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Automotive aftermarket shake-up – The Competition Commission's final Automotive Aftermarket Guidelines

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"*These Guidelines are aimed at removing restrictions imposed by OEMs on car owners on the service providers for service and maintenance as well as replacement parts for their motor vehicles in accordance with international best practices. It will unleash entry and participation in the lucrative aftersales value chain by SMMEs and HDI owned firms. This is in line with the Commission's strategy of opening up markets to support growth and transformation. We urge the OEMs to embrace the Guidelines and comply as this asks them to do no more than what they already do in their home countries and other parts of the world. For its part, the Commission is absolutely committed to the enforcement of the Competition Act in accordance with these Guidelines*," says Competition Commissioner Tembinkosi Bonakele in a media statement issued by the Competition Commission on 11 December 2020.

On 10 December 2020, the Competition Commission ("**Commission**") issued the final guidelines for competition in the South African Automotive Aftermarket[1] ("**Automotive Guidelines**"). The Automotive Guidelines are forward thinking as the measures proposed therein apply not only to internal combustion engines (ICE) but also to electric vehicles (EV's) and to propulsion by other means (i.e. hybrid).

The automotive industry contributes 6.4% to South Africa's gross domestic product (GDP) (4.0% manufacturing and 2.4% retail) and accounts for 30.1% of South Africa's manufacturing output. It is the country's fifth-largest exporting sector out of all 104 sectors and accounts for 13.9% of total exports[2]. The manufacturing segment employs more than 110,000 people across component manufacturing to vehicle assembly. Accordingly, the automotive sector is an important economic engine for South Africa and a very big contributor to employment in South Africa. It is, therefore, unsurprising that the Commission is keen to ensure that conditions and commercial arrangements between participants at the different levels of the automotive value chain are conducive to competition, as competition is generally regarded to be the driver of innovation and consumer choice.

The Commission states that it issued the Automotive Guidelines with the aim of promoting competition in the automotive aftermarket, and specifically to promote economic access, inclusion and greater spread of ownership for Historically Disadvantaged Individuals (HDI).

Stakeholder Consultation

In the Commission's media statement dated 11 December 2020, the Commission indicates that it consulted widely with industry participants including the National Association of Automobile Manufacturers of South Africa (NAAMSA), the National Automobile Dealers Association (NADA), the South African Insurance Association (SAIA), the Banking Association of South Africa (BASA) plus individual OEMs and individual Insurers. The Commission also states in its media release that it had engaged with independent repairer associations including Motor Industry Federation (MIF), African Panelbeaters Motor Mechanics Association (APMMA), Tyre, Equipment, Parts Association (TEPA), Right to Repair (RTR), Motor Industry Workshop Association (MIWA) and the Automotive Remanufacturers' Association (ARA).

The genesis of the Commission's engagement in the automotive industry stems from the numerous complaints the Commission received over the last decade. In this regard, the Commission has been working with participants in the automotive since early 2017 to resolve these market issues. The Commission initially facilitated an advocacy program towards a voluntary Code of Conduct for the industry, but after two years of engagement, the Commission states in the Automotive Guidelines that stakeholders did not reach consensus and/or did not commit to meaningful pro-competitive reforms in response to the challenges posed. The Commission, therefore, issued the Automotive Guidelines to provide practical guidance for the automotive aftermarkets industry. The Automotive Guidelines are intended to promote inclusion and to encourage competition through greater participation of small businesses as well as historically disadvantaged groups.

Measures proposed in the Automotive Guidelines

Some of the novel measures proposed in the Automotive Guidelines, which have cost, staffing and legal implications for participants in the automotive industry, are the following:

- the unbundling of the new motor vehicle price from the price of the service and/or maintenance plan of that motor vehicle. In other words, dealers must ensure that at the point of sale of a motor vehicle, that consumers have full disclosure of the i) purchase price of the motor vehicle; and ii) the purchase prices of service and maintenance plans, and other value-added products. Consumers will then have the choice whether to purchase the motor vehicle and service/maintenance plan separately or at the same time;
- Original Equipment Manufacturers (OEMs) and independent third party providers must transfer a service and/or maintenance plan to a replacement motor vehicle in circumstances where the motor vehicle is written off by the insurer;
- in circumstances where there is no replacement motor vehicle after a write-off or its not feasible to transfer a service and/or maintenance plan to a replacement motor vehicle, the consumer must be afforded the right to cancel the service and/or maintenance plan contract and/or receive a refund for the balance of the product;
- approved dealers that sell new motor vehicles and products of competing OEMs must ensure that they do not engage in price co-ordination. Specifically, the prices of competing motor vehicles and products must be determined by different individuals within the dealership;
- approved dealers that sell new motor vehicles and products of competing OEMs must ensure that no commercially sensitive information (including information stored in the cloud) is provided or shared with competing OEMs.

Conclusion

The Automotive Guidelines are effective from 1 July 2021 and affected parties in the automotive industry, thus, have until 1 July 2021 to ensure their businesses and business arrangements are compliant. Although the Automotive Guidelines are non-binding on the competition authorities, it indicates the Commission's approach on any matter falling within its jurisdiction in terms of the Competition Act, No. 89 of 1998 ("**Competition Act**"). Importantly, the Automotive Guidelines do not preclude the Commission from pursuing any firm in the automotive industry for anti-competitive conduct through the Commission's enforcement powers.

Businesses should, therefore, carefully consider the implications of the measures proposed by the Commission in the Automotive Guidelines on their franchise and dealer arrangements, and on their different services and product offerings pertaining to motor vehicle servicing, repair and/or maintenance.

Interestingly, the Automotive Guidelines do not apply to motorcycle dealers or finance and insurance institutions who provide products and services to participants in the motorcycle industry. However, participants in other industries that have similar franchise, distribution, servicing and/or repair arrangements to the automotive industry will undoubtedly be keeping a watchful eye on how the implementation of the Commission's Automotive Guidelines unfold in the automotive sector.

About the Author:

Dominique is a Director in the Werksmans Competition Practice Area. Amongst other things, Dominique offers practical training and insights to participants in the automotive industry on the Automotive Guidelines, on the Commission's Guidelines on the Exchange of Information between Competitors and on the provisions of the Competition Act (including section 4).

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[1] The automotive aftermarket is defined in the Automotive Guidelines as "…*the after-sale market which includes maintenance and repair services and related value added products, Mechanical Repairs, Structural Repairs and Non-Structural Repairs to Motor Vehicles, the sale of motor vehicle Spare Parts, tools and components and the sale and administration of Motor Vehicle Insurance*".

[2] NAAMSA submission to the Commission on the Draft Guidelines for Competition in the South African Automotive Aftermarket Industry dated 30 June 2020.

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