⁹ and the CPA.⁹⁰ Each of these aspects of liability in the South African automotive aftermarket will be discussed in detail below.

2.3.1 The Common Law of Contract

In terms of the common law of contract, where a contractual relationship exists between a consumer and a member of the supply chain for the supply of goods, the consumer will have recourse to the contractual remedies for any losses caused by the supply of such goods.⁹¹ In the South African automotive industry, an automotive dealer which operates as an OEM's approved dealer typically issues a consumer with a contract containing service, maintenance and repair terms for the vehicle purchased by the consumer.⁹² These contracts oblige the automotive dealer to service, maintain or repair a consumer's vehicle provided the consumer complies with the terms of the warranty included therein.⁹³

The term 'warranty' was first defined in the case of *Lewis v Norwich Union Fire Insurance Co Ltd*⁹⁴ as 'a statement or stipulation upon the exact truth of which, or the exact performance of which, as the case may be, the validity of the contract depends'.⁹⁵ Alternatively, a warranty can be understood to be 'a contractual undertaking by a debtor that a certain fact relating to his performance is or will be as it is stated or promised to be'.⁹⁶ In the context of the Mercedes-Benz warranty terms and conditions, Mercedes-Benz warrants 'Mercedes-Benz genuine replacement parts and approved accessories supplied by itself against defects and faulty workmanship, including labour costs for two years from the date of fitment ... only when and if installed by a Mercedes-Benz dealer and if not in breach of any exclusion'⁹⁷ contained

⁸⁷ Section 61 of the CPA.

⁸⁸ *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd and Another* [2006] 3 All SA 309 (SCA).

⁸⁹ *Ciba Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA).

⁹⁰ Section 61 of the CPA.

⁹¹ GB Bradfield & RH Christie *Christie's Law of Contract in South Africa* 7 ed (2016) 616.

⁹² Jaguar Land Rover Limited op cit note 86.

⁹³ Mercedes-Benz op cit note 6.

⁹⁴ 1916 AD 509.

⁹⁵ *Lewis v Norwich Union Fire Insurance Co Ltd* 1916 AD 515.

⁹⁶ MM Loubser *Product Liability in South Africa* (2012) 25.

⁹⁷ Mercedes-Benz op cit note 6.

therein. This means that Mercedes-Benz will service, maintain or repair the vehicle without the consumer incurring any costs during the in-warranty period where:

1. damage to the vehicle is caused by defects in Mercedes-Benz original spare parts or approved accessories; and
2. those parts or accessories were previously installed by Mercedes-Benz themselves.⁹⁸

This benefit is available to consumers for the in-warranty period, in this case a period of two years from the date of fitment of the Mercedes-Benz genuine replacement parts or approved accessories.⁹⁹ The Mercedes-Benz original spare replacement parts or approved accessories would be those manufactured by an OEM or an OES for use in Mercedes-Benz vehicles.¹⁰⁰

Warranties have been described to be like a 'trump card' for the issuers thereof because the beneficiary of a warranty needs to comply with the exact terms in order for the warranty to operate.¹⁰¹ In the context of the Mercedes-Benz warranty terms and conditions, where a Mercedes-Benz is serviced, maintained or repaired using Mercedes-Benz replacement parts that are not genuine, ie non-original Mercedes-Benz spare parts, the warranty issued by Mercedes-Benz in their warranty terms and conditions would be declared to be void and would no longer apply.¹⁰² Thus, a consumer would no longer have the right to acquire replacement original spare parts, approved services or labour at the expense of Mercedes-Benz. Rather, such replacement parts, approved services or labour would be at cost to the consumer.¹⁰³

A warranty may be express¹⁰⁴ or implied.¹⁰⁵ An express warranty may be stipulated in various ways such as a description of a feature of a product.¹⁰⁶ Conversely, an implied warranty is one that is imposed by the operation of the law (ex lege) or imposed due

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Badenhorst-Weiss & Naude op cit note 63 at 82.

¹⁰¹ C Visser 'Warranties in insurance policies' (1993) 1 *Juta's Business Law* 114.

¹⁰² Mercedes-Benz op cit note 6 read with the definition of 'warranty' in Loubser op cit note 96.

¹⁰³ Ibid.

¹⁰⁴ *Van Rooyen v Brown and Another* (A3104/2015) [2018] ZAGPJHC 453 para 4.

¹⁰⁵ *Haviside v Heydricks and Another* (AR27/13) [2013] ZAKZPHC 53 para 11.4.

¹⁰⁶ *Van Rooyen* supra note 104 para 5.

to the facts surrounding the formation of a contract as tacit terms thereof.¹⁰⁷ Warranties in the automotive aftermarket are typically included in a document setting out the warranty terms and conditions and therefore tend to be express warranties.¹⁰⁸

Where an express warranty is breached the consumer has recourse to the contractual remedies.¹⁰⁹ Accordingly, where a consumer seeks to enforce their Mercedes-Benz warranty, they can refer to the provisions thereof and indicate their compliance therewith.¹¹⁰ Where they are able to prove that they have only repaired the vehicle using Mercedes-Benz original spare parts or approved accessories installed by Mercedes-Benz within the previous two years, Mercedes-Benz would be required to conduct service, maintenance or repair work on the vehicle without costs being incurred by the consumer.¹¹¹

2.3.2 The Common Law of Delict

In terms of the common law of delict, in the absence of a contract between a consumer and a member of the supply chain, liability may nevertheless arise.¹¹² The SCA explained the position in *Ciba Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*.¹¹³ In this case the SCA held that a manufacturer incurs liability where it produces goods commercially without taking the necessary steps to do adequate testing and such goods cause harm when used for their intended purpose by a consumer.¹¹⁴

The court explained that:

‘Although the historical origin of the manufacturer’s liability is an agreement between the manufacturer and the distributor, the liability, which arises from the manufacture and distribution of the product, extends *via* the other contracting party to any third party

¹⁰⁷ Ibid.

¹⁰⁸ Mercedes-Benz op cit note 6.

¹⁰⁹ MM Botha & T Joubert ‘Does the Consumer Protection Act 68 of 2008 provide for strict product liability? – a comparative analysis’ (2011) 75 *THRHR* 308.

¹¹⁰ Mercedes-Benz op cit note 6.

¹¹¹ Ibid.

¹¹² T Naude & E de Stadler ‘The Consumer Protection Act 68 of 2008’ in J du Plessis et al *The Law of Contract in South Africa* (3 ed) 429.

¹¹³ 2002 (2) SA 447 (SCA).

¹¹⁴ *Ciba Geigy* supra note 89 para 66.

who utilises the product in the prescribed manner and suffers damage as a result thereof.¹¹⁵

Where a consumer seeks to rely on the law of delict in order to claim from a manufacturer, they are required to establish the five elements of a delict.¹¹⁶ Accordingly, a consumer is required to prove: 'the commission or omission of an act (*actus reus*), which is unlawful or wrongful (wrongfulness), committed negligently or with a particular intent (*culpa* or fault), which results in or causes the harm (causation) and the suffering of injury, loss or damage (harm)'.¹¹⁷ Notably, these elements are separate aspects of the same delict, each having distinct requirements and tests that must be satisfied in order for delictual liability to arise.¹¹⁸

While the application of the law of delict allows consumers to impose liability on manufacturers, it is not without its shortfalls. One such shortfall is that of the requirement to establish fault in the form of intent or negligence on the part of the manufacturer in order for delictual liability to arise.¹¹⁹ In the case of *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*¹²⁰ (hereinafter referred to as *Wagener*) the appellant alleged that the local anaesthetic administered to her before she underwent a medical procedure was defective due to the negligent manufacture thereof by the respondent.¹²¹

The issue to be determined by the SCA was 'whether liability attaches even if the breach occurred without fault on the respondent's part', in other words, whether strict liability could be imposed on the respondent.¹²² The appellant highlighted the difficulty with establishing fault in delictual claims for manufacturer's liability by arguing that establishing fault should not be a requirement in such cases as it was so difficult to prove.¹²³ The appellant argued that strict liability should be imposed on the respondent

¹¹⁵ English translation of para 66 in headnote to *Ciba Geigy* supra note 89.

¹¹⁶ *Judd v Nelson Mandela Bay Municipality* (CA149/2010) [2011] ZAECPHC 4 para 8.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ 2003 (4) SA 285 (SCA).

¹²¹ *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA) para 4.

¹²² *Wagener* supra note 121 para 7.

¹²³ *Wagener* supra note 121 para 10.

by the court through the development of the common law in line with the spirit, object and purport of the Bill of Rights.¹²⁴ The court firmly rejected this argument and held that 'if strict liability is to be imposed, it is the Legislature that must do it'.¹²⁵

2.3.3 The Consumer Protection Act 68 of 2008

The finding of the court in *Wagener* was illustrative of a lacuna in the law: manufacturers of defective products would only incur liability in limited instances. The first of these was where there was a contract between the parties which contained an express or implied warranty that had been breached.¹²⁶ In such circumstances, a consumer would be able to obtain service, maintenance or repair work without incurring any costs on the basis of the warranty issued by the manufacturer.¹²⁷ The obvious difficulty presented by this is the requirement for there to be a contract governing the relationship between a consumer and a manufacturer. Where no such contract exists, this recourse is unavailable to the consumer.

The second of these was where the consumer made a delictual claim against the manufacturer for the supply of a defective product.¹²⁸ This remedy enabled a consumer to institute a claim against a manufacturer where they had been supplied with a defective product in the absence of a contractual relationship between the consumer and the manufacturer. While this remedy expands the category of consumers who can claim against the manufacturer, these consumers face the challenge of proving all the elements of delictual liability, including fault, on the part of the manufacturer,¹²⁹ in order for their claims to succeed.

The limited recourse available to consumers when they had been supplied with defective products in the automotive aftermarket left them vulnerable.¹³⁰ In addition to difficulty with holding manufacturers liable for supplying defective products, they could

¹²⁴ *Wagener* supra note 121 para 9.

¹²⁵ *Wagener* supra note 121 para 38.

¹²⁶ Mercedes-Benz op cit note 6.

¹²⁷ Ibid.

¹²⁸ *Wagener* supra note 121 para 4.

¹²⁹ *Wagener* supra note 121 para 17.

¹³⁰ T Woker 'Consumer protection: an overview since 1994' (2019) *Stellenbosch Law Review* 99.

be exposed to unethical practices including fraud.¹³¹ This position was inconsistent with the Constitution which protects social and economic rights together with political and civil rights.¹³² The vulnerable position of consumers, the apparent call for the legislature to pass legislation to regulate consumer matters in *Wagener*,¹³³ together with the obligation incumbent on Parliament in terms of the Constitution resulted in the promulgation of various statutes.¹³⁴

An example of these statutes is the CPA. The CPA was promulgated in 2008 to 'promote a fair, accessible and sustainable marketplace for consumer products and services'.¹³⁵ This is to be achieved through, inter alia, introducing a reliable system of redress for consumers.¹³⁶ In the context of the automotive aftermarket, the aims of the CPA are achieved through the application of s 61 thereof.

The CPA has introduced specific provisions which impose an amended strict liability regime on members of the supply chain, together with specific defences available to them in limited circumstances.¹³⁷ As discussed above, strict liability is generally understood to be liability that arises despite fault,¹³⁸ in the form of intent or negligence, not being attributable to the liable party.¹³⁹ This means that any member of the supply chain can be held liable for the supply of a defective product.¹⁴⁰ Where the CPA applies to a transaction,¹⁴¹ section 61(1) of the CPA imposes liability on a producer, importer, distributor or retailer where harm is caused in any of three distinct methods.

¹³¹ Ibid.

¹³² Woker op cit note 130 at 97.

¹³³ *Wagener* supra note 121 para 38.

¹³⁴ Woker op cit note 130 at 97.

¹³⁵ Long title of the CPA.

¹³⁶ Section 3(1)(h) of the CPA.

¹³⁷ Section 61 of the CPA.

¹³⁸ At common law, liability without fault i.e. strict liability, could, and still can, arise in various circumstances. These include on the part of the owner of a domestic animal that caused damage in terms of the *actio de pauperie*, on the part of a thief upon the loss of a stolen thing and on the part of an employer for harm caused by his employee. In this regard, see J Neethling & J Potgieter & JC Knobel *Law of Delict* 8 ed (2020) 435, J Neethling & J Potgieter & JC Knobel *Law of Delict* 8 ed (2020) 441 and J Neethling & J Potgieter & JC Knobel *Law of Delict* 8 ed (2020) 444 respectively.

¹³⁹ Botha & Joubert op cit note 109 at 310.

¹⁴⁰ Section 61(1)(b) of the CPA.

¹⁴¹ This is determined with reference to section 5 of the CPA.

The first of these is where a producer, importer, distributor or retailer causes harm which can be attributed either in whole or in part to the supply by that producer, importer, distributor or retailer of unsafe goods to a consumer or other person.¹⁴² A producer, importer, distributor or retailer supplies goods when they sell, rent, exchange or hire any goods, amongst other actions, in the ordinary course of business.¹⁴³ Unsafe goods are those which 'present an extreme risk of personal injury or property damage to the consumer or to other persons'.¹⁴⁴ The effect of this provision in the automotive aftermarket is that where a supplier in the form of an approved dealer or ISP supplies automotive components or parts that are unsafe and thus cause harm to a consumer, such approved dealer or ISP would be liable for the harm caused.¹⁴⁵

The second of these is where there is 'a product failure, defect or hazard in any goods'.¹⁴⁶ In this instance, the reasonable expectations of the consumer are of relevance when determining if there is a product defect.¹⁴⁷ Where a consumer seeks to rely on s 61(1)(b) they are accordingly required to establish one of two things:

1. that there is an imperfection in the manufacture of the goods that renders them 'less acceptable than persons generally would reasonably be entitled to expect in the circumstances';¹⁴⁸ or
2. there are characteristics of the goods that 'render them less useful, practicable or safe than a consumer would reasonably be entitled to expect in the circumstances'.¹⁴⁹

In the automotive aftermarket, a consumer would be required to establish that the automotive components or parts acquired from an approved dealer or ISP did not meet their reasonable expectations in order for liability to arise.¹⁵⁰

¹⁴² Section 61(1)(a) of the CPA.

¹⁴³ Definition of 'supply' in s 1 of the CPA.

¹⁴⁴ Definition of 'unsafe' in s 53(1)(d) of the CPA.

¹⁴⁵ Section 61(1)(a) of the CPA.

¹⁴⁶ Section 61(1)(b) of the CPA.

¹⁴⁷ Naude & de Stadler op cit note 112.

¹⁴⁸ E van Eerden *A Guide to the Consumer Protection Act 2* ed (2013) 391.

¹⁴⁹ Ibid.

¹⁵⁰ Naude & de Stadler op cit note 112.

The third of these is where there are 'inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods'.¹⁵¹ In circumstances where a producer, importer, distributor or retailer's products can malfunction and cause harm to consumers or other persons, such producer, importer, distributor or retailer must have adequate instructions or warnings to prevent such harm.¹⁵² A failure to do so will result in the liability of that producer, importer, distributor or retailer for the harm caused.¹⁵³ This is irrespective of whether it arose wholly or partly as a result of their failure to provide adequate instructions or warnings about those goods.¹⁵⁴

In all three of the instances referred to above, liability of a supplier arises irrespective of whether the supplier acted with intention or negligence in bringing about the harm complained of by the consumer or other person.¹⁵⁵ In addition to the above, in order for the liability of a supplier to arise there must be a transaction between a supplier and a consumer which has led to the supply of the goods by the supplier to the consumer or to another person.¹⁵⁶

This was held by the SCA in *Eskom Holdings Ltd v Halstead-Cleak*¹⁵⁷ where the court found that the respondent who sought to claim from Eskom Holdings Ltd (hereinafter referred to as *Eskom*) for injuries sustained from low hanging electric cables while biking was not a consumer vis-à-vis Eskom.¹⁵⁸

This was as:

'(a) the respondent did not enter into any transaction with Eskom as a supplier or producer of electricity in the ordinary course of Eskom's business; and (b) the respondent was not utilising the electricity, nor was he a recipient or beneficiary thereof'.¹⁵⁹

¹⁵¹ Section 61(1)(c) of the CPA.

¹⁵² Van Eerden op cit note 148 at 393.

¹⁵³ Ibid.

¹⁵⁴ Section 61(1)(c) of the CPA.

¹⁵⁵ Section 61(1) of the CPA.

¹⁵⁶ *Eskom Holdings Limited v Halstead-Cleak* 2017 (1) SA 333 (SCA) para 25.

¹⁵⁷ 2017 (1) SA 333 (SCA).

¹⁵⁸ *Halstead-Cleak* supra note 156 at para 22.

¹⁵⁹ Ibid.

Accordingly, the respondent could not successfully impose liability on Eskom in terms of s 61(1) of the CPA.¹⁶⁰

The harm for which a supplier may be held liable in terms of s 61(1) is listed in s 61(5) of the CPA. Such harm includes ‘the death of, or injury to, any natural person, ... an illness of any natural person; ... any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable’;¹⁶¹ and any economic loss that arises due to the harm previously mentioned in the ss.¹⁶²

The liability referred to in s 61(1) of the CPA does not arise if one of the defences thereto as set out in s 61(4) is applicable. These defences may be relied on by a producer, importer, distributor or retailer to escape liability where harm is caused in any of the three manners referred to in s 61(1) as detailed above.

The first defence is that ‘the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation’.¹⁶³ The effect of this provision is that where harm to a consumer in the automotive aftermarket arises due to compliance by approved dealers or ISPs with industry standards imposed by public regulation, such approved dealers or ISPs will not incur liability in terms of s 61(1) of the CPA.¹⁶⁴

The second defence is that ‘the alleged unsafe product characteristic, failure, defect or hazard’¹⁶⁵ either ‘did not exist in the goods at the time it was supplied by that person to another person alleged to be liable’¹⁶⁶ or ‘was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person’.¹⁶⁷

¹⁶⁰ *Halstead-Cleak* supra note 156 at para 25.

¹⁶¹ Section 61(5) of the CPA.

¹⁶² *Ibid.*

¹⁶³ Section 61(4)(a) of the CPA.

¹⁶⁴ *Ibid.*

¹⁶⁵ Section 61(4)(b) of the CPA.

¹⁶⁶ Section 61(4)(b)(i) of the CPA.

¹⁶⁷ Section 61(4)(b)(ii) of the CPA.

This means that, where an OEM which supplies goods to an approved dealer or ISP in the automotive aftermarket can show that the fault complained of in the goods did not exist at the time they were supplied to the approved dealer or ISP, such approved dealer or ISP will not incur liability.¹⁶⁸ Alternatively, such an approved dealer or ISP will be able to avoid liability if they can show that the harm arose based solely on their compliance with instructions they received when they acquired the goods from the OEM for onward sale to the consumer.¹⁶⁹

The third defence is that 'it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers'.¹⁷⁰ This defence serves to protect those with limited involvement in the marketing of a product and is thus only available to a distributor or retailer.¹⁷¹ In terms of s 1 of the CPA, a 'retailer' supplies goods to consumers in the ordinary course of business. Authorised dealers and ISPs as retailers in the automotive aftermarket can make use of this defence to avoid liability where their limited role in the marketing of a product prevents them from discovering a fault in the goods.¹⁷²

The fourth defence is that the claim in terms of s 61(1) was brought more than 3 (three) years after any of the following:

1. the occurrence of death or injury of any natural person;¹⁷³
2. the earliest time at which a person had knowledge of the material facts about an illness of any natural person;¹⁷⁴
3. the earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property;¹⁷⁵ or
4. the latest date on which a person suffered any economic loss as a result of any of the foregoing causes of harm.¹⁷⁶

¹⁶⁸ Section 61(4)(b)(i) of the CPA.

¹⁶⁹ Section 61(4)(b) of the CPA.

¹⁷⁰ Section 61(4)(c) of the CPA.

¹⁷¹ Van Eerden op cit note 148 at 395.

¹⁷² Section 61(4)(c) of the CPA.

¹⁷³ Section 61(4)(d)(i) of the CPA.

¹⁷⁴ Section 61(4)(d)(ii) of the CPA.

¹⁷⁵ Section 61(4)(d)(iii) of the CPA.

¹⁷⁶ Section 61(4)(d)(iv) of the CPA.

This defence will be available to an approved dealer or ISP in the automotive aftermarket where they can show that a period of 3 (three) years had elapsed since the occurrence of any of the types of harm contemplated in s 61(5)(a) to s 61(5)(d), as discussed above.

2.4 Conclusion

The South African automotive supply chain consists of four main role players: ACMs,¹⁷⁷ OEMs,¹⁷⁸ OESs¹⁷⁹ and the automotive aftermarket.¹⁸⁰ The focus of this study is the automotive aftermarket. Together with other role players outside the focus of this study, the automotive aftermarket consists of OEMs, approved dealers and ISPs.¹⁸¹

A consideration of liability in the automotive aftermarket shows that members of the automotive aftermarket may incur liability in one of three ways. Firstly liability may arise through the enforcement of a warranty against a manufacturer of vehicle parts or accessories.¹⁸² Secondly, liability may arise through a claim against a manufacturer in delict which requires a consumer to prove all elements of a delictual claim, including fault.¹⁸³ Thirdly, producers, importers, distributors or retailers in the automotive aftermarket may be held liable pursuant to a claim being made by a consumer in terms of s 61 of the CPA.

As it is now established how liability in the automotive supply chain operates, particularly in the automotive aftermarket, Chapter 3 of this study will proceed to consider the promulgation of the CA, the establishment of the Competition Commission¹⁸⁴ and its authority to promulgate the Guidelines.¹⁸⁵

¹⁷⁷ Badenhorst-Weiss & Naude op cit note 63 at 81.

¹⁷⁸ Ibid.

¹⁷⁹ Badenhorst-Weiss & Naude op cit note 63 at 82.

¹⁸⁰ Ibid.

¹⁸¹ The Guidelines 11.

¹⁸² Botha & Joubert op cit note 109.

¹⁸³ *Judd* supra note 116 para 8.

¹⁸⁴ Section 19(1) of the CA.

¹⁸⁵ Section 79(1) of the CA.

CHAPTER 3

THE COMPETITION COMMISSION AND ITS AUTHORITY TO PROMULGATE THE GUIDELINES

3.1 Introduction

In the words of Lewis, 'it was a dark and stormy night'.¹⁸⁶ In his personal account of his time spent at the Competition Tribunal, Lewis sets the scene in the South African economy at the time the CA was passed.¹⁸⁷ The darkness he refers to was the long shadow cast by business practices during apartheid.¹⁸⁸ The storm Lewis refers to arose when the government was compelled to confront industry members engaging in anti-competitive conduct and attempt to bring in a new regulatory regime with the transition of society from apartheid to democracy.¹⁸⁹ In so doing, it was hoped that the government would lift the darkness that had fallen over South African society.¹⁹⁰

This new regime called for establishing competitive markets regulated by strong, independent organisations so as to encourage economic growth.¹⁹¹ The regime's focus on genuine and prolific competition made, and arguably continues to make, competition law an area of vital significance for the effective functioning of the South African economy today.¹⁹² In a bid to achieve the aims of the democratic regime, the state promulgated legislation aimed specifically at increasing the involvement of all South African citizens in commerce, the CA.¹⁹³ The CA sets out objectives which emphasise the development of the economy through the involvement of small to medium enterprises and HDIs.¹⁹⁴

¹⁸⁶ D Lewis *Thieves at the Dining Table: Enforcing the Competition Act: A Personal Account* (2012) 1.

¹⁸⁷ *Ibid.*

¹⁸⁸ LM Mariotti & J Fourie 'The economics of apartheid: an introduction' (2014) 29(2) *Economic History of Developing Regions* 113.

¹⁸⁹ Lewis *op cit* note 186.

¹⁹⁰ *Ibid.*

¹⁹¹ G Makhaya & S Roberts 'Expectations and outcomes: considering competition and corporate power in South Africa under democracy' (2013) 40(138) *Review of African Political Economy* 557.

¹⁹² Makhaya & Roberts *op cit* note 191 at 558.

¹⁹³ Preamble to the CA.

¹⁹⁴ Makhaya & Roberts *op cit* note 191.

As legislation that regulates all economic activity in South Africa, the CA has a bearing on the functioning of the automotive industry.¹⁹⁵ The various methods for market regulation, including the passing of guidelines by the Competition Commission,¹⁹⁶ thus apply equally to the automotive aftermarket. This chapter of the study will now turn to a discussion of the promulgation of the CA, the establishment of the Competition Commission and its authority to pass the Guidelines. In so doing, this chapter aims to place the Guidelines in their appropriate context before proceeding to analyse their provisions in the following chapter.

3.2 Brief History of Competition Law¹⁹⁷

Competition law has its roots in Roman law in the form of the *lex julia annona* which was an action that is likely to have emerged during the reign of Julius Caesar.¹⁹⁸ In terms of this action, a fine could be levied on a person who artificially inflated the price of corn.¹⁹⁹ Despite this early attempt to curb monopolies, their existence persisted as any laws enacted to prevent their operation were quickly repealed.²⁰⁰ In modern times, America has been seen as the pioneer of competition law through its passing of the Sherman Antitrust Act of 1890, an Act which still remains at the core of American competition law today.²⁰¹ Thereafter, the rapid development of American competition law and competition law jurisprudence led to American competition law having a significant influence on the development of competition law in South Africa.²⁰²

South African history, in particular that of apartheid, has also had a significant influence on competition law in South Africa.²⁰³ During apartheid, the international isolation of South Africa due to economic sanctions²⁰⁴ resulted in the South African

¹⁹⁵ Section 3(1) of the CA.

¹⁹⁶ Section 79(1) of the CA.

¹⁹⁷ The full history of this area of law falls beyond the scope of this study. Accordingly, a brief overview is included to provide context.

¹⁹⁸ K Kemp & P Sutherland *Competition Law of South Africa* (2000) 2-6.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ DF Turner 'The American antitrust laws' (1955) 18(3) *Modern Law Review* 244.

²⁰² Mariotti & Fourie *op cit* note 188.

²⁰³ K Moodaliyar & S Roberts 'Introduction: Reflecting on the maturing South African competition law regime' in K Moodaliyar & S Roberts (eds) *The Development of Competition Law and Economics in South Africa* (2012) ix.

²⁰⁴ *Ibid.*

government occupying positions as both producer and regulator.²⁰⁵ Apartheid policies favoured large companies and the government established numerous vital industries under its own ownership,²⁰⁶ resulting in it having little incentive to prohibit anti-competitive conduct.

The economic sanctions also resulted in investment patterns by companies which were fertile ground for the South African economy to develop on the basis of a conglomerate structure.²⁰⁷ Conglomerates are large corporations with various product lines operating and owned by the same management.²⁰⁸ While these structures served as a means of limiting risk of failure through diversification,²⁰⁹ they also limited competition.²¹⁰ This is because they had the effect of locking out small and medium companies from participating in an industry, leading to an imbalance in the manner in which income and wealth were distributed in South Africa.²¹¹

The first notable attempt made by the South African government to regulate competition was the promulgation of the RMCA.²¹² This admirable effort to regulate competition in the South African economy was nevertheless fraught with shortcomings. These included the failure to account for challenges to competition outside of monopolies and the fact that enforcement decisions were subject to overrule at the discretion of the executive.²¹³

After the failure of the RMCA, the Mouton Commission was established in order to investigate and report on competition policy in South Africa.²¹⁴ The chief recommendation made by the Commission was that a new South African competition

²⁰⁵ T Hartzenberg 'Competition policy and practice in South Africa: promoting competition for development' (2006) 26(3) *Northwestern Journal of International Law and Business* 683.

²⁰⁶ Competition Commission and Competition Tribunal 'Ten years of enforcement by South African competition authorities – unleashing rivalry' 2009, available at <https://www.comptrib.co.za/Content/Documents/Info%20Library/Reports/unleashing-rivalry---ten-years-of-enforcement-by-sa-competition-authorities.pdf>, accessed on 4 September 2020.

²⁰⁷ GN 1953 GG 16085 of 15/11/1994 7.

²⁰⁸ P Leinwand & C Mainard 'The Coherent Conglomerate' 12 June 2012, available at <https://hbr.org/2012/06/the-coherent-conglomerate>, accessed on 24 August 2020.

²⁰⁹ Ibid.

²¹⁰ Hartzenberg op cit note 205 at 669.

²¹¹ Ibid.

²¹² L Kelly et al *Principles of Competition Law in South Africa* (2017) 24.

²¹³ SJ Naude 'Maintenance and promotion of competition: the Mouton report' (1978) 121 *De Rebus* 5.

²¹⁴ Kelly et al op cit note 212 at 25.

law regime should be established.²¹⁵ Thereafter the Maintenance and Promotion of Competition Act 96 of 1979 which established the Competition Board was promulgated.²¹⁶ The Competition Board was empowered to regulate 'all aspects of economic competition policy, including the entrepreneurial activities in respect of institutions directly or indirectly controlled by the State'.²¹⁷ However, much like its predecessor,²¹⁸ there was little enforcement of the Act.²¹⁹ Ultimately, the Competition Board fulfilled the function of an advisory body as opposed to that of an enforcement agency as its decisions were subject to the approval or rejection of what is now the Minister.²²⁰ An indicator of its abject failure lies in the fact that throughout its existence, the Competition Board only had a single successful prosecution under the Act which resulted in a fine of merely R100.00 (one hundred Rand).²²¹

By the time South Africa passed the CA in 1998, it was in dire need of legislation to bring about higher levels of competition as a means of addressing the effects of apartheid on the South African economy and society.²²² In 1994, the advent of the Reconstruction and Development Programme paved the way for the promulgation of the CA.²²³ In drafting the CA, the newly elected democratic government of South Africa was faced with the task of redressing economic practices which had resulted in inadequate protection of labourers and the majority of wealth being held by the white minority at the expense of the black majority.²²⁴

3.3 The Competition Act 89 of 1998 and its Enforcement

In light of the foregoing, the significance of the CA to the South African economy cannot be overstated. Reference to promoting competition in the Reconstruction and Development Programme shows it to have been a part of the strategy to move South

²¹⁵ P Koornhof & D Prins 'Assessing the nature of competition law enforcement in South Africa' (2014) 18 *Law, Democracy and Development* 139.

²¹⁶ Section 3 of the erstwhile MPCA.

²¹⁷ Section 6(1)(a)(i) of the erstwhile MPCA.

²¹⁸ Naude op cit note 213.

²¹⁹ PEJ Brooks 'Redefining the objectives of South African competition law' (2001) 34(3) *Comparative and International Law Journal of Southern Africa* 298.

²²⁰ Section 13(2) of the erstwhile MPCA.

²²¹ Koornhof & Prins op cit note 215.

²²² C Visser 'An overview of the Competition Act (Part 1)' (2004) 12(1) *Juta's Business Law* 54.

²²³ GN 1953 GG 16085 of 15/11/1994 24.

²²⁴ GN 1953 op cit note 223 at 7.

Africa out of the economic slump caused by apartheid into a time of economic prosperity.²²⁵ This view is supported by academic commentary from authors such as Lewis who states that '[i]n South Africa, antitrust²²⁶ was not part of a market liberalisation agenda; it was a central feature of the democratic project'.²²⁷ Ultimately, confirmation of this view comes from the Act itself which provides that it regulates all economic activity in or having an effect in South Africa,²²⁸ save for in certain exceptional circumstances indicated therein.²²⁹

The role of the Act in regulating the entire South African economy makes the actions of any institutions acting in terms of the Act significant given their potentially widespread impact.²³⁰ These institutions, which will be more fully described below, have shown themselves to be robust in the enforcement of the CA.²³¹ The two main mechanisms that the institutions established under the CA use to enforce the Act are consent orders²³² and administrative penalties.²³³ Both of these methods have been used to deter violations of the CA in the form of price fixing²³⁴ and the charging of excessive prices.²³⁵

²²⁵ GN 1953 op cit note 223 at 24.

²²⁶ Competition law is referred to as 'antitrust' in America. Much like competition law, antitrust laws aim to 'protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up'. See Federal Trade Commission 'The Antitrust Laws' date unknown, available at <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>, accessed on 14 July 2021.

²²⁷ Lewis op cit note 186 at 10.

²²⁸ Section 3(1) of the CA.

²²⁹ In the case of *Standard Bank Investment Corporation v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA), the SCA considered the meaning of the phrase 'all economic activity' as it appears in section 3(1) of the CA. It held that '[t]hese words of great generality extend its [the Act's] operation to the countless forms of activity which people undertake in order to earn a living. But the extension is not unlimited, as the existence of the five exceptions (a) to (e) proclaims'.

²³⁰ Section 3(1) of the CA.

²³¹ See for example, the administrative penalty of R1,200,000 levied by the Competition Tribunal against Dis-chem Pharmacies Limited for charging excessively high prices for surgical masks during the Covid-19 pandemic in *Competition Commission of South Africa v Dis-Chem Pharmacies Limited* CR008Apr20. See also consent order between Competition Commission and Manhattan Cosmetics CC for donation of sanitisers in light of their excessively high pricing of the same products in *Competition Commission of South Africa v Manhattan Cosmetics CC* CO019May20.

