



ADPA.EU

Guidelines on exclusionary abuses of dominance

ADPA input to the public consultation

SAFETY - SUSTAINABILITY - AFFORDABILITY



Table of contents

Table of contents	2
Notice	2
Contact	2
Introduction	3
1. About the automotive aftermarket and ADPA Members	3
2. New access challenges	4
3. Objectives of Article 102 TFEU and need for new policies in draft Guidelines	5
4. Key issues to address in the Guidelines on Exclusionary Abuses	6
4.1. Using more legal presumptions and reducing evidentiary burden	6
4.2. In-vehicle data access, refusal to supply and access restrictions	7
4.3. Emphasis on compliance, deterrence and robust enforcement	8
Conclusion	9
Annex 1 - Used acronyms	10
Annex 2 - References	11

Notice

This document is the detailed input from ADPA to the public consultation on the Guidelines on exclusionary abuses of dominance organised by the European Commission from the 1st of August 2024 to the 31st of October 2024.

ADPA remains of course available to discuss it further with relevant institutions and fellow stakeholders.

Contact

Pierre THIBAUDAT

Director General

pierre.thibaudat@adpa.eu

31 October 2024



Introduction

The Automