

FIGIEFA submission - Draft Guidelines on Exclusionary Abuses of Dominance

Brussels, 31st of October 2024

1. Introduction

First, FIGIEFA welcomes the draft of guidelines on exclusionary abuses of dominance (hereinafter ‘the DGL’). We fully share the Commission’s view to ensure that abuse of dominance rules need to be clear, effective and applied vigorously to the benefit of European consumers and the economy at large.

Notices and guidelines set out the Commission’s view on the interpretation and application of the competition rules. FIGIEFA is of the opinion that the DGL should not be merely a summary of case law of the ECJ. It results from the draft guidelines that they are without prejudice to the exercise by the ECJ of its jurisdiction. However, the aim of the draft guidelines should be to provide greater legal clarity as regards the policy and framework of analysis applied by the Commission under Art. 102 TFEU, resulting in more predictability, more uniformity, more compliance, better administrability and vigorous enforcement.

2. Purpose, effectiveness and predictability

Because dominant firms are not sufficiently disciplined by their competitors, suppliers, customers and consumers and thus can exert market power, the dominant firms’ activities are more prone to anti-competitive effects. Therefore, Art. 102 TFEU imposes a “special responsibility” on dominant firms and prohibits them from engaging in certain conduct that would be unobjectionable if adopted by non-dominant undertakings. Art. 102 TFEU - by definition - implies imbalanced competitive circumstances, making adequate enforcement of abuse by the Commission, national competition authorities (NCAs) and courts indispensable.

The DGL expresses a concerns of growing market concentration in various industries and the digitization of the Union economy and acknowledges the importance to apply Art. 102 TFEU vigorously and effectively. These developments request more ambitious guidelines than a mere summary of existing case law. A change is needed to make Art. 102 TFEU a more adequate ex-post instrument in a fast-moving economy. The Commission should not forget that one of the aims of Art. 102 TFEU is to establish an internal market, including a system ensuring undistorted competition (Art 3(3) TFEU and Protocol 27 to TEU and TFEU). This is not about imposing fines a decade after initiating procedures nor about favouring competitors, but about protecting the existence of effective competition on the internal market in the EU, in the interest of consumer welfare, better choice, quality and innovation.

FIGIEFA is concerned that the Art. 102 TFEU-instrument currently risks losing its purpose, especially in quickly evolving markets. Almost invariably, when the Commission or a national competition authority attempts to enforce Art. 102 TFEU (despite their range of investigative powers and evidence-gathering capabilities, which lacks in civil procedures), it ends in lengthy

FIGIEFA

International Federation of Automotive Aftermarket Distributors
Boulevard de la Woluwe 42, Box 5
BE-1200 Brussels

Tel.: +32 2 761 95 10
E-mail: figiefa@figiefa.eu
Web: www.figiefa.eu

IBAN: BE37310149413028
BIC: BBRUBEBB
V.A.T.: BE-0472205007
EC Transparency Register ID:
69678928900-56

investigations and proceedings that render decisions and fines incapable of bringing a timely and effective end to the anticompetitive behaviour. The dominant party is thus potentially left to make a calculated trade-off, where it (often) pays to continue the contested behaviour.

The complexity of enforcing Art. 102 TFEU with a high burden of proof on the authorities/claimant's side and many abilities for dominant parties to rely on 'economic uncertainties' clearly favours the procedural position of dominant parties in the digital society. It has become too easy to - legitimately - delay proceedings by years, meanwhile allowing the dominant party to strengthen its position to the detriment of undistorted competition. Any procedural victory will not repair the damage done to the competitive structure of the market. These developments make litigation to challenge the conduct of the dominant party too expensive and too time-consuming for most competitors (in particular SMEs), not to mention their position that often entails some form of dependence, including a substantial risk of retaliatory measures.

To make enforcement under Art. 102 TFEU more effective, it is necessary to recognise that the increasing digitalisation and electrification inevitably results in increasing inequality and dependency, which require effective and swift interventions to guard undistorted competition in the internal market. This increasing and structural imbalance should be echoed in guidelines and procedural rules should enable effective maintenance of a system of undistorted competition. It should minimise opportunities for obstruction of a smooth and fair trial.

The Commission should define in the guidelines a structured and limited set of conditions against which anti-competitive effects are assessed and - more explicitly - make use of evidentiary presumptions (e.g. dominance deemed at market shares of > 50% and dominance should also be presumed in cases where (objectively) vertically integrated undertakings are in a position to deny access to its (downstream) competitors to enter a market. The burden of proof should shift to the dominant undertaking to reject the presumption.

The Commission should avoid expanding investigations with additional elements with the intention to build stronger cases, which seems mainly based on a concern to prevent negative court rulings. Ultimately, we believe that this is a dead-end, because more arguments create more room for debates and endless procedures with less predictability. Therefore, the guidelines should set a clear bar for evidence and the Commission itself should strengthen predictability and effectiveness from a practical point of view by effectively limiting its investigations to the required legal standard. The Commission should therefore strive to take on much more and also smaller cases aiming at more and quicker enforcement to ultimately contribute better to maintaining undistorted competition on the internal market. This approach would also be more compatible with the Digital Markets Act (DMA).

3. Relevance of factual circumstances and characteristics of sectors – guidance to enhance compliance

The European Court of Justice recently emphasized in Google Shopping¹ that in order to find an 'abuse of a dominant position' under Art. 102 TFEU, **as a general rule**, it is necessary to demonstrate that through recourse methods different from those governing competition on the merits, the conduct has the actual or potential effect of restricting competition on the market(s) concerned, which may either be the dominated market or related or neighbouring markets. Conduct

¹ Judgment of 10 September 2024, Google and Alphabet v Commission (Google Shopping), C-48/22, ELI:EU:C:2024:726.

may also be categorised as ‘abuse of a dominant position’ where it has been proven to have the actual or potential effect – or even the object – of impeding potentially competing undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures or other means different from those which govern competition on the merits, from even entering that or those market(s) and, in so doing, preventing the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation.² The ECJ states in this context (par. 168, Google shopping): *“It follows from that case-law that **the relevant factual circumstances include not only those that concern the conduct itself, but also those that concern the market or markets in question or the functioning of competition on that or those market(s).** Thus, circumstances relating to the context in which the conduct of the undertaking in a dominant position is implemented, **such as the characteristics of the sector concerned, must be regarded as relevant.**”*

Thus, the specific characteristics of the automotive sector are relevant under Art. 102 TFEU assessments. In that respect it is important to make a distinction between the primary market, with large manufacturers and global competition and the secondary/aftermarket where the competition takes place on the internal market. The ‘Draghi report’³ clearly supports the view that the automotive sector is a key industry in the EU and affordable automotive mobility is essential for the citizens of the European Union. Where the Draghi report refers to the competitiveness of the EU automotive sector on a global scale, the focus lies on the primary market and its value chain (e.g. from minerals to battery). The competitiveness on the internal market should mostly focus on the secondary markets of the automotive sector. These are mostly brand-specific aftermarkets, where increasingly independent operators encounter access hindrances and distortions of independent and branded supply chains, obstructing also new innovations related to for example mobility services.

The aftermarket is a major part of the EU automotive industry, accounting for 4 million European jobs and providing essential services ensuring safety & compliance of the 280 million vehicles on European roads. An overwhelming majority of independent businesses in the automotive aftermarket are SMEs. In the automotive sector with brand-specific aftermarkets Independent Operators (‘IOs’) have the important role to put competitive constraint on (dominant) vehicle manufacturers (‘VMs’) and their authorised selective networks. Due to the long lifespan of vehicles, the relatively high purchase price, technologic complexity and brand-specific aftermarkets, a healthy independent aftermarket is fundamental to support effective competition. It reduces risks of vendor lock-in, enhances consumer welfare and supports affordable, innovative, safe and secure mobility on the internal market.