²³² Section 49D of the CA.

²³³ Section 59 of the CA.

²³⁴ Section 5(2) of the CA.

²³⁵ Section 4(1)(b)(i) of the CA.

A consent order is an agreement negotiated and concluded²³⁶ between the Competition Commission and an accused firm during an investigation by the Competition Commission into alleged anti-competitive conduct.²³⁷ Such agreement is then confirmed by the Competition Tribunal.²³⁸ A consent order typically compels a party considered by the Competition Commission to be engaging in anti-competitive conduct to alter such behaviour going forward.²³⁹ This was evident in case of *Competition Commission v South African Airways (Pty) Limited*.²⁴⁰ In this case, an application by SAA for exemption of a bilateral agreement from the application of the Act revealed an agreement between SAA and Lufthansa to fix prices for tickets for flights between Cape Town/Johannesburg and Frankfurt.²⁴¹ This was found by the Competition Commission to be in breach of s 4(1)(b)(i) of the CA which prohibits price fixing.²⁴² A consent agreement was concluded between the Competition Commission and SAA in terms of which SAA agreed to refrain from engaging in the prohibited conduct and to provide evidence of its compliance with the agreement.²⁴³

An administrative penalty is an amount that a firm can be charged for engaging in conduct prohibited by the CA.²⁴⁴ In the case of *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Others*²⁴⁵ the Competition Tribunal emphasised that the role of administrative penalties was to act as a deterrent rather than a punishment.²⁴⁶ They deter the firm that has currently engaged in anti-competitive conduct, as they have incurred a fine, and any other firms that may seek to engage in the anti-competitive behaviour, due to the risk of incurring

²³⁶ Section 21(1)(f) of the CA

²³⁷ Section 49D(1) of the CA.

²³⁸ Ibid.

²³⁹ See *Competition Commission South Africa v Sasol Chemical Industries Ltd; Competition Commission South Africa v Sasol Chemical Industries Ltd and Others* (31/CR/May05) [2009] ZACT 33 where Sasol Chemical Industries Limited, which was accused of price fixing, consented to refraining from certain anti-competitive practices in future and agreed to publicise this agreement. See also discussion of *Competition Commission v Toyota South Africa Motors (Pty) Limited* 41/CR/May04 below.²⁴⁰ 43/CR/May06.

²⁴¹ *Competition Commission v South African Airways (Pty) Limited* 43/CR/May06 para 4.2.

²⁴² *South African Airways* supra note 241 para 4.4.

²⁴³ *South African Airways* supra note 241 para 5.

²⁴⁴ Section 59 of the CA.

²⁴⁵ (08/CR/Mar01) [2003] ZACT 43.

²⁴⁶ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Others* (08/CR/Mar01) [2003] ZACT 43 para 117.

a similar fine.²⁴⁷ While the amount that can be charged in terms of an administrative penalty is limited to a maximum of 10% (ten per cent) of a firm's annual turnover in South Africa in the previous financial year,²⁴⁸ this amount can prove quite significant in practice,²⁴⁹ making it an effective deterrence measure.

In the case of *Competition Commission v Pioneer Foods (Pty) Limited*²⁵⁰ the Competition Commission investigated allegations of the operation of a bread cartel in the Western Cape.²⁵¹ It was alleged that the cartel consisted of Premier Foods (the Blue Ribbon brand), Pioneer Foods (the Sasko and Duens brands) and Tiger Brands (the Albany brand).²⁵² Pioneer Foods, unlike the other firms implicated, denied being involved in such a cartel or the national cartel it subsequently emerged had also been in operation.²⁵³

The Competition Tribunal found that Pioneer Foods, together with the other brands, had engaged in conduct in breach of s 4(1)(b)(i) and (ii) of the CA which prohibits restrictive horizontal practices in the form of setting selling or purchase prices and dividing and allocating markets. The Competition Commission sought for an administrative penalty to be imposed on Pioneer Foods together with an order compelling them to cease the prohibited conduct.²⁵⁴ Ultimately, Pioneer Foods was charged an administrative penalty making up 9.5% (nine point five per cent) of its Sasko bread turnover for the Western Cape which amounted to R46,019,954 (forty-six million nineteen thousand nine hundred and fifty-four Rand)²⁵⁵ – an amount that cut meaningfully into their profits.

The strong enforcement of the CA through the imposing of administrative penalties or entry into consent orders acts as a deterrent to companies due to the knock-on effects

²⁴⁷ *Federal Mogul* supra note 246 para 118.

²⁴⁸ Section 59(2) of the CA.

²⁴⁹ See *Competition Commission v Pioneer Foods (Pty) Limited* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9 where 10% of Pioneer Food (Pty) Limited's annual turnover amounted to approximately R7,859,739,593 nationally and R1,981,407,170 in the Sasko division.

²⁵⁰ (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9.

²⁵¹ *Pioneer Foods* supra note 249 para 2.

²⁵² *Ibid.*

²⁵³ *Pioneer Foods* supra note 249 para 6 and para 9.

²⁵⁴ *Pioneer Foods* supra note 249 para 138.

²⁵⁵ *Pioneer Foods* supra note 249 para 6 and para 173.

thereof. These effects include reputational risk²⁵⁶ and/or financial loss.²⁵⁷ Van Reenen emphasises that ‘a company’s reputation can instantly be ruined with all the media and communication tools available on the market these days. The whole world can read about a scandal on the internet just minutes after a company’s misfortune is exposed. It is for this reason that a company’s reputation can be one of its biggest assets or risks at any given time’.²⁵⁸ Chapman adds that ‘[r]eputation directly affects sales figures, profitability, treatment by regulators, media coverage, share price and public opinion’.²⁵⁹

When consumers are made aware that they have been charged amounts that a bread cartel conspired to charge them to achieve maximum profit, they may look at brands such as Albany or Sasko with a jaundiced eye and avoid them in the future.²⁶⁰ This would cause financial loss for the companies through the decrease in sales. This loss would be in addition to that already suffered due to the levying of an administrative penalty by the Competition Commission.²⁶¹ Consumers would have the right to claim damages for losses suffered as a result of a breach of the CA, resulting in even further financial loss for the companies.²⁶²

Even a suggestion of anti-competitive conduct would be sufficient to damage a company’s reputation²⁶³ and this has accordingly served as a strong motivator for companies to negotiate or otherwise work with the Competition Commission. An example of this would be when the Competition Commission conducted an inquiry into the private healthcare sector aimed at considering issues such as market concentration.²⁶⁴ Key private health companies such as Discovery were quick to make

²⁵⁶ R van Reenen ‘A reputable reputation’ (2007) 1(2) *Enterprise Risk* 9.

²⁵⁷ R Chapman ‘Piloting a course: reputation risk’ (2009) 3(5) *Enterprise Risk* 30.

²⁵⁸ Van Reenen op cit note 256.

²⁵⁹ Chapman op cit note 257 at 29.

²⁶⁰ *Pioneer Foods* supra note 249.

²⁶¹ *Pioneer Foods* supra note 249 para 173.

²⁶² Section 65(6)(b) of the CA.

²⁶³ See the Competition Commission’s Data Market Inquiry which looked into all members of the supply chain who influence the price of data available at <http://www.compcom.co.za/newsletter/data-market-inquiry/>. The Competition Commission conducting an inquiry into data prices implies that there are concerning practices in the data market which may be anti-competitive. This may be detrimental to the reputation of service providers in the data market and accordingly motivate them to work with the Competition Commission.

²⁶⁴ Competition Commission ‘Health Market Inquiry’ date unknown, available at <http://www.compcom.co.za/healthcare-inquiry/>, accessed on 5 November 2020.

submissions after the stakeholder sessions held by the Competition Commission in April of 2019.²⁶⁵ Discovery's submissions agreed with the findings of the Competition Commission regarding market concentration and set out suggestions on how to curb this in future.²⁶⁶

In the automotive industry, the competition authorities have adopted a similarly rigorous approach to the sanctioning of anti-competitive conduct. Authorities have swiftly shut down price setting agreements (vertical price fixing)²⁶⁷ in conflict with the CA.

In the case of *Competition Commission v Toyota South Africa Motors (Pty) Limited*²⁶⁸ a complaint was made to the Competition Commission that Toyota was imposing fines on its approved dealers for failure to impose discounts stipulated by Toyota.²⁶⁹ It was alleged that this amounted to a restrictive vertical practice or minimum resale price maintenance in breach of the CA.²⁷⁰ An investigation by the Competition Commission found that Toyota had engaged in minimum resale price maintenance in breach of s 5(2) of the CA.

As a consequence of this finding, Toyota entered into a consent agreement in terms of which it agreed, among other things, to cease the discounting programme and to inform its dealers of the termination of the programme.²⁷¹ In addition to the consent order, Toyota also received an administrative penalty in the amount of R12,000,000 (twelve million Rand).²⁷² It is submitted that the requirement to publicise the consent order,²⁷³ together with the considerable amount of the fine levied against Toyota,²⁷⁴ resulted in both financial loss for, and reputational damage to, Toyota. This is as the

²⁶⁵ Discovery Health (Pty) Limited 'Discovery Health submission to the Health Market Inquiry' 26 April 2019, available at <http://www.compcom.co.za/wp-content/uploads/2020/01/Discovery-Health-submission-to-the-HMI-26th-April-2019-for-publishing.pdf>, accessed on 5 November 2020.

²⁶⁶ *Ibid.*

²⁶⁷ T Woker *The Franchise Relationship under South African Law* (2012) 219.

²⁶⁸ 41/CR/May04.

²⁶⁹ *Toyota* supra note 239 para 2.2.

²⁷⁰ *Toyota* supra note 239 para 2.3.

²⁷¹ *Toyota* supra note 239 para 6.1.

²⁷² *Toyota* supra note 239 para 7.2.

²⁷³ *Toyota* supra note 239 para 6.1.

²⁷⁴ *Toyota* supra note 239 para 7.2.

substantial fine may lead consumers to view the conduct engaged in by Toyota as being particularly reprehensible, making them a company to be avoided when seeking to purchase a vehicle.²⁷⁵ This may result in even more financial loss for Toyota as a result of a decrease in sales.

Competition authorities have also expressed caution in respect of tie-in and exclusive dealing arrangements typically found in the automotive sector. Tie-ins compel the purchase of another product to secure the purchase of the desired product²⁷⁶ while exclusive dealing arrangements compel the use of a particular supplier to the exclusion of competitors.²⁷⁷ Both these types of agreements can be effective in order to ensure quality control²⁷⁸ and the protection of intellectual property but they can also prove detrimental to competition.²⁷⁹ Where there is no genuine competition with competitors in the market, such agreements may breach the s 5(1) of the CA which prohibits restrictive vertical practices or s 8(1)(d)(i) which prohibits a dominant firm from compelling a supplier or consumer not to deal with a competitor.²⁸⁰

The awareness of the knock-on effects of enforcement of the CA by the competition authorities referenced above is thus similarly acute in the automotive industry, including the automotive aftermarket. In light of such awareness, the automotive industry has made efforts to work with the competition authorities in regulating the sector, as opposed to falling foul of their rules.²⁸¹ These efforts have taken the form of discussions beginning in 2017 between automotive industry members and the Competition Commission.²⁸² The discussions focused on concerns that members of the automotive industry were engaging in anti-competitive practices which had the result of preventing ISPs from participating in the automotive supply chain.²⁸³ The clear

²⁷⁵ Van Reenen op cit note 256.

²⁷⁶ S Semeraro 'Should anti-trust condemn tying agreements that increase price without restraining competition' (2010-2011) 123 *Harvard Law Review Forum* 30.

²⁷⁷ Woker op cit note 267.

²⁷⁸ Woker op cit note 267 at 220.

²⁷⁹ Competition Commission 'Franchising Notice' date unknown, available at <http://www.compcom.co.za/wp-content/uploads/2017/11/layout.pdf>, accessed on 6 October 2020.

²⁸⁰ Ibid.

²⁸¹ I Venter 'Criticism, praise for Competition Commission's aftermarket guidelines' 18 February 2020, available at https://www.engineeringnews.co.za/article/criticism-praise-for-competition-commissions-aftermarket-guidelines-2020-02-18/rep_id:4136, accessed on 16 September 2020.

²⁸² Ibid.

²⁸³ Ibid.

effort of industry members to be involved in regulating the industry, as opposed to risking stern regulation by the Competition Commission, illustrates the powerful position occupied by the Competition Commission in the South African automotive industry.

3.4 The Competition Commission

The CA regulates the economy in a structure consisting of three bodies: the Competition Commission,²⁸⁴ the Competition Tribunal²⁸⁵ and the Competition Appeal Court.²⁸⁶

The Competition Commission is an administrative body created to ensure compliance with the Act.²⁸⁷ Subject to the Constitution and other existing law, it is an independent body.²⁸⁸ This independence is further supported by the mandate given to the Competition Commission to be impartial and perform its duties without fear, favour, or prejudice.²⁸⁹ The independence of the Competition Commission is significant as an intentional departure from the past where decisions of competition authorities were subject to the final say of the government.²⁹⁰

The Competition Commission performs its duties under the leadership of a Commissioner²⁹¹ who acts with the assistance of a Deputy Commissioner.²⁹² Generally, the Commissioner is responsible for ensuring that the objectives of the CA are achieved²⁹³ and this is done by performing those duties set for the Commissioner by the Act.²⁹⁴ The Competition Tribunal summarised the role of the Competition Commission in the matter of *Norvatis SA (Pty) Ltd and Others v Competition Commission and Others*²⁹⁵ where it was held that:

²⁸⁴ Section 19(1) of the CA.

²⁸⁵ Section 26(1) of the CA.

²⁸⁶ Section 36(1) of the CA.

²⁸⁷ Kemp & Sutherland op cit note 198 at 11-6(1).

²⁸⁸ Section 20(1)(a) of the CA.

²⁸⁹ Section 20(1)(b) of the CA.

²⁹⁰ Kelly et al op cit note 212 at 25.

²⁹¹ Section 22 of the CA.

²⁹² Section 23 of the CA.

²⁹³ Section 22(3) of the CA.

²⁹⁴ Section 22(3)(a) of the CA.

²⁹⁵ CT22/CR/B/Jun01, 2.7.2001.

'55. Section 21 of the Act, which deals with the functions of the commission, states that the commission has the power to investigate and evaluate alleged contraventions of chap 2. Chapter 2 deals with prohibited practices. The commission therefore is empowered to investigate and evaluate alleged prohibited practices, and, in terms of s 50(2), refer to the tribunal those complaints that in respect of which, it "determines", a prohibited practice has been established. The commission is an investigative body, which in referring the complaint to the tribunal is only instituting the initial procedural step on the road to a hearing.²⁹⁶

The Competition Commission enforces competition law in South Africa together with two other bodies, the Competition Tribunal²⁹⁷ and the Competition Appeal Court.²⁹⁸ The Competition Tribunal is an adjudicative body approved to determine whether a practice prohibited by the CA has occurred.²⁹⁹ As illustrated in the cases referred to above,³⁰⁰ the Competition Tribunal also has the duty to confirm, with or without amendments, or reject consent agreements entered into by the Competition Commission.³⁰¹ The Competition Appeal Court is established in terms of s 36(1) of the CA and is a body that hears appeals from the Competition Tribunal.³⁰²

3.4 The Guidelines and their Standing in Law

In performing its duties, the Competition Commission is authorised in terms of s 79(1) of the CA to pass guidelines that reflect the Competition Commission's policy stance in respect of any matter under its purview in terms of the Act.³⁰³ Such guidelines are not binding on the Competition Commission, the Competition Tribunal or the Competition Appeal Court for the purposes of the interpretation of the CA or otherwise exercising their discretion.³⁰⁴

²⁹⁶ *Norvatis SA (Pty) Ltd and Others v Competition Commission and Others* CT22/CR/B/Jun01, 2.7.2001 para 55.

²⁹⁷ Section 26(1) of the CA.

²⁹⁸ Section 36(1) of the CA.

²⁹⁹ *Norvatis SA* supra note 296 para 56.

³⁰⁰ See *South African Airways* supra note 241 and *Toyota* supra note 239.

³⁰¹ Section 49D(2) of the CA.

³⁰² Section 37(1)(b) of the CA.

³⁰³ Section 79(1) of the CA.

³⁰⁴ Section 79(4) of the CA.

The Guidelines serve as practical guidance to the automotive sector about how it is to go about transforming the automotive aftermarket and promoting competition therein by ensuring the increased involvement of small to medium enterprises and HDIs.³⁰⁵ The Guidelines may, but will not necessarily, inform the approach of the competition authorities in interpreting and applying the provisions of the CA.³⁰⁶ A failure to comply with them may be regarded by the Competition Commission as a failure to promote competition in the automotive aftermarket at best or a breach of the provisions of the CA at worst.³⁰⁷ Given the robust crackdown by the Competition Commission on anti-competitive conduct discussed above, members of the automotive industry have a keen incentive to comply with the Guidelines.

3.5 Conclusion

This chapter traced the origins of competition law from the time of the Roman Empire³⁰⁸ to the promulgation of the CA. It was determined that South African competition law, which draws to a large extent from American competition law,³⁰⁹ is fraught with its own unique challenges including the consequences of economic isolation during apartheid.³¹⁰ These struggles have resulted in the promulgation of the CA which aims to bring about the participation of small and medium businesses in the South African economy,³¹¹ together with the increased involvement of HDIs in South African businesses.³¹²

In order to achieve its objectives, the CA has established certain administrative bodies, including the Competition Commission.³¹³ The Competition Commission has shown itself to be proactive in the enforcement of competition law,³¹⁴ including in the automotive industry, where it has launched investigations,³¹⁵ concluded consent

³⁰⁵ The Guidelines 4.

³⁰⁶ Section 79(2)(b) of the CA.

³⁰⁷ The Guidelines 4.

³⁰⁸ Kemp & Sutherland op cit note 198.

³⁰⁹ Kemp & Sutherland op cit note 198 at 2-11.

³¹⁰ R Havemann 'The exchange control system under apartheid' (2014) 29(2) *Economic History of Developing Regions* 269.

³¹¹ Section 2(e) of the CA.

³¹² Kemp & Sutherland op cit note 198 at 3-44.

³¹³ Section 19, s 26 and s 36 of the CA.

³¹⁴ See *South African Airways* supra note 241.

³¹⁵ See *Toyota* supra note 239.

agreements and imposed administrative penalties for breaches of the CA.³¹⁶ The effectiveness of swift action by the Competition Commission has been aided by the desire of automotive companies to avoid reputational damage³¹⁷ and financial loss³¹⁸ to their businesses as a consequence of enforcement action.

In fulfilling its purposes, the Competition Commission is authorised to pass guidelines.³¹⁹ The guidelines passed by the Competition Commission indicate its policy position on issues affecting competition in an industry³²⁰ and this is the case in respect of the Guidelines. Given the approach to competition law enforcement taken by the Competition Commission in the past,³²¹ there is strong incentive for the automotive industry to adhere to the provisions of the Guidelines.

Now that the provisions of the legal framework into which the Guidelines fall has been considered, it is appropriate to turn to Chapter 4 of this study which will consider in detail the provisions of the Guidelines and their implications for the South African automotive aftermarket during the in-warranty period.

³¹⁶ *South African Airways* supra note 241 and *Toyota* supra note 239.

³¹⁷ Chapman op cit note 257 at 29.

³¹⁸ Van Reenen op cit note 256.

³¹⁹ Section 79(1) of the CA.

³²⁰ Ibid.

³²¹ See *South African Airways* supra note 241 and *Toyota* supra note 239.

CHAPTER 4 THE GUIDELINES AND CRITICISMS THEREOF

4.1 Introduction

As previously indicated, the Competition Commission has engaged with automotive supply chain members over a period of three years, beginning in 2017.³²² This engagement was aimed at the Competition Commission and automotive supply chain members collaborating to develop, amongst other things, methods to promote competition and inclusion of ISPs and HDIs in the automotive aftermarket.³²³ This would in turn increase consumer choice in the market³²⁴ while simultaneously providing consumers with competitive prices.³²⁵

Initially it was proposed that the automotive industry would be regulated by a voluntary code of conduct³²⁶ known as the 'Automotive Code of Conduct'.³²⁷ Despite the strong incentive for automotive supply chain members to work with the Competition Commission,³²⁸ after two years of consultation, automotive industry stakeholders could not reach agreement.³²⁹ The Competition Commission was ultimately of the view that automotive supply chain members had failed to commit to meaningful reforms to address barriers to competition in the sector.³³⁰ This led the Competition Commission to draft the Guidelines.³³¹

³²² Cover.co.za 'Guidelines for Competition in the SA Automotive Aftermarket Industry South African Insurance Association' 12 April 2020, available at <https://cover.co.za/guidelines-for-competition-in-the-sa-automotive-aftermarket-industry-south-african-insurance-association/>, accessed on 6 November 2020.

³²³ Ibid.

³²⁴ Section 2(b) of the CA.

³²⁵ Ibid.

³²⁶ The Guidelines 3.

³²⁷ Competition Commission 'Submissions Automotive Code of Conduct' date unknown, available at <http://www.compcom.co.za/submissions-automotive-code-of-conduct/>, accessed on 22 December 2020.

³²⁸ M Domisse 'Draft guidelines in the South African automotive aftermarket industry a "threat to road safety standards"' 25 February 2020, available at <https://www.news24.com/wheels/News/draft-guidelines-in-the-south-african-automotive-aftermarket-industry-a-threat-to-road-safety-standards-20200225>, accessed on 6 November 2020.

³²⁹ The Guidelines 3.

³³⁰ Ibid.

³³¹ The Guidelines 4.

The Draft Guidelines were published on 6 February 2020 and were open for comment until 16 March 2020.³³² After considering the provisions of the Draft Guidelines, automotive supply chain members³³³ expressed the opinion that their efforts at negotiating with the Competition Commission had been in vain.³³⁴ They were also of the view that the Competition Commission had acted in bad faith³³⁵ by soliciting the industry's views on promoting competition in the automotive aftermarket before adopting an approach contrary to such views in the Guidelines.³³⁶ Finally, they considered the Draft Guidelines to be unworkable and of no tangible benefit to consumers.³³⁷

In support of this, the chairperson for NADA indicated that the Draft Guidelines undermined existing efforts at inclusion in and transformation of the automotive industry as proposed in the Automotive Master Plan 2035.³³⁸ This plan includes industry approved measures to increase local content in South African assembled vehicles to 60% (sixty per cent) and to transform the South African automotive industry so that it will be more representative of the country's demographic makeup by 2035.³³⁹ It aims at a progressive realisation of these goals as opposed to the immediate mechanisms proposed by the Guidelines.³⁴⁰

The Chief Executive Officer of a major manufacturer of automotive tyres and rubber products,³⁴¹ Sumitomo Rubber South Africa (Pty) Limited, indicated that there were potential unintended consequences of the Draft Guidelines.³⁴² These included

³³² The Draft Guidelines 0.

³³³ These include those OEMs represented by NAAMSA. In this regard, see P de Wet 'You may soon be able to service your car where you like – if the Competition Commission has its way' 17 February 2020, available at <https://www.businessinsider.co.za/competition-commission-draft-guidelines-for-cheaper-car-service-and-repairs-2020-2>, accessed on 6 November 2020.

³³⁴ Ibid.

³³⁵ P de Wit op cit note 330.

³³⁶ Venter op cit note 281.

³³⁷ Jonckie op cit note 51.

³³⁸ Dommissie op cit note 328.

³³⁹ J Barnes et al 'Geared for growth South Africa's automotive industry masterplan to 2035: a report of the South African Automotive Masterplan Project' 18 December 2018, available at <https://www.exportersec.co.za/wp-content/uploads/2019/08/SA-Auto-Masterplan-2035.pdf>, accessed on 6 November 2020.

³⁴⁰ Ibid.

³⁴¹ Sumitomo Rubber South Africa (Pty) Limited 'About us' date unknown, available at <https://www.srigroup.co.za/about-us>, accessed on 11 January 2020.

³⁴² Jonckie op cit note 51.

negative implications for foreign investment in the South African automotive industry and concerns around road safety.³⁴³ These and other criticisms of the Draft Guidelines will be explored more fully below to consider whether the Competition Commission accounted for them in the Guidelines. Presently, it is sufficient to note that the concerns around the provisions of the Draft Guidelines resulted in the automotive industry rejecting them emphatically.³⁴⁴

After considering comments from automotive aftermarket stakeholders,³⁴⁵ the final Guidelines were published in the Government Gazette on 29 January 2019.³⁴⁶ It is indicated within the Guidelines that they will come into effect on 1 July 2021.³⁴⁷ The Guidelines apply to the South African³⁴⁸ automotive aftermarket³⁴⁹ in respect of the service, maintenance, mechanical and motor-body repair³⁵⁰ of any vehicle. These various terms are defined by the Guidelines as follows:

- service work is work conducted pursuant to a service plan which is a product that allows for the replacement of vehicle parts or components when a vehicle reaches a particular mileage;³⁵¹
- maintenance work is work conducted pursuant to a maintenance plan which is a product that allows for the replacement of vehicle parts or components, including replacement for wear and tear, when a vehicle reaches a particular mileage;³⁵²
- mechanical repair work is work conducted on the mechanisms or ‘working parts’³⁵³ of a vehicle including its engine or other electronic components;³⁵⁴ and
- motor-body repair work is work conducted on damaged parts of the interior or exterior of a vehicle that do not relate to its mechanisms.³⁵⁵ These include non-

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ GN 126 GG 43015 of 14/02/2020 2.

³⁴⁶ GN 46 GG 44103 of 29/01/2020.

³⁴⁷ Ibid.

³⁴⁸ The Guidelines 18.

³⁴⁹ The Guidelines 5.

³⁵⁰ Definition of ‘Automotive Aftermarket’ in the Guidelines 5.

³⁵¹ Definition of ‘Service Plan’ in the Guidelines 8.

³⁵² Definition of ‘Maintenance Plan’ in the Guidelines 8.

³⁵³ Definition of ‘Mechanical Repair’ in the Guidelines 7.

³⁵⁴ Ibid.

³⁵⁵ Definition of ‘Motor-body Repairer’ read with definition of ‘Non-Structural Repair’ in the Guidelines 7 and definition of ‘Structural Repair’ in the Guidelines 9.

structural parts such as aluminium steel parts³⁵⁶ and structural parts such as frames.³⁵⁷

A full examination of these Guidelines is beyond the scope of this mini-dissertation, therefore this chapter will consider only those guidelines that have a direct impact on the supply chain liability of OEMs during the in-warranty period. Each guideline will be considered in detail, together with the aims that the Competition Commission is attempting to achieve through imposing each such guideline. Thereafter, the criticisms levelled by industry members against the Draft Guidelines will be considered to determine whether the Competition Commission has adequately accounted for any unintended consequences that may arise from the implementation of the Guidelines.

The guidelines that will be considered in this chapter are accordingly the following:

- guideline 5;
- guideline 6; and
- guideline 10.

The criticisms from members of the automotive industry which will be discussed in respect of the guidelines are the following:

- sufficient competition in the automotive aftermarket currently;
- implications for road safety;
- implications for direct foreign investment;
- sufficient work for OEM approved motor-body repairers in a particular Geographic Area; and
- counterfeiting of original spare parts.

This chapter will now turn to a consideration of the measures to promote competition for the benefit of consumers in the automotive aftermarket.

³⁵⁶ Definition of 'Non-Structural Repair' in the Guidelines 7.

³⁵⁷ Definition of 'Structural Repair' in the Guidelines 9.

4.2 Guideline 5

Guideline 5 regulates the in-warranty service, maintenance, mechanical and motor-body repair of vehicles.³⁵⁸ The in-warranty period is that period when an OEM has an obligation to repair or replace any defective parts or components of a vehicle which they have manufactured.³⁵⁹ The defect can be in respect of the quality of the part or component or the workmanship used to install a part or a component of a vehicle.³⁶⁰ The in-warranty period is distinguished from the out-of-warranty period when there is no obligation on an OEM to repair or replace any defective part or component of a vehicle.³⁶¹

4.2.1 Outline of the Guideline

In terms of guideline 5, there are three types of service providers that can provide service, maintenance and mechanical or motor-body repair work.³⁶² These are an approved dealer,³⁶³ an approved motor-body repairer³⁶⁴ or an ISP.³⁶⁵ Each of these can be understood as follows:

- an approved dealer is a business approved by an OEM to sell new or used vehicles and engage in service, maintenance or mechanical repair work on vehicles;³⁶⁶
- an approved motor-body repairer is appointed by an OEM or an insurer to conduct motor-body repairs on a vehicle;³⁶⁷ and
- an ISP is a business that is not approved by an OEM or an insurer to perform service, maintenance, mechanical or motor-body repairs on vehicles.³⁶⁸

Guideline 5 provides that during the in-warranty period, consumers can approach:

1. either an approved dealer or an ISP for service, maintenance and mechanical

³⁵⁸ Guideline 5.1 of the Guidelines.

³⁵⁹ Definition of 'In-Warranty' in the Guidelines 9.

³⁶⁰ Ibid.

³⁶¹ Definition of 'Out-of-Warranty' in the Guidelines 9.

³⁶² Guideline 5 also regulates motor-body repair work conducted on insured vehicles but this is outside the scope of this study.

³⁶³ Guideline 5.4.1 of the Guidelines.

³⁶⁴ Guideline 5.4.3 of the Guidelines.

³⁶⁵ Guideline 5.4.1 read together with guideline 5.4.4 of the Guidelines.

³⁶⁶ Definition of 'Dealer' in the Guidelines 5.

³⁶⁷ Definition of 'Motor-body Repairer' in the Guidelines 7.

³⁶⁸ Definition of 'Independent Service Provider or ISP' in the Guidelines 6.

repair work;³⁶⁹ and

2. their choice of an approved dealer, approved motor-body repairer or an ISP for repair work³⁷⁰ where the vehicle is not insured.³⁷¹

4.2.2 Aims of the Guideline

As noted in Chapter 2, OEMs typically conclude long-term franchise agreements with approved dealers³⁷² in terms of which approved dealers grant warranties which require consumers to service, maintain and repair their vehicles at approved dealers in order to maintain the warranty.³⁷³ Where consumers fail to do this, all or part of the warranty granted to them may be rendered invalid or void.³⁷⁴ This has had the effect of limiting consumer choice during the in-warranty period to a single service provider, the approved dealer.³⁷⁵ A lack of consumer choice means that there is a lack of competition between suppliers, resulting in no incentive for OEMs to innovate in a manner that exposes consumers to a better quality or price of goods.³⁷⁶ This is in direct conflict with s 2(b) of the CA which provides that one of the purposes of the Act is to promote consumer choice and expose consumers to competitive prices.

Guideline 5 aims to address this limitation on the participation of ISPs in the automotive aftermarket by:

- enabling consumers to elect to use an ISP to conduct service, maintenance and mechanical repair work during the in-warranty period;³⁷⁷
- enabling consumers to elect to use an ISP to conduct motor-body repair work where a vehicle is not insured during the in-warranty period;³⁷⁸ and

³⁶⁹ Guideline 5.4.1 of the Guidelines.

³⁷⁰ The term 'Repair Work' is not defined in the Guidelines but is understood in the context of guideline 5.4.4 of the Guidelines to include both mechanical and motor-body repair work.

³⁷¹ Guideline 5.4.4 of the Guidelines.

³⁷² Guideline 8.2 of the Guidelines.

³⁷³ Guideline 5.2 of the Guidelines.

³⁷⁴ The Guidelines 19.

³⁷⁵ Guideline 8.2 of the Guidelines.

³⁷⁶ D Waters *Supply Chain Risk Management: Vulnerability and Resilience in Logistics* 2 ed (2011) 61.

³⁷⁷ Guideline 5.4.1 of the Guidelines.

³⁷⁸ Guideline 5.4.4 of the Guidelines.

- imposing a requirement on OEMs not only to recognise but also not to obstruct a consumer's choice as to service provider in the automotive aftermarket during the in-warranty period.³⁷⁹

These requirements will serve to meet two policy objectives set out in the Guidelines, namely, enabling ISPs to participate in in-warranty service, maintenance, mechanical and motor-body repair work and facilitating greater consumer choice in the automotive aftermarket.³⁸⁰

4.2.3 Criticisms of the Guideline

Criticisms of guideline 5 include the following: there is already sufficient competition in the automotive aftermarket, that its implementation may adversely affect foreign direct investment in the South African automotive industry and it may have negative implications for road safety where mechanical and motor-body repair work is conducted on vehicles.³⁸¹

4.2.3.1 Sufficient Competition in the Automotive Aftermarket

The chairperson of NADA indicated that the organisation unilaterally rejected the Draft Guidelines.³⁸² The organisation represents the interests of all new and certain used vehicle dealerships with the aim, amongst others, of facilitating a better relationship between consumers and vehicle dealerships.³⁸³ NADA rejected the Draft Guidelines based on their view that there is already substantial choice for consumers in the automotive aftermarket due to the investment of its members in the establishment of dealerships.³⁸⁴ It further argued that this investment has rendered the automotive aftermarket sufficiently competitive.³⁸⁵ Accordingly, it may be deduced that NADA rejects the Guidelines on the basis that there is no need for them to specifically provide for the increased involvement of ISPs in the automotive aftermarket.

³⁷⁹ Guideline 5.4.1 of the Guidelines.

³⁸⁰ The Guidelines 18.

³⁸¹ Dommissie op cit note 328.

³⁸² Ibid.

³⁸³ National Automobile Dealers' Association 'About us' date unknown, available at www.nada.co.za, accessed on 26 December 2020.

³⁸⁴ Dommissie op cit note 328.

³⁸⁵ Ibid.

In conflict with this view, there is evidence to strongly support proactive measures to ensure the involvement of ISPs in the automotive aftermarket. The chairperson of Right to Repair South Africa, an organisation established to represent independent distributors and ISPs in the automotive aftermarket,³⁸⁶ has indicated that the automotive aftermarket is characterised by a lack of consumer choice and exposure to anti-competitive prices.³⁸⁷ Additionally, ISPs have had their ability to compete with OEMs and approved dealers hampered by a lack of access to technical information.³⁸⁸

In support of this view, ISPs have indicated that the current practices create a monopoly³⁸⁹ controlled by larger industry members in the automotive aftermarket.³⁹⁰ This monopoly prevents them from conducting service, maintenance, mechanical and motor-body repair work, restricting their earning capacity.³⁹¹ This has led to complaints to the Competition Commission from ISPs and consumers alike.³⁹²

In the Guidelines, the Competition Commission sets out its findings that are at odds with the criticism levelled by industry members against the Draft Guidelines. It identifies consumers as key stakeholders in the automotive aftermarket, with a third of households in South Africa being users of services therein.³⁹³ It further identifies that the automotive supply chain is dominated by seven OMEs, namely Ford, BMW, Mercedes-Benz, Isuzu, Nissan, Volkswagen and Toyota.³⁹⁴ These findings support the Competition Commission's statement that consumers have, contrary to the view

³⁸⁶ Right to Repair South Africa 'About Right to Repair South Africa' date unknown, available at <https://www.right2repair.org.za/home/>, accessed on 11 January 2021.

³⁸⁷ Right to Repair South Africa 'Right to Repair – what the consumer needs to know' February 2020, available at <https://www.right2repair.org.za/unpacking-right-to-repair-what-the-consumer-needs-to-know/>, accessed on 11 January 2021.

³⁸⁸ Right to Repair South Africa 'A resounding win for the consumer – Right to Repair welcomes Competition Commission Draft Guidelines for Automotive aftermarket sector' 14 February 2020, available at <https://www.right2repair.org.za/a-resounding-win-for-the-consumer-right-to-repair-welcomes-competition-commission-draft-guidelines-for-automotive-aftermarket-sector/>, accessed on 11 January 2021.

³⁸⁹ The monopoly established by OEMs is not a monopoly in the strict sense in that there is more than one OEM involved in preventing the more active participation of ISPs in the automotive aftermarket. For ease of reference it will nevertheless be referred to as a monopoly throughout this thesis.

³⁹⁰ M Naidoo 'Major car workshop grip slips' 27 February 2020, available at <https://www.iol.co.za/sunday-tribune/news/major-car-workshops-grip-slips-43588748>, accessed on 11 January 2020.

³⁹¹ Ibid.

³⁹² The Guidelines 3.

³⁹³ The Guidelines 14.

³⁹⁴ The Guidelines 13.

of automotive industry members, been exposed to a number of restrictive practices in the automotive aftermarket which in turn restricts competition therein in a manner similar to various developing jurisdictions.³⁹⁵

Due to the aims of the CA to provide consumers with competitive prices³⁹⁶ and to ensure distributed ownership in the market place,³⁹⁷ the status quo as articulated by the complaints of ISPs and consumers clearly and quite strongly motivates for guideline 5. This is to ensure the increased involvement of ISPs in service, maintenance, mechanical and motor-body repair work during the in-warranty period.

4.2.3.2 Foreign Direct Investment

The South African automotive industry is a key generator of inward foreign direct investment³⁹⁸ which is advantageous to economic growth³⁹⁹ and thus particularly desirable in a developing country such as South Africa.⁴⁰⁰ Countries including China have made significant investments in the South African automotive sector⁴⁰¹ by establishing subsidiaries of international OEMs to manufacture vehicles and vehicle components locally.⁴⁰² In the South African automotive sector, foreign direct investment has proved particularly advantageous as it has enabled the sector to produce an upwards of R585,000,000,000.00 (five hundred and eighty-five billion Rand) worth of automotive exports.⁴⁰³

Despite this significant contribution to the development of the South African economy, South Africa still requires further foreign direct investment⁴⁰⁴ in order to render it

³⁹⁵ The Guidelines 16.

³⁹⁶ Section 2(b) of the CA.

³⁹⁷ Section 2(e) of the CA.

³⁹⁸ J Brown '\$5.3 billion in foreign direct investment in SA' 19 June 2019 available at <https://www.news24.com/citypress/business/53-billion-in-foreign-direct-investment-hits-sa-20190619>, accessed on 27 December 2020.

³⁹⁹ MSI Wentzel & M Steyn 'Investment promotion in the South African manufacturing industry: incentive comparisons with Malaysia and Singapore' (2014) 17(3) *South African Journal of Economic and Management Sciences* 319.

⁴⁰⁰ Ibid.

⁴⁰¹ Brown op cit note 398.

⁴⁰² International Trade Administration 'South Africa – commercial country guide' 1 October 2020, available at <https://www.trade.gov/knowledge-product/south-africa-automotive>, accessed on 27 December 2020.

⁴⁰³ Naude op cit note 67 at 407.

⁴⁰⁴ Wentzel & Steyn op cit note 399.

increasingly more competitive internationally.⁴⁰⁵ A factor that has a meaningful impact on inward foreign direct investment is the policy stance adopted by the state in a particular industry.⁴⁰⁶ This is because legal uncertainty or unfavourable legal conditions can diminish the desire of investors to become involved in a particular market.⁴⁰⁷

It has been argued by members of the automotive aftermarket that the policy stance articulated by the Competition Commission in terms of the Draft Guidelines has the potential to reduce inward foreign direct investment.⁴⁰⁸ This argument is likely to have been based on the belief that the increased involvement of ISPs in the automotive aftermarket as provided for by guideline 6.1.1 and 6.1.2 of the Draft Guidelines would diminish investment opportunities for foreign investors.

Guideline 6 of the Draft Guidelines provided the following:

1. in terms of guideline 6.1.1, OEMs were obliged to approve all service providers, including ISPS, to conduct service, maintenance, mechanical and motor-body repair work where they met the OEM's standards and specifications; and
2. in terms of guideline 6.1.2, OEMs were obliged to permit approved dealers to conduct service, maintenance, mechanical and motor-body repair work on vehicles from other OEMs, ie multiple brands.

The effect of guideline 6.1.1 of the Draft Guidelines was to cater for the increased involvement of ISPs in the automotive aftermarket. In contrast, guideline 6.1.2 of the Draft Guidelines intervened in the relationship between OEMs and approved dealers in a manner that could not be shown to facilitate the increased involvement of ISPs in the automotive aftermarket. This is because the ability of an OEM's approved dealers to service, maintain and conduct mechanical or motor-body repairs on vehicles manufactured by other brands did not cater for the increased involvement of ISPs in

⁴⁰⁵ Naude op cit note 67 at 407.

⁴⁰⁶ Nordea 'Foreign direct investment in South Africa' December 2020, available at <https://www.nordeatrade.com/dk/explore-new-market/south-africa/investment>, accessed on 27 December 2020.

⁴⁰⁷ Ibid.

⁴⁰⁸ Jonckie op cit note 51.

the automotive aftermarket.⁴⁰⁹ Moreover, it served to alter the existing automotive business model⁴¹⁰ in terms of which OEMs appoint approved dealers to conduct service, maintenance and mechanical repair work on their brand of vehicle alone.⁴¹¹

It was argued by NAAMSA that such changes⁴¹² would be detrimental to foreign direct investment in the South African automotive industry.⁴¹³ There was some merit to this argument as the alteration of the existing automotive business model⁴¹⁴ of OEMs and approved dealers could have been considered to be an unfavourable legal condition for investing in the South African automotive industry, diminishing the desire of investors to become involved in the market.⁴¹⁵

In response to the criticisms of the Draft Guidelines and in recognition of this potential adverse effect, the Competition Commission took the following steps:

1. it maintained the substance of guideline 6.1.1 of the Draft Guidelines in guideline 5.4.1 of the Guidelines by obliging OEMs to allow consumers to conduct service, maintenance and mechanical repair work at the service provider of their choice, whether an approved dealer or OEM;⁴¹⁶ and

⁴⁰⁹ Guideline 6.1.2 of the Draft Guidelines.

⁴¹⁰ Venter op cit note 281.

⁴¹¹ Guideline 8.2 of the Guidelines.

⁴¹² It is notable that while guideline 11 of the Draft Guidelines and guideline 12 of the Guidelines provide for the sharing of OEM technical information with ISPs on request, each of these guidelines provides for the protection of the intellectual property of OEMs. In terms of guideline 11.1.3 of the Draft Guidelines OEMs were obliged to take reasonable measures, including compelling ISPs to sign confidentiality undertakings, before disclosing their intellectual property. In terms of guideline 12.2.4 of the Guidelines OEMs may impose reasonable conditions, including the signing of a confidentiality undertaking, before disclosing their intellectual property to ISPs.

The effect of these provisions is that while OEMs are obliged in terms of the Draft Guidelines and the Guidelines to share technical information with ISPs on request, provision is still made for such intellectual property to remain confidential.

Further, guideline 7.1.11 of the Draft Guidelines and guideline 9.3.2 of the Guidelines prohibit the anti-competitive sharing of commercially sensitive information between dealers and OEMs.

This provides scope for OEMs to preserve trade secrets and innovations so as to remain competitive in the automotive aftermarket.

⁴¹³ Venter op cit note 281.

⁴¹⁴ Ibid.

⁴¹⁵ Nordea op cit note 406.

⁴¹⁶ Additionally, in accordance with guideline 5.4.3 of the Guidelines, where an insured vehicle requires motor-body repair work it is to be conducted by an OEM approved motor-body repairer allocated by the insurer.

2. it did not include guideline 6.1.2 of the Draft Guidelines in the Guidelines, thus allowing for OEMs to continue to restrict service, maintenance and repair work that can be conducted by approved dealers to the OEM's brand.

The maintenance of the substance of guideline 6.1.1 of the Draft Guidelines in guideline 5.4.1 of the Guidelines can be substantiated on two grounds. The first is that South Africa's competition policy, particularly its amendment of the regulatory area to ensure increased competition, is considered to be one of the factors that makes it attractive to foreign investors.⁴¹⁷ The implementation of guideline 5.4.1 would not likely be sufficient to diminish foreign direct investment, particularly when considered in conjunction with the second factor.

The second factor is that the involvement of ISPs in the automotive aftermarket is accompanied by mechanisms in guideline 10 to increase ISP access to original spare parts which are typically produced by OEMs⁴¹⁸ which have local subsidiaries in South Africa.⁴¹⁹ This presents an opportunity for foreign investors to make further investments to meet the need for local suppliers of automotive parts, a need which is currently not adequately provided for.⁴²⁰

4.2.3.3 Road Safety

NADA has indicated that OEMs and approved dealers currently provide highly technical services which comply with standards aimed at maintaining the safety of consumers.⁴²¹ Accordingly, the expansion of the category of service providers that consumers can approach for service, maintenance, mechanical and motor-body repair work to include ISPs, as provided for in guideline 6.1.1 of the Draft Guidelines, was seen to threaten road safety due to an inability of ISPs to meet these technical standards and thus preserve the safety of consumers.⁴²²

As indicated above, guideline 6.1.1 of the Draft Guidelines provided that consumers

⁴¹⁷ Nordea op cit note 406.

⁴¹⁸ Definition of 'Original Spare Parts' in the Guidelines 8.

⁴¹⁹ International Trade Administration op cit note 392.

⁴²⁰ Naude op cit note 68 at 406.

⁴²¹ Dommissie op cit note 328.

⁴²² Ibid.

could approach ISPs for service, maintenance, mechanical and motor-body repair work during the in-warranty period. In order for ISPs to conduct such work, there was no obligation imposed on them by guideline 6 of the Draft Guidelines to comply with the standards and specifications of the OEM responsible for the manufacture of the vehicle in question. This could have had negative implications for road safety as, without access to technical information or appropriate training, ISPs would not necessarily have been able to conduct effective service, maintenance, mechanical or motor-body repair work on vehicles.⁴²³

By way of example, a lack of effective mechanical repair work in respect of a vehicle's security systems by an ISP could clearly compromise the safety of a vehicle on the road. This was a valid concern because, while the preamble to the CA provides that it aims to balance the interests of workers, consumers and suppliers, it is submitted that it could not be the intention of the Competition Commission to compromise the safety and reliability of vehicles on the road in the interests of generating competition.⁴²⁴

In recognition of this concern, and in support of the argument that it could not be the aim of the Competition Commission to compromise road safety in order to generate competition, the Competition Commission included guideline 11 and guideline 12 in the Draft Guidelines. These guidelines addressed the lack of access by ISPs to technical information and OEM training by:

1. obliging OEMs in terms of guideline 11.1.1 of the Draft Guidelines to provide ISPs with technical information relating to their vehicles. This information excluded information relating to the security systems of such vehicles; and
2. obliging OEMs in terms of guideline 12.1.1 of the Draft Guidelines to provide ISPs upon request with training relating to parts or products manufactured by the OEM.

While the stated purpose of these guidelines was indicated in the Draft Guidelines to be to enable ISPs to become increasingly competitive,⁴²⁵ they also had an impact on road safety. By way of example, the access of ISPs to training by OEMs relating to the

⁴²³ The Guidelines 35.

⁴²⁴ Guideline 11 and guideline 12 of the Draft Guidelines.

⁴²⁵ Guideline 11.1 of the Draft Guidelines.

service of a vehicle's security systems would ensure that ISPs could conduct service work on a par with that conducted by an approved dealer or other parties in an OEM's approved network.⁴²⁶ The threat to the safety of a vehicle on the road, previously detailed above, was thus clearly capable of being averted.⁴²⁷

Notwithstanding the criticism of guideline 6.1.1 of the Draft Guidelines by automotive industry members,⁴²⁸ its substance has been maintained in guideline 5.4.1 of the Guidelines.⁴²⁹ As previously indicated, guideline 5.4.1 obliges OEMs to allow consumers to conduct service, maintenance and mechanical repair work at the service provider of their choice, whether an approved dealer or ISP.

Similarly, in recognition of the concern for road safety expressed by automotive industry members,⁴³⁰ the Guidelines provide for measures to ensure consumer safety.⁴³¹ Guideline 12 provides for the sharing of technical information with, and provision of training by, OEMs to ISPs.

Guideline 12 does this by:

1. obliging OEMs, on request, to provide ISPs with technical information relating to vehicles manufactured by them⁴³² including technical manuals,⁴³³ data record information⁴³⁴ and operational software⁴³⁵ on reasonable terms in order to enable ISPs to conduct effective motor-body repairs,⁴³⁶ and
2. obliging OEMs, on request, to provide ISPs with training or access to training relating to OEM manufactured vehicles in order to enable ISPs to conduct effective service and maintenance of vehicles and the fitment of spare parts.⁴³⁷

⁴²⁶ Guideline 12.1.1 of the Draft Guidelines.

⁴²⁷ Ibid.

⁴²⁸ Domnisse op cit note 328.

⁴²⁹ Read with guideline 5.4.3 of the Guidelines which provides that where an insured vehicle requires motor-body repair work it is to be conducted by an OEM approved motor-body repairer allocated by the insurer.

⁴³⁰ Domnisse op cit note 328.

⁴³¹ Guideline 12 of the Guidelines.

⁴³² Guideline 12.2.1 of the Guidelines.

⁴³³ Guideline 12.2.3(c) of the Guidelines.

⁴³⁴ Guideline 12.2.3(i) of the Guidelines.

⁴³⁵ Guideline 12.2.3(j) of the Guidelines.

⁴³⁶ Guideline 12.2.1 of the Guidelines.

⁴³⁷ Guideline 12.3.1 of the Guidelines.