The automotive aftermarket is undergoing transformation with the rise of battery-electric vehicles (‘BEVs’) and software-defined vehicles (‘SDVs’), giving rise to new services, opportunities and challenges. However, they also have a disruptive impact on the competition on the automotive aftermarket, due to the proprietary closed (digital) design of the vehicle (e.g. through proprietary in-vehicle telematics systems or the increasing use by VMs of parts activation codes). IOs are in direct competition with vertically integrated VMs on the aftermarket. At the same time, IOs can only rely on the VMs to obtain access to essential (digital) inputs required for IOs to provide their independent services and parts.

Rightly, the amended Supplementary Guidelines to the Motor Vehicle Block Exemption Regulation warn that Art. 102 TFEU may be applicable where a ‘supplier’ unilaterally withholds from

² Judgment of 21 December 2023, European Super League Company, C-333/21, EU:C:2023:1011, paragraph 131 and the case-law cited.

³https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en, September 2024

independent operators an essential input, such as vehicle-generated data (Commission Notice (2023/C 133 I/01), par. 68a).

The new guidelines on exclusionary abuses should refer to and elaborate on par. 68a Supplementary Guidelines⁴ to the MVB⁵, with the aim of providing more legal certainty to enhance compliance and making it easier (for SMEs) to obtain their right. Examples could be provided of digital and/or physical anti-competitive foreclosure and/or access restrictions to spare parts and captive parts, RMI- and OBD- information, in-vehicle data, functions and resources (read and write, and remote access), to software updates and to cybersecurity relevant information (without a proportional justification).

Anyway, the upcoming guidelines on exclusionary abuses should include clear sets of examples of the Commission's enforcement policy in individual cases (e.g. like it is done in the horizontal guidelines). Examples of prohibited conduct should be provided to focus more on compliance. In addition, examples should also be provided of sector-/market-characteristics that will influence the assessment. In order to support the objective of vigorous enforcement, guidance on the (increased) use of interim measures and commitment decisions (with the involvement of stakeholders), should be provided as well.

4. Scope and structure of the DGL

In par. 11 DGL is stated that the guidelines only concern exclusionary abuses, and (only) section 2 and 5 are claimed to be relevant to other forms of abusive conduct. Art. 102 TFEU⁶ refers to 'any abuse' and does not create a need to make a distinction between different types of abuses, which distinction might eventually be difficult to make. The Commission should avoid adding the burden of proof. The DGL could be interpreted as establishing a need to make such a categorization. It should be made clear that there is no obligation to make a categorization, that the guidelines can be of relevance to any type of abuse and anyway that any type of categorization will not alter the assessment under Art. 102 TFEU.

⁴ Commission notice Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (2010/C 138/05), (OJ C 138, 28.5.2010, p. 16, amended by Communication from the Commission Amendments to the Commission Notice – Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (2023/C 133 I/01, C 13, 17.4.2023, par 68a:

Par (68a) *Withholding a particular item, such as an essential input belonging to the categories set out in paragraphs 62 to 68 of these Guidelines, including vehicle-generated data, that is not made available by motor vehicle manufacturers to members of the relevant authorised repair network, may amount to an abuse under Article 102 of the Treaty where a dominant supplier withholds such an item from independent operators.*

⁵ Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, amended by Commission Regulation (EU) 2023/822 on amending Regulation (EU) No 461/2010 as regards its period of application, 17 April 2023.

⁶ Article 102 TFEU reads as follows:

Any abuse by one or more undertakings of a **dominant position** within the **internal market** or in a substantial part of it shall **be prohibited** as incompatible with the internal market in so far as it **may affect trade between Member States**.

Such abuse **may, in particular**, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[bold added]

In par. 14 and par. 45 DGL the Commission takes a 2-step approach to constitute an exclusionary abusive conduct, it should be established: 1) that the conduct departs from competition on the merits and 2) that it can have exclusionary effects.