Much like with guideline 11 and guideline 12 of the Draft Guidelines, despite it being indicated that the purpose of these measures is to ensure that ISPs have the ability to effectively compete with suppliers in the approved network,⁴³⁸ guideline 12 of the Guidelines will also have implications for road safety. These are the same as those illustrated by the example cited above in respect of the application of guideline 12.1.1 of the Draft Guidelines.

4.3 Guideline 6

Guideline 6 regulates the appointment of motor-body repairers by OEMs.⁴³⁹

4.3.1 Outline of the Guideline

Guideline 6 targets those practices of OEMs which are detrimental to consumers and suppliers, particularly ISPs. It does this by:

1. requiring OEMs to take proactive measures to facilitate the involvement of more suppliers in the automotive aftermarket, particularly those suppliers owned by HDIs;⁴⁴⁰
2. requiring OEMs to approve any motor-body repairer, including an ISP,⁴⁴¹ where it meets the standards and specifications of the OEM;⁴⁴²
3. preventing OEMs from entering into exclusive contracts for the provision of motor-body repair services in a particular Geographic Area with any approved motor-body repairers;⁴⁴³
4. limiting the period to which an OEM can approve a motor-body repairer to a maximum of 5 (five) years;⁴⁴⁴ and
5. prohibiting repetitive renewals of the appointment of an approved motor-body repairer to the exclusion of ISPs capable of performing such motor-body repair work in a particular Geographic Area.⁴⁴⁵

⁴³⁸ Guideline 12.1 of the Guidelines.

⁴³⁹ Guideline 6.1 of the Guidelines.

⁴⁴⁰ Guideline 6.9.1 of the Guidelines.

⁴⁴¹ The Guidelines 6.

⁴⁴² Guideline 6.9.2 of the Guidelines.

⁴⁴³ Guideline 6.9.3 of the Guidelines.

⁴⁴⁴ Guideline 6.9.4 of the Guidelines.

⁴⁴⁵ Ibid.

4.3.2 Aims of the Guideline

When an uninsured vehicle requires motor-body repairs during the in-warranty period, consumers may approach a service provider of their choice.⁴⁴⁶ The service provider can be an approved motor-body repairer or an ISP.⁴⁴⁷ An approved motor-body repairer is selected by the OEM.⁴⁴⁸ In order for a supplier to be selected as an approved motor-body repairer by an OEM they must meet the OEM's 'standards and specifications'.⁴⁴⁹

These standards and specifications are problematic for consumers and suppliers alike for various reasons. The first is that they typically require the supplier to make a large financial investment in order to be compliant.⁴⁵⁰ This is detrimental as it can result in the costs of such investment being passed on to consumers, exposing them to high prices.⁴⁵¹

The second is that they typically limit the number of suppliers approved to perform motor-body repair work in a particular Geographic Area⁴⁵² based on the rationale of preventing market saturation and a resultant lack or insufficiency of work for their suppliers.⁴⁵³ This is detrimental as it can result in consumers not having an approved service provider in their Geographic Area, needing to seek repairs far from their Geographic Area and being exposed to delays in receiving the motor-body repair services they require.⁴⁵⁴

The third is that, once a supplier complies with these standards and specifications, they are typically appointed in terms of an exclusive contract to provide motor-body repair services for a single OEM for a lengthy or even indefinite period of time.⁴⁵⁵ This prevents the entry of new participants, including ISPs and HDIs, into the automotive

⁴⁴⁶ Guideline 5.4.4 of the Guidelines.

⁴⁴⁷ Guideline 5.4.4 of the Guidelines read with the definition of a 'Dealer' in the Guidelines 5.

⁴⁴⁸ Guideline 6.1 read with guideline 6.2 of the Guidelines.

⁴⁴⁹ Guideline 6.1 of the Guidelines.

⁴⁵⁰ Ibid.

⁴⁵¹ J Katzew & M Mushariwa 'Product liability insurance in the wake of the Consumer Protection Act 68 of 2008' (2012) 24(1) *South African Mercantile Law Journal* 11.

⁴⁵² Guideline 6.2 of the Guidelines.

⁴⁵³ Guideline 6.4 of the Guidelines.

⁴⁵⁴ Guideline 6.6 of the Guidelines.

⁴⁵⁵ Guideline 6.3 of the Guidelines.

aftermarket.⁴⁵⁶ This is in direct conflict with s 2(f) of the CA which indicates that the Act aims to increase the ownership stakes of HDIs in the market.

In imposing guideline 6, the Competition Commission is targeting the exclusionary behaviour of OEMs that prevents the entry of ISPs and HDIs into the automotive aftermarket.⁴⁵⁷ In preventing this exclusionary behaviour, the Competition Commission is attempting to lower barriers to entry and participation of ISPs and HDIs in the automotive aftermarket.⁴⁵⁸ For example, pursuant to the implementation of guideline 6.9.2, ISPs, including those owned by HDIs, will have an improved potential for appointment as an approved motor-body repairer. This is because, where they meet an OEM's standards and specifications, the guideline obliges OEMs to appoint such an ISP.

4.3.3 Criticism of the Guideline

Guideline 6 may be criticised on the basis that its implementation may result in insufficient work for OEM approved motor-body repairers in a particular Geographic Area.⁴⁵⁹

4.3.3.1 Lack of Sufficient Work for OEM Approved Motor-body Repairers

The implementation of guideline 6.9.2 and guideline 6.9.3 will result in there being an increase in the number of OEM approved motor-body repairers in a particular Geographic Area during the in-warranty period. This is good for consumers as it has the potential to decrease the long lead times they currently experience in order to secure OEM approved motor-body repairs.⁴⁶⁰ A variety of motor-body repairers who can conduct repairs in a particular Geographic Area during the in-warranty period has previously been rejected by OEMs.⁴⁶¹ The rationale provided by OEMs for limiting OEM approved motor-body repairers in a Geographic Area as provided in the Guidelines has been the goal of ensuring that OEM approved motor-body repairers

⁴⁵⁶ Guideline 6.7 of the Guidelines.

⁴⁵⁷ Guideline 6.8 of the Guidelines.

⁴⁵⁸ Ibid.

⁴⁵⁹ Guideline 6.4 of the Guidelines.

⁴⁶⁰ Guideline 6.6 of the Guidelines.

⁴⁶¹ Guideline 6.4 of the Guidelines.

have adequate work in a particular Geographic Area.⁴⁶² This is so as to justify the investment made by such suppliers to comply with the OEM's standards and specifications.⁴⁶³

A consideration of this rationale provides the potential criticism of the implementation of guideline 6, namely that implementing guideline 6 and introducing more motor-body repairers in a Geographic Area may result in inadequate work for motor-body repairers in a particular Geographic Area.⁴⁶⁴ This potential criticism has been catered for in the Guidelines in three manners. Firstly, an OEM approved motor-body repairer may be appointed as an approved motor-body repairer by multiple OEMs where they meet the standards and specifications of each OEM.⁴⁶⁵

Secondly, the guidelines do not prevent an OEM approved motor-body repairer from also being appointed as an insurer approved motor-body repairer, provided that they also meet the standards and specifications of the insurer pursuant to guideline 7.8.2. Thirdly, the Guidelines do not prevent an OEM approved motor-body repairer from also being appointed as an insurer approved motor-body repairer by multiple insurers pursuant to guideline 7.8.2, provided that they meet the standards of each insurer.

The cumulative effect of these guidelines is that OEM approved motor-body repairers working in a particular Geographic Area will have the ability to perform various types of work. This should enable them to sustain their businesses notwithstanding compliance by OEMs with guideline 6.

4.5 Guideline 10

Guideline 10 regulates both the fitment of, and access by ISPs to, spare parts.⁴⁶⁶ In terms of the Guidelines, spare parts are divided into two categories:

- original spare parts which are those spare parts produced on behalf of an OEM in compliance with its standards and specifications, bearing the trademark of

⁴⁶² Ibid.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Guideline 6.9.2 read with guideline 6.9.3 of the Guidelines.

⁴⁶⁶ Guideline 10 of the Guidelines.

such OEM.⁴⁶⁷ Original spare parts are distributed by an OEM and any of its approved distributors⁴⁶⁸ such as approved dealers;⁴⁶⁹ and

- non-original spare parts which are legitimately produced by a manufacturer for its own sale and distribution, accompanied by a warranty from the producing manufacturer.⁴⁷⁰ Non-original spare parts exclude those spare parts that are sourced illegally, are counterfeit or amount to grey market spare parts.⁴⁷¹

4.5.1 Outline of the Guideline

Guideline 10 regulates the fitment of spare parts by providing that consumers can fit either original or non-original spare parts during the in-warranty period at an approved dealer, approved motor-body repairer or ISP.⁴⁷²

Guideline 10 regulates the sale and distribution of spare parts by:

1. obliging OEMs and approved dealers to make original spare parts available to ISPs in order to enable them to conduct service, maintenance and repair work;⁴⁷³
2. prohibiting OEMs from restricting the access of ISPs to original spare parts except in instances where ISPs procure original spare parts for sale to third parties;⁴⁷⁴ and
3. prohibiting OEMs from entering into agreements which limit the access of ISPs to original or non-original spare parts, except where the parts are protected by intellectual property rights or where they relate to the anti-theft parts of a vehicle,⁴⁷⁵ ie those aimed at preventing it from starting without a key fob.⁴⁷⁶

⁴⁶⁷ Definition of 'Original Spare Parts' in the Guidelines 8.

⁴⁶⁸ Ibid.

⁴⁶⁹ Definition of 'Dealer' in the Guidelines 5.

⁴⁷⁰ Definition of 'Non-Original Spare Parts' in the Guidelines 8.

⁴⁷¹ Guideline 10.6 of the Guidelines.

⁴⁷² Guideline 10.8.1 of the Guidelines.

⁴⁷³ Guideline 10.9.1 of the Guidelines.

⁴⁷⁴ Guideline 10.9.3 of the Guidelines.

⁴⁷⁵ Guideline 10.9.5 of the Guidelines.

⁴⁷⁶ Definition of 'Security Systems' in the Guidelines 7.

4.5.2 Aims of the Guideline

When a consumer purchases a vehicle and is issued with a warranty, the warranty can relate to the body of the vehicle, the vehicle parts or both.⁴⁷⁷ In the context of Nissan, the warranty applies both in respect of the body – excluding the undercarriage and chassis – and all parts to be replaced during a service.⁴⁷⁸ These parts are original spare parts manufactured by Nissan's OEM.⁴⁷⁹ The parts warranty entitles a consumer to replacement of parts during a service by and at cost to Nissan, provided they are installed by an authorised Nissan dealer during the in-warranty period.⁴⁸⁰

Where a consumer fails to comply with these terms by using non-original parts, such non-compliance may void the warranty in respect of either the parts or both the parts and the body of the vehicle.⁴⁸¹ This, coupled with the lack of access that ISPs have to original spare parts,⁴⁸² has had the effect of restricting a consumer to service, maintenance and mechanical repair work conducted by a Nissan approved dealer using original spare parts during the in-warranty period.⁴⁸³

This effect is problematic for two reasons. Firstly, it conflicts with s 2(e) of the CA which indicates that the Act aims to more actively involve small and medium enterprises in the economy because it restricts the participation of ISPs in the automotive aftermarket. Secondly, it conflicts with s 2(b) of the CA which provides that the Act aims to expose consumers to competitive prices. This is because original spare parts typically prove to be more expensive than non-original spare parts, exposing consumers to higher prices where a more affordable option could be made available to them.⁴⁸⁴

The ability of consumers to fit original or non-original spare parts in vehicles during the in-warranty period, will enable manufacturers of non-original spare parts to participate

⁴⁷⁷ Nissan 'Warranty Conditions' 2020, available at <https://www.nissan.co.za/owners/nissan-assured/warranty-conditions.html>, accessed on 10 November 2020.

⁴⁷⁸ Ibid.

⁴⁷⁹ Definition of 'Spare Parts' in the Guidelines 8 read with Nissan op cit note 477.

⁴⁸⁰ Nissan op cit note 477.

⁴⁸¹ Guideline 10.7 of the Guidelines.

⁴⁸² Guideline 10.6 of the Guidelines.

⁴⁸³ Nissan op cit note 477.

⁴⁸⁴ Guideline 10.7 of the Guidelines.

more actively in the automotive aftermarket.⁴⁸⁵ Smit notes that ‘when a market has a relatively large number of firms, ceteris paribus, the level of competition between them tends to be higher, compared to a market with only a few firms’.⁴⁸⁶ The increased involvement of non-original spare parts manufacturers in the automotive aftermarket will thus serve to meet the policy objectives of the Guidelines by facilitating competition in the market for spare parts.⁴⁸⁷

4.5.3 Criticism of the Guideline

Guideline 10 may be criticised due to its potential to exacerbate the counterfeiting of original spare parts.⁴⁸⁸

4.5.3.1 Counterfeiting of Spare Parts⁴⁸⁹

Counterfeit spare parts are those that are manufactured without the consent of the OEM as the intellectual property rights holder in respect of such spare parts.⁴⁹⁰ They accordingly amount to illegitimate reproductions or copies of original vehicle spare parts.⁴⁹¹ These counterfeit spare parts will typically carry the trademark of the intellectual property rights holder to assist in rendering the counterfeit goods virtually indistinguishable from the original spare parts.⁴⁹² The purchase and use of counterfeit spare parts poses a unique risk for consumers: unlike the purchase of a counterfeit pair of shoes which is only detrimental due to its capacity to weaken an intellectual property right holder’s trademark, counterfeit vehicle spare parts also pose the risk of injury or death.⁴⁹³

⁴⁸⁵ Guideline 10.8.1 of the Guidelines.

⁴⁸⁶ C Smit ‘The rationale for competition: a South African perspective’ read at the biennial ESSA Conference, 7-9 September 2005, Elangeni Holiday Inn, Durban, KwaZulu-Natal, South Africa 4.

⁴⁸⁷ The Guidelines 18.

⁴⁸⁸ M Arnoldi ‘Authorities help to curb counterfeit spare car part imports’ 24 March 2017, available at https://www.engineeringnews.co.za/article/authorities-help-to-curb-counterfeit-car-part-imports-2017-03-24/rep_id:4136, accessed on 12 January 2021 read with guidelines 10, 11 and 12 of the Guidelines.

⁴⁸⁹ While the counterfeiting of original spare parts as a result of the implementation of guideline 10 of the Guidelines is a valid concern, the complexities involved in a discussion of the issue render a full discussion of it beyond the scope of this mini-dissertation. This critique of guideline 10 will thus be briefly considered in this study.

⁴⁹⁰ Section 1 of the CGA.

⁴⁹¹ Ibid.

⁴⁹² Ibid.

⁴⁹³ V Gilbey ‘Fake car parts can cost you your life’ 21 July 2004, available at <https://www.iol.co.za/travel/south-africa/fake-car-parts-can-cost-you-your-life-217723>, accessed on 12 January 2021.

This is because counterfeit spare parts do not comply with the manufacturing standards and specifications set by the law or OEMs.⁴⁹⁴ They will therefore generally be of a lesser quality than their original counterparts and be subject to quicker wear and tear.⁴⁹⁵ For example, counterfeit brake pads have been found to have been produced using components such as sawdust or compressed grass which heat up and fail under extreme pressure.⁴⁹⁶ Such counterfeit parts could heat up or fail on the road, endangering the life of the vehicle owner.⁴⁹⁷ For the reasons indicated above, the use of counterfeit spare parts is undesirable and its prohibition in South Africa is regulated by the Counterfeit Goods Act 37 of 1997.

Counterfeit goods are distinguished from grey market goods which are those original spare parts which have been imported into South Africa without the approval or licence of the OEM who has produced such goods.⁴⁹⁸ Unlike counterfeit spare parts, grey market spare parts are original parts which lawfully bear the trademark of the OEM which manufactured them, notwithstanding the fact that they have been imported without the licence or approval of such OEM.⁴⁹⁹ Delays in obtaining service, maintenance, mechanical and motor-body repair services in the automotive aftermarket may lead consumers to seek grey market goods.⁵⁰⁰

Consumers may access grey market spare parts through various channels, including e-commerce websites which offer convenient and quick access to such parts.⁵⁰¹ Grey market spare parts pose difficulty for the automotive industry for the following reasons:

1. they present a safety concern as they are not inspected for quality compliance and the incorrect use thereof can have negative implications for the operation

⁴⁹⁴ S Peterson 'Counterfeit automotive parts increasingly putting consumer safety at risk' 13 May 2019, available at <https://www.worldtrademarkreview.com/anti-counterfeiting/counterfeit-automotive-parts-increasingly-putting-consumer-safety-risk>, accessed on 12 January 2021.

⁴⁹⁵ Gilbey op cit note 494.

⁴⁹⁶ Peterson op cit note 495.

⁴⁹⁷ Ibid.

⁴⁹⁸ Section 25(2) of the CPA.

⁴⁹⁹ Ibid.

⁵⁰⁰ A Bowers 'Genuine vs grey market parts – how manufacturers can win' 26 April 2018, available at <https://www.syncron.com/genuine-vs-grey-market-parts-how-manufacturers-can-win/>, accessed on 12 January 2021.

⁵⁰¹ R Brown 'Fighting back against fake parts' 28 January 2020, available at <https://www.automotivelogistics.media/service-parts-logistics/fighting-back-against-fake-parts/40052.article>, accessed on 12 January 2021.

of vehicles.⁵⁰² An example of this would be where the owner of a BMW iX model purchases and uses spare parts for a BMW 1 Series model procured from the grey market. While such parts would be original spare parts, they may not be intended for use in a BMW iX model, thus compromising the efficient functioning and safety of the consumer's BMW iX model; and

2. they are seen as a gateway to the counterfeiting of spare parts due to the fact that they provide access to original spare parts outside the control of the relevant OEM.⁵⁰³ This provides counterfeiters with access to the original spare parts which they can then illegally reproduce.⁵⁰⁴

Notwithstanding the difficulties associated with grey market spare parts, their import and use are permissible in South Africa and are regulated by the CPA.⁵⁰⁵ In terms of s 25(2) of the CPA, any person marketing grey market goods, including spare parts, is required to inform consumers of this through the use of a conspicuous notice. Notably, grey market spare parts do not carry a warranty from the OEM as they are unwilling to assume liability in respect of grey market spare parts because they do not know whether or not they have been modified.⁵⁰⁶ In such circumstances, the consumer may rely on the implied warranty on quality of goods set out in s 56 of the CPA but this protection is only valid for a period of 6 (six) months from the delivery of goods to the consumer.⁵⁰⁷

From the above, it is apparent that the counterfeiting of spare parts is a critical issue currently facing the South African automotive aftermarket.⁵⁰⁸ This issue may be exacerbated by the choice consumers will now have pursuant to guideline 10 between

⁵⁰² Bowers op cit note 500.

⁵⁰³ Brown op cit note 501.

⁵⁰⁴ Ibid.

⁵⁰⁵ Section 25(2) of the CPA.

⁵⁰⁶ K Rickelman 'Navigating the grey market is not a black and white issue' 3 April 2020, available at <https://www.bizcommunity.com/Article/196/307/202424.html>, accessed on 12 January 2021.

⁵⁰⁷ Section 56(2) of the CPA.

⁵⁰⁸ See S Kuh 'Tackling fake automotive parts' 1 September 2018, available at <http://www.securitysa.com/60969n>, accessed on 12 January 2021 which discusses the dangers of counterfeit airbags, Fiat.co.za 'Counterfeit spare parts' date unknown, available at <https://www.fiat.co.za/mopar/original-parts/counterfeit-parts-fiat>, accessed on 12 January 2021 which discusses the risks inherent in the use of counterfeit parts and D Slater 'Counterfeit parts threaten motorists' safety' 20 June 2014, available at <https://www.engineeringnews.co.za/print-version/counterfeit-parts-threaten-motorists-safety-2014-06-20>, accessed on 12 January 2021 which points out the threat to South African consumer safety that counterfeit parts pose.

use of original or non-original spare parts for service, maintenance, mechanical and motor-body repair work during the in-warranty period.⁵⁰⁹ This is because the ability of consumers to use non-original parts during the in-warranty period may provide increased scope for counterfeit parts to infiltrate the automotive aftermarket.⁵¹⁰

4.6 Conclusion

The Guidelines aim to address concerns of restrictive practices in the automotive aftermarket at the hands of OEMs and insurers⁵¹¹ that result in ISPs being prevented from participation therein.⁵¹² The Guidelines do this by regulating the position in the automotive aftermarket in respect of vehicles in and out of warranty⁵¹³ and insured vehicles.⁵¹⁴ The focus of this chapter has been the measures imposed in respect of OEMs to facilitate the inclusion of ISPs during the in-warranty period.

In terms of guideline 5, OEMs are obliged to allow ISPs to conduct service, maintenance and mechanical repair work on vehicles during the in-warranty period.⁵¹⁵ This has been criticised on various grounds, including its potential adverse effect on foreign direct investment.⁵¹⁶ As elaborated on above, this concern may prove invalid due to, amongst other factors, the involvement of ISPs in the automotive aftermarket being accompanied by mechanisms in guideline 10 to increase ISP access to original spare parts which are produced by OEMs.⁵¹⁷

Guideline 5 has also been criticised on the basis of its potential to compromise road safety⁵¹⁸ but a consideration of this concern reveals that it has been catered for by guideline 12. Guideline 12 provides for information sharing with⁵¹⁹ and training⁵²⁰ of

⁵⁰⁹ Guideline 10.8.1 of the Guidelines.

⁵¹⁰ Brown op cit note 501.

⁵¹¹ The Guidelines 3.

⁵¹² The Guidelines 18.

⁵¹³ Guideline 5 of the Guidelines.

⁵¹⁴ Guideline 7 of the Guidelines.

⁵¹⁵ Guideline 5.4.1 of the Guidelines.

⁵¹⁶ Jonckie op cit note 51.

⁵¹⁷ Definition of 'Original Spare Parts' in the Guidelines 8.

⁵¹⁸ Dommissie op cit note 328.

⁵¹⁹ Guideline 12.2 of the Guidelines.

⁵²⁰ Guideline 12.3 of the Guidelines.

ISPs to render them competitive with OEM approved motor-body repairers.⁵²¹ These measures have been shown to also have positive implications for road safety.⁵²²

In terms of guideline 6, OEMs are prohibited from entering into exclusive contracts for the provision of motor-body repair services in a particular Geographic Area with any approved motor-body repairers.⁵²³ A consideration of guideline 6 showed that, despite OEMs limiting approved motor-body repairers in a Geographic Area due to concern about a lack of sufficient work for such repairers,⁵²⁴ the concern is not valid.

In terms of guideline 10, consumers will have a choice between the fitment of original or non-original spare parts during the warranty period.⁵²⁵ ISPs will have increased access to original spare parts due to the obligation on OEMs to make such parts available to them.⁵²⁶ This right will be subject to the right of OEMs to limit access to those parts that are protected by intellectual property rights or where they relate to the anti-theft parts of a vehicle.⁵²⁷ While this guideline may have implications for the counterfeiting of spare parts, a full discussion of this issue falls beyond the scope of this thesis.

Ultimately, while it appears that there are criticisms that could be levelled against the Guidelines by members of the automotive industry, this chapter has found that they have largely made provision for any potential harm that could arise from their implementation. In the next chapter of this study, the impact of the Guidelines on supply chain liability during the in-warranty period will be considered to determine whether their implementation can truly be said to be to the benefit of consumers.

⁵²¹ Guideline 12.1 of the Guidelines.

⁵²² Guideline 12.3.1 of the Guidelines.

⁵²³ Guideline 6.9.3 of the Guidelines.

⁵²⁴ Guideline 6.4 of the Guidelines.

⁵²⁵ Guideline 10.8.1 of the Guidelines.

⁵²⁶ Guideline 10.9.1 of the Guidelines.

⁵²⁷ Guideline 10.9.5 of the Guidelines.

CHAPTER 5

IMPLICATIONS OF THE GUIDELINES FOR SUPPLY CHAIN LIABILITY DURING THE IN-WARRANTY PERIOD

5.1 Introduction

As previously indicated, the South African automotive aftermarket consists of various role players: OEMs, approved dealers, OEM approved motor-body repairers, insurers, insurer approved motor-body repairers and ISPs.⁵²⁸ This chapter will consider the implications of the Guidelines on automotive aftermarket supply chain liability in respect of OEMs, approved dealers, OEM approved motor-body repairers and ISPs.

5.2 Supply Chain Liability in the Automotive Aftermarket Prior to the Implementation of the Guidelines

Where a consumer receives defective service or is supplied with defective spare parts in the automotive aftermarket, they may institute proceedings against the members thereof.⁵²⁹ The full extent of the liability of members of the automotive aftermarket was considered in Chapter 2 of this study. For present purposes, it is necessary to note that liability may be imposed on:

1. the manufacturer in terms of the law of contract, typically the warranty terms and conditions;⁵³⁰
2. the producer, importer, distributor or retailer⁵³¹ in terms of s 61(1) of the CPA, provided that none of the defences in s 61(4) of the CPA apply; or
3. the manufacturer in terms of the law of delict, provided that the consumer can establish all of the elements of a delict, including fault.⁵³²

⁵²⁸ The Guidelines 11.

⁵²⁹ Section 61(1) of the CPA.

⁵³⁰ See, for example, Mercedes-Benz *op cit* note 6 and Nissan *op cit* note 477.

⁵³¹ Consumers will typically attempt to hold the manufacturer of defective goods liable as they have the means to make good the harm experienced by consumers. See, for example National Consumer Commission 'National Consumer Commission rules on Ford Kuga consumers compensation - payment to Ford Kuga consumers finalised' 26 November 2020, available at <https://www.gov.za/speeches/payment-compensation-26-nov-2020-0000>, accessed on 18 January 2021 where consumers held Ford liable in terms of s 61 of the CPA.

⁵³² *Judd supra* note 116 para 8.

When consumers experience harm in the automotive industry, they have typically sought to hold OEMs liable.⁵³³ In the automotive supply chain, OEMs have been the ideal supplier to be held liable, due to their comparatively deeper pockets which provide consumers with the comfort that, if established, their claims against OEMs will be satisfied.⁵³⁴ The success of such claims has provided certainty for consumers that OEMs can be held liable for harm suffered by consumers in the automotive industry.⁵³⁵

An example of this is the dispute between FMCSA and consumers who purchased Ford Kuga vehicles that proved to be defective.⁵³⁶ There were 76 (seventy-six) affected consumers who took part in the mediation process held to resolve the dispute.⁵³⁷ Of those 76 (seventy-six), 47 (forty-seven) elected to hold FMCSA (the OEM) liable in terms of s 61 of the CPA for the harm that they had suffered.⁵³⁸ They were paid an amount of R50,000 (fifty thousand Rand) in settlement of their claims.⁵³⁹

5.3 Supply Chain Liability in the Automotive Aftermarket After the Implementation of the Guidelines

While the introduction of the Guidelines has been deemed to be a win for consumers,⁵⁴⁰ the changes that they introduce by increasingly including ISPs in the automotive aftermarket supply chain, the ability of consumers to approach ISPs during the in-warranty period serves to break the existing chain of liability in the automotive aftermarket during the in-warranty period.⁵⁴¹ This threatens the certainty consumers have had that they can approach OEMs to establish liability for harm suffered in the automotive aftermarket.⁵⁴²

⁵³³ National Consumer Commission 'National Consumer Commission rules on Ford Kuga consumers compensation - payment to Ford Kuga consumers finalised' 26 November 2020, available at <https://www.gov.za/speeches/payment-compensation-26-nov-2020-0000>, accessed on 18 January 2021 where consumers held Ford liable in terms of s 61 of the CPA.

⁵³⁴ Ibid.

⁵³⁵ Ibid.

⁵³⁶ T Bulbulia 'Payment of compensation to Ford Kuga owners finalised' 26 November 2020, available at https://www.engineeringnews.co.za/article/payment-of-compensation-to-ford-kuga-owners-finalised-2020-11-26/rep_id:4136, accessed on 18 January 2021.

⁵³⁷ Ibid.

⁵³⁸ Ibid.

⁵³⁹ Ibid.

⁵⁴⁰ Droppa op cit note 37.

⁵⁴¹ Guideline 5.4.1, guideline 6.9.1 and guideline 6.9.2 of the Guidelines read with s 61 of the CPA.

⁵⁴² National Consumer Commission op cit note 533.

An example of this would be where a consumer approaches an ISP for service, maintenance, mechanical or motor-body repair work during the in-warranty period.⁵⁴³ As they have customarily done, the consumer may attempt to hold the OEM liable for harm that they suffer due to defective workmanship or the supply of defective spare parts during such work.⁵⁴⁴ Where the consumer attempts to hold the OEM liable in terms of:

1. the warranty, the OEM will have the right pursuant to guideline 5.4.8 to conduct an assessment, at its own costs, to determine whether the defect in the original spare parts was caused by the ISP. If the defect and consequential damage to the vehicle was in fact caused by the ISP, this may result in certain provisions of the warranty, including those which the consumer seeks to rely on in order to hold the OEM liable, being declared void;⁵⁴⁵
2. s 61 of the CPA on the basis that the OEM produced defective parts, the OEM could avoid liability on the basis that the defect in the original spare parts did not exist at the time that they were supplied to the ISP;⁵⁴⁶ or
3. delict on the basis that the OEM produced defective original spare parts, the consumer would be required to prove all of the elements of a delict including fault on the part of the OEM.⁵⁴⁷ A delictual claim, particularly in the context of the element of fault, has historically proven difficult for consumers to prove.⁵⁴⁸

The consumer may thereafter approach the ISP who performed the work in order to establish liability in terms of:

1. section 61 of the CPA, but the ISP may avoid liability on the basis it is unreasonable to expect the ISP as a retailer of the spare parts to have discovered their defective nature;⁵⁴⁹ or
2. in delict, but they would encounter similar difficulty with establishing fault on the part of the ISP.⁵⁵⁰

⁵⁴³ Guideline 5.4.1 of the Guidelines.

⁵⁴⁴ J Evans 'Ford pays R50 000 compensation to owners whose Kuga caught fire' 26 November 2020, available at <https://www.news24.com/news24/SouthAfrica/News/ford-pays-r50-000-compensation-to-owners-whose-kuga-caught-fire-20201126>, accessed on 18 January 2021.

⁵⁴⁵ Guideline 5.4.8 of the Guidelines.

⁵⁴⁶ Section 61(4)(b)(i) of the CPA.

⁵⁴⁷ *Judd* supra note 116 para 8.

⁵⁴⁸ *Wagener* supra note 121 para 10.

⁵⁴⁹ Section 61(4)(c) of the Consumer Protection Act 68 of 2008.

⁵⁵⁰ *Wagener* supra note 121 para 10.

From this, it is clear that while consumers have the right to hold members of the automotive aftermarket liable for defective workmanship or the supply of defective spare parts, their ability to seek services from ISPs means that they will no longer have a clear path to imposing liability on OEMs as they have preferred to do in the past.

Further, in circumstances where an ISP admits liability, their failure to comply with guideline 5.4.7 which calls for ISPs to disclose to consumers that they have adequate insurance to conduct the work requested, may render the consumer's claim under s 61 of no substance. This is because, where the ISP does not have adequate insurance to satisfy a claim under s 61 and failed to disclose this to the consumer at the time of conducting the work, there is no mechanism in the Guidelines to enforce this obligation.⁵⁵¹ This will be to the detriment of a consumer as, even where such an ISP concedes liability to the consumer, they will not necessarily be in a financial position to satisfy the consumer's claim.⁵⁵²

This difficulty will be particularly prevalent where consumers approach unqualified ISPs, a circumstance that the implementation of the Guidelines ensures will occur with increasing frequency.⁵⁵³ This is because, while the Guidelines provide for the increased involvement of ISPs, there are no standards or specifications imposed therein that an ISP must comply with in order to render service, maintenance, mechanical or motor-body repair work during the in-warranty period.⁵⁵⁴ Consumers will have the increased opportunity to make use of ISPs during this period,⁵⁵⁵ some of whom may prove to be unqualified.⁵⁵⁶

The increased exposure of consumers to unqualified ISPs during the in-warranty period may in turn increase the exposure of consumers to counterfeit spare parts during the in-warranty period.⁵⁵⁷ This is because, where consumers have been

⁵⁵¹ Guideline 5.4.7 of the Guidelines.

⁵⁵² Ibid.

⁵⁵³ See guideline 5 of the Guidelines.

⁵⁵⁴ Ibid.

⁵⁵⁵ Guideline 5.4.1, guideline 6.9.1 and guideline 6.9.2 of the Guidelines.

⁵⁵⁶ H Bamford 'The roadworthy car that wasn't' 24 March 2004, available at <https://www.iol.co.za/news/south-africa/the-roadworthy-car-that-wasnt-209125>, accessed on 21 January 2021.