Again, the Commission sets we believe an unnecessary high threshold that could harm adequate enforcement of Art. 102 TFEU. **The recent Google-shopping case⁷ clarified unambiguously that it is not necessary to show that a certain behaviour departs from competition on the merits, in every instance. There are instances where potentially competing undertakings are impeded at an earlier stage from even entering the market(s) concerned.** This is for example the case when in the automotive aftermarkets independent Operators are not provided with required digital parts-codes or abilities to interact with the embedded software, thus preventing effective competition from independent aftermarket operators. In these instances, there is no need to show that such conduct departs from competition on the merits. Moreover, - as is stated in the SGL (par.52) - case law⁸ shows that even if an intention to compete on the merits has been established, it does not imply the absence of an abuse⁹. This means basically that a set of relevant facts and circumstances related to the nature and the impact of the conduct should be considered (see par. 55 DGL), instead of imposing a (negative) burden of proof on the Commission with the need to show that no competition on the merits took place. Furthermore, as stated in para 47 and 53 DGL, conduct fulfilling the requirements of a specific legal test is deemed to fall outside the scope of competition on the merits. The above **reference to the Google-shopping case highlights that even when conduct does not meet a specific legal test, e.g. in particular in cases of “Access restrictions” (see par. 163-166 DGL), there is no need to show that the conduct departs from competition on the merits.** This should be adjusted in par. 55 DGL.

With regard to the second threshold, it is very positive that the DGL provide more clarity in respect of the evidentiary burden to demonstrate a conduct’s capability to produce exclusionary effects. A dynamic and workable effects-based approach is applauded.

Earlier, the Commission stated in its BEH-Electricity¹⁰ decision that the General Court clarified in *Intel* that the Commission under Art. 102 TFEU is entitled to rely on the anti-competitive object of the behaviour and is not required to demonstrate the actual or potential effects on competition. This is relevant for the evidentiary burden and the substantive legal standard. Naked restrictions, as mentioned in the DGL, will likely fall under object-infringement, but the latter could have a much wider scope than conduct that has no economic interest. This should be clarified in the DGL. FIGIEFA supports chapter 3.3.4 DGL referring to elements that are **not** necessary to show the capability to produce exclusionary effects. Indeed, - in accordance with par. 73 DGL – the recent Google shopping-case¹¹ confirmed unambiguously that it is not necessary to show that rivals are as efficient as the dominant firm when demonstrating the exclusionary effects of a conduct. The recent Intel-case¹² does not alter this view because in that case the Commission opted to perform an ‘as-efficient-competitor’ (AEC)- analysis and additionally based its assess-

⁷ Judgment of 10 September 2024, Google and Alphabet v Commission (Google Shopping), C-48/22, ELI:EU:C:2024:726, par. 165

⁸ Judgement 19 April 2012, Tomra and others v Commission, C-549/10, EU:C:2012:221, par. 22

⁹ Judgement of 19 April 2012, Tomra and Others v. Commission, C-549/10 P, EU:C:2012:221, par.22.

¹⁰ Case AT.39767 BEH Electricity, commitment decision 10 December 2015, par. 62. “*In the Intel Case the General Court expressly recognised that where there is a restriction of competition by object, the Commission is entitled under Article 102 of the Treaty to rely on the anti-competitive object of such behaviour and is not required to demonstrate the capability of such behaviour to restrict competition.*”

¹¹ Judgment of 10 September 2024, Google and Alphabet v Commission (Google Shopping), C-48/22, ELI:EU:C:2024:726, par. 264

¹² Judgment of 24 October 2024, Commission v Intel Corporation, C-240/22 P, par. 331 and 334. Note. the question raised in par 331 whether possibly a strategy exists aiming to exclude competitor that are at least as efficient as the dominant undertaking, does not imply a full AEC-analysis.

ment to determine that the rebate scheme at issue was capable of having foreclosure effects on as-efficient competitors on that AEC-test.

5. Specific legal tests & conducts with no specific legal test

FIGIEFA welcomes the clarification of the specific legal tests, which is a useful summarize of the status of the case law. However, it should be made clearer in the DGL that not all elements that might be relevant, actually need to be assessed by the Commission to establish abusive conduct. For example, par. 94 DGL lists additional elements that may be relevant depending on the circumstances of the case, while par 89 DGL already lists the conditions under which tying is liable to be abusive. Dominant parties might use such a potentially relevant list to claim that one or more of these elements are indeed relevant and that additional and broader investigations are required. Additional investigations - that are not strictly required to comply with the necessary legal standards - should be avoided, as mentioned earlier, to avoid unnecessary long and complex procedures. The DGL should present this in the DGL as a generic policy choice and elaborate on the need to keep Art. 102 TFEU functional and administrable.

Important for the automotive aftermarket is that the differences between 'Refusal to supply'(par 96-106) and "Access restrictions' (par.163-166) are made clearer. It now appears that a dominant undertaking that simply refuses access has a better procedural position under Art. 102 TFEU than that same firm that provides some access to third parties. This is an invitation to close access rigorously, which cannot be the intention of the DGL.

6. Compliance & enforcement

The DGL should aim more at compliance. Clearcut examples of infringements should be provided in the DGL to support in particular SME's to raise issues, which are otherwise too difficult to address in their (dependency) relationship with a dominant party. Only when it is fairly impossible to deny an infringement, a dominant undertaking might listen to an SME and the DGL can - as such – have deterrent effect. In addition, as mentioned earlier, the Commission should aim at enforcing more and smaller cases (e.g. abusive anti-competitive conduct of a dominant undertaking towards SMEs in different jurisdictions), without unnecessary investigations and assessments that ultimately helps dominant firms to fuel their arguments and delay procedures. In the fast-moving digital economy **interim measures and options for commitment decisions** need to be used to speed up procedures. The DGL should elaborate on this.

7. Conclusion and summary

As detailed above, FIGIEFA requests the Commission to focus on the aspects mentioned below:

1. **Greater legal certainty:** The DGL should provide a clearer framework for the interpretation and application of Article 102 TFEU. Define a structured set of conditions for assessing anti-competitive effects and utilise more evidentiary presumptions (such like dominance at market shares over 50%).
2. **Examples of prohibited conduct:** Provide clear examples of anti-competitive conduct to facilitate compliance, especially for SMEs. Include sector-specific characteristics in these examples for the assessment under Article 102 TFEU and to enhance compliance. Clarify in the DGL the reference in the Supplementary Guidelines to the MVBBER to Art. 102 TFEU for the automotive aftermarket, to enhance legal certainty. Provide clear examples, e.g. indicating

that denying independent operators access to technical information, even if not provided to members of the relevant authorised repair network, amounts to an abuse under 102 TFEU, for which efficiency defences are unlikely to be successful.

3. **Clarify legal tests:** Make clear that not all (potentially) relevant elements need to be assessed to establish abusive conduct and that - as a policy measure to keep art. 102 TFEU administrable - additional investigations are avoided unless strictly necessary.
4. **Categorizing types of abuse:** explain in the DGL that the categorization in types of abuses does not impose an additional burden of proof on the Commission.
5. **Clarify important distinctions with large implications on the evidentiary burden:** Clarify differences between "*Refusal to supply*" and "*Access restrictions*" as this distinction is very important in a digital-economy and will have a large impact on the abilities to take action and might easily be misinterpreted (which uncertainty might be used by dominant firms)
6. **Timely and Effective Enforcement:** The Commission should ensure that investigations lead to timely resolutions to prevent ongoing anti-competitive behaviour. The Commission should limit its own investigations to necessary legal standards, to enhance predictability and effectiveness.
7. **Emphasize on deterrence and compliance:** Aim for compliance, e.g. by providing examples of infringements to help SMEs identify and address issues. The Commission is encouraged to pursue more small-scale abuses over different member States to address anti-competitive conduct quicker and more effectively. Vigorous enforcement is required to uphold deterrence.
8. **Utilize Interim Measures:** Include guidance on using interim measures and commitment decisions to expedite procedures in the digital economy.

These requests emphasize the need for clarity, effectiveness, and rapid enforcement in addressing anti-competitive conduct in the context of Article 102 TFEU.

About independent distributors of automotive replacement parts

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About FIGIEFA

Founded in 1956 and based in Brussels, FIGIEFA is the European federation representing the independent distributors of automotive replacement parts and components towards the European Union's and United Nations' institutions. It brings together 19 national associations, as well as the 5 leading International Trade Groups.