⁵⁵⁷ Kuh op cit note 508.

exposed to unqualified ISPs, such service providers have at times rendered their services making use of counterfeit spare parts⁵⁵⁸ in an effort to drive down the costs thereof.⁵⁵⁹ Additionally, the ability of consumers to choose between the use of original or non-original spare parts during the in-warranty period in terms of guideline 10.8.1 of the Guidelines may itself provide increased scope for counterfeit original spare parts to infiltrate the automotive aftermarket during the in-warranty period.⁵⁶⁰ This is to the detriment of consumers, as counterfeit parts pose the risk of injury or death.⁵⁶¹

Where a consumer attempts to hold the manufacturer of the counterfeit spare parts that have caused their harm liable, they will similarly face challenges.⁵⁶² This is because counterfeiters operate illegally and must be secretive to avoid the detection of the authorities.⁵⁶³ In order to establish liability, the consumer would be required to first locate the manufacturer of the counterfeit spare parts and this may take an excess of 3 (three) years, resulting in the prescription of their claim under s 61 of the CPA.⁵⁶⁴

5.4 Conclusion

The operation of supply chain liability in the automotive industry, including the automotive aftermarket, has meant that consumers typically approach OEMs in an attempt to establish liability where they have suffered harm.⁵⁶⁵ The implementation of the Guidelines will break the existing chain of supply chain liability in the automotive aftermarket. This will be achieved through the Guidelines introducing ISPs into the supply chain.⁵⁶⁶

The breaking of the existing chain of supply chain liability means that consumers will encounter two main difficulties in attempting to establish liability for harm suffered in the automotive aftermarket. Firstly, consumers will no longer have a clear path to

⁵⁵⁸ Ibid.

⁵⁵⁹ Bamford op cit note 557.

⁵⁶⁰ Brown op cit note 501.

⁵⁶¹ Gilbey op cit note 494.

⁵⁶² D Slater 'Counterfeit parts threaten motorists' safety' 20 June 2014, available at <https://www.engineeringnews.co.za/print-version/counterfeit-parts-threaten-motorists-safety-2014-06-20>, accessed on 12 January 2021.

⁵⁶³ Ibid.

⁵⁶⁴ Section 69(4)(d) of the CPA.

⁵⁶⁵ Evans op cit note 545.

⁵⁶⁶ Guideline 5.4.1 of the Guidelines.

holding OEMs liable for defective services or the supply of defective parts.⁵⁶⁷

Secondly, consumers have the potential to be increasingly exposed to unqualified ISPs which may not have the requisite insurance to satisfy claims brought by consumers under s 61 of the CPA.⁵⁶⁸ Where this occurs, consumers' claims may not be satisfied, leaving them without meaningful recourse in the event that they suffer harm in the automotive aftermarket during the in-warranty period.⁵⁶⁹

The increased exposure of consumers to unqualified ISPs facilitated by the Guidelines⁵⁷⁰ may in turn expose them to counterfeit spare parts. Where consumers are exposed to such counterfeit parts, they will similarly have difficulty in attempting to establish the liability of the counterfeit parts manufacturers, due to the illegal nature of counterfeiting.⁵⁷¹

In light of the findings of this chapter, the final chapter of this study will consider whether the implementation of the Guidelines can be said to benefit consumers.

⁵⁶⁷ Guideline 5.4.8 of the Guidelines.

⁵⁶⁸ Guideline 5.4.7 of the Guidelines.

⁵⁶⁹ Ibid.

⁵⁷⁰ Guideline 5.4.1 of the Guidelines.

⁵⁷¹ Slater op cit note 563.

CHAPTER 6

CONCLUSION

6.1 Introduction

Currently, franchise agreements concluded between OEMs and approved dealers⁵⁷² mean that consumers are confined by the terms of their warranties to the use of approved dealers for service, maintenance and mechanical repair work during the in-warranty period.⁵⁷³ Approved dealers conduct this work using original spare parts manufactured by the relevant OEM.⁵⁷⁴ The risk of rendering the warranty granted by an OEM void overall has also confined consumers to conducting service, maintenance and mechanical repair work using approved dealers where certain parts of a vehicle are in-warranty while others are out-of-warranty.⁵⁷⁵ Similarly, arrangements between OEMs and OEM approved motor-body repairers⁵⁷⁶ mean that consumers are confined by the terms of their warranties to the use of approved motor-body repairers in order to conduct in-warranty motor-body repair work.⁵⁷⁷

This status quo in the automotive aftermarket has led to ISPs, particularly those who are HDIs,⁵⁷⁸ and consumers making complaints to the Competition Commission over the last ten years.⁵⁷⁹ The complaints from ISPs have centred on their exclusion from participation in the automotive aftermarket and their lack of access to original spare parts.⁵⁸⁰ ISPs and HDIs have an incentive to be involved in the automotive aftermarket because of its lucrative nature. By way of example, the motor-body repair market accounts for R10,000,000,000.00 (ten billion Rand) of spending per year.⁵⁸¹ The exclusionary practices of OEMs in the automotive aftermarket prevent ISPs and HDIs from accessing most of this value.

⁵⁷² Guideline 8.2 of the Guidelines.

⁵⁷³ Mazda South Africa 'Mazda's new vehicle warranty' date unknown, available at <https://www.mazda.co.za/owners/warranties/>, accessed on 29 December 2020 read with guideline 5.2 of the Guidelines.

⁵⁷⁴ Mazda South Africa op cit note 574 read with guideline 12 of the Guidelines which requires OEMs to extend brand specific training to ISPs.

⁵⁷⁵ Guideline 5.2 of the Guidelines.

⁵⁷⁶ Guideline 6 of the Guidelines.

⁵⁷⁷ Mazda South Africa op cit note 574 read with guideline 5.2 of the Guidelines.

⁵⁷⁸ Guideline 7.6 of the Guidelines.

⁵⁷⁹ The Guidelines 3.

⁵⁸⁰ Ibid.

⁵⁸¹ The Guidelines 14.

The complaints from consumers have centred on their lack of choice and exposure to high prices in the automotive aftermarket.⁵⁸² In particular, consumers have been confined to the use of approved dealers and approved motor-body repairers, exposed to long lead times in order to secure OEM approved motor-body repairs⁵⁸³ and exposed to the high prices of original spare parts during the in-warranty period.⁵⁸⁴

6.2 The Competition Commission and the Publication of the Guidelines

As detailed in Chapter 3 of this study, the CA regulates competition in South Africa with the aim, amongst other goals, to provide consumers with choice as to service provider,⁵⁸⁵ ensure competitive pricing,⁵⁸⁶ and expand the spread of ownership in the market.⁵⁸⁷ The Competition Commission, as an administrative body created to ensure compliance with the CA,⁵⁸⁸ is empowered by s 79(1) of the CA to indicate its policy stance on any matter falling within the ambit of the Act. In response to the complaints from ISPs and consumers⁵⁸⁹ and in line with s 79 of the CA, the Competition Commission published the Guidelines.

The Guidelines and the aims of the Competition Commission in imposing them were set out in Chapter 4 of this study. In summary, the Competition Commission has introduced guidelines 5, 6, and 10 to provide for the increased involvement of ISPs and HDIs in the automotive aftermarket.⁵⁹⁰ This includes through the following mechanisms:

⁵⁸² The Guidelines 3.

⁵⁸³ Guideline 6.6 of the Guidelines.

⁵⁸⁴ Guideline 10.7 of the Guidelines.

⁵⁸⁵ Section 2(b) of the CA.

⁵⁸⁶ Ibid.

⁵⁸⁷ Section 2(f) of the CA.

⁵⁸⁸ Kemp & Sutherland op cit note 198 at 11-6(1).

⁵⁸⁹ The Guidelines 3.

⁵⁹⁰ Such increased access is desirable given the income potential of working in the automotive industry. For example, the motor-body repair industry has been indicated to account for approximately ten billion Rand's worth of spend per annum alone. Where ISPs have increased access to the motor-body repair industry, they can have increased access to this spend. For this statistic in context, see the Guidelines 14.

1. allowing consumers to choose whether to conduct service, maintenance or mechanical repair work at an ISP or approved dealer during the in-warranty period;⁵⁹¹
2. prohibiting OEMs from entering into exclusive arrangements with either one or more motor-body repairers approved by them in a particular Geographic Area during the in-warranty period;⁵⁹²
3. allowing consumers to choose between the fitment of original or non-original spare parts during the in-warranty period;⁵⁹³ and
4. prohibiting OEMs from restricting the access of ISPs to original spare parts for the purpose of service, maintenance or repair work.⁵⁹⁴

The increased involvement of ISPs and HDIs in the automotive aftermarket will serve to increase consumer choice as to which service provider to approach.⁵⁹⁵ The ability of consumers to elect whether to use original or non-original spare parts during the in-warranty period⁵⁹⁶ will enable consumers to lower the high costs associated with use of original spare parts by electing to use non-original spare parts.⁵⁹⁷

6.3 Supply Chain Liability as a Result of the Implementation of the Guidelines

As detailed in Chapter 5 of this study, the implementation of the Guidelines will break the existing chain of liability in the automotive aftermarket during the in-warranty period.⁵⁹⁸ The breaking of the existing chain of supply chain liability means that consumers will face new difficulties with imposing liability on OEMs and ISPs.⁵⁹⁹ Further, consumers will have the potential to be increasingly exposed to unqualified ISPs which may not have the requisite insurance to satisfy claims brought by consumers under s 61 of the CPA.⁶⁰⁰

⁵⁹¹ Guideline 5.4.1 of the Guidelines.

⁵⁹² Guideline 6.9.3 of the Guidelines.

⁵⁹³ Guideline 10.8.1 of the Guidelines.

⁵⁹⁴ Guideline 10.9.3 of the Guidelines.

⁵⁹⁵ Guideline 5.4.1, guideline 6.9.1 and guideline 6.9.2 of the Guidelines.

⁵⁹⁶ Guideline 10.9.1 of the Guidelines.

⁵⁹⁷ Guideline 10.7 of the Guidelines.

⁵⁹⁸ Guideline 5.4.1, guideline 6.9.1 and guideline 6.9.2 of the Guidelines read with s 61 of the CPA.

⁵⁹⁹ Ibid.

⁶⁰⁰ Guideline 5.4.7 of the Guidelines.

The increased exposure of consumers to unqualified ISPs during the in-warranty period may in turn increase the exposure of consumers to counterfeit spare parts during the in-warranty period.⁶⁰¹ Where consumers attempt to hold the manufacturers of the counterfeit spare parts that cause their harm liable, they will face difficulties in locating and establishing liability on the manufacturers due to the need to first locate them.⁶⁰²

Ultimately, the implementation of the Guidelines serves to render the imposing of liability under s 61 of the CPA an increasingly uncertain exercise for consumers.⁶⁰³ This is to their detriment as s 61 serves as the primary method of imposing liability for defective services or the supply of defective spare parts in the automotive aftermarket.⁶⁰⁴

6.4 Conclusion and Recommendations

In publishing the Guidelines, the Competition Commission has acted in a manner that is consistent with s 2(f) of the CA in an effort to curb the monopoly that has been established by OEMs in the automotive aftermarket.⁶⁰⁵ This has been achieved by providing for the inclusion of ISPs and HDIs therein, particularly during the in-warranty period.⁶⁰⁶

However, a consideration of the impact of the Guidelines on supply chain liability during the in-warranty period shows that the implementation thereof is not without its shortcomings for consumers. Contrary to what they have done customarily, consumers will no longer have the ability to hold OEMs liable with relative ease through recourse to s 61 of the CPA.⁶⁰⁷

This is because, in addition to the ability of an OEM to reject a claim in terms of guideline 5.4.8, OEMs may rely on the defences in s 61(4) of the CPA. Due to a lack

⁶⁰¹ Kuh op cit note 508.

⁶⁰² Slater op cit note 563.

⁶⁰³ Guideline 5.4.1, guideline 6.9.1 and guideline 6.9.2 of the Guidelines read with s 61 of the CPA.

⁶⁰⁴ Section 61(1) of the CPA.

⁶⁰⁵ Naidoo op cit note 391.

⁶⁰⁶ Guideline 5.4.1 of the Guidelines.

⁶⁰⁷ Ibid.

of standards and specifications for ISPs in the Guidelines and mechanisms to enforce provisions such as guideline 5.4.7, consumers will also face an increased risk of exposure to unqualified ISPs⁶⁰⁸ who may make use of counterfeit spare parts.⁶⁰⁹ This will result in claims by consumers against ISPs and counterfeiters having limited prospects of success due to the defences under s 61(4) of the CPA.⁶¹⁰

These shortcomings indicate that while the Guidelines will promote competition in the South African automotive aftermarket in a manner that is consistent with the aims of the CA articulated in s 2(b) and 2(f) thereof, there is some doubt as to whether they can truly be said to benefit consumers.

In order to mitigate harm that may arise for consumers as a result of these shortcomings, the following measures are proposed:

1. consumer education regarding the new difficulties they may encounter in attempting to hold OEMs and ISPs in the automotive aftermarket liable as a result of the implementation of the Guidelines;
2. the monitoring by the NCC⁶¹¹ of compliance by members of the automotive aftermarket with the provisions of the Guidelines. An example would be the monitoring of the conduct of ISPs to disclose that their working on a vehicle presents a risk that part of a vehicle's warranty may be rendered void,⁶¹² and
3. the monitoring by the NCC⁶¹³ of the implementation of the Guidelines to ensure that their provisions are not being abused to the detriment of consumers. An example of this would be ensuring that OEMs do not rely on the defence against liability available to them pursuant to guideline 5.4.8 in circumstances where the harm suffered by the consumer was not as a result of work done by an ISP.

⁶⁰⁸ Bamford op cit note 557.

⁶⁰⁹ Kuh op cit note 508.

⁶¹⁰ Guideline 5.4.7 of the Guidelines.

⁶¹¹ This would be consistent with s 99(c) of the CPA which places a duty on the National Consumer Commission to monitor the consumer market to ensure that prohibited conduct and offences are prevented, detected and prosecuted. The NCC could be assisted in its efforts by the Competition Commission which has a duty in terms of s 21(1)(h) of the CA to interact with any regulatory authority, including the NCC, to ensure consistent application of the principles of the CA.

⁶¹² Guideline 5.4.6 of the Guidelines.

⁶¹³ See note 611.

The monitoring efforts of the NCC referred to above could be used by the NCC to identify those practices in the automotive aftermarket which continue to present a risk to consumer rights as articulated in the CPA, notwithstanding the publication of the Guidelines.⁶¹⁴ Having identified such practices, the NCC could, working together with the Competition Commission as is provided for in section 95(1)(a) of the CPA, implement measures to effect further reform in the automotive aftermarket, to entrench the reform sought to be achieved by the Guidelines.⁶¹⁵

An example of this would be, where it is identified through monitoring that ISPs are failing to indicate that their working on a vehicle presents a risk that part of a vehicle's warranty may be rendered void,⁶¹⁶ such action could place the right of a consumer to quality service as articulated in section 54 of the CPA at risk. This is as such service could be contrary to the manner of service a consumer is generally entitled to expect.⁶¹⁷ This may justify the imposition of a legislative obligation on ISPs to disclose that their working on a vehicle presents a risk that part of a vehicle's warranty may be rendered void, coupled with a penalty for failure to comply with the legislative obligation.

Another example would be, where it is identified through monitoring that OEMs are relying on the defence against liability available to them pursuant to guideline 5.4.8 in circumstances where the harm suffered by the consumer was not as a result of work done by an ISP, the NCC could report to the Minister regarding the findings of their monitoring and make recommendations for reform in order to achieve the rights in the CPA.⁶¹⁸ Such measures of reform could include rendering the conduct above an offense subject to a fine.

In monitoring and implementing further measures to entrench the reform articulated in the Guidelines, the NCC, working together with the Competition Commission, could bring about effective change in the automotive aftermarket.

⁶¹⁴ See note 611.

⁶¹⁵ Section 95(1)(a) of the CPA.

⁶¹⁶ Guideline 5.4.6 of the Guidelines.

⁶¹⁷ Section 54(1)(b) of the CPA.

⁶¹⁸ Section 98(a) of the CPA.

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ANNEXURE 1: ETHICAL CLEARANCE



Miss Ntokozo Majola (211527728)
School Of Law
Howard College

Dear Miss Ntokozo Majola,

Protocol reference number: 00011440
Project title:

Exemption from Ethics Review

In response to your application received on 17/03/2021, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Simphiwe Peaceful Phungula
obo Academic Leader Research
School Of Law

UKZN Research Ethics Office
Westville Campus, Govan Mbeki Building
Postal Address: Private Bag X54001, Durban 4000
Website: <http://research.ukzn.ac.za/Research-Ethics/>

Founding Campuses: ■ Edgewood ■ Howard College ■ Medical School ■ Pietermaritzburg ■ Westville

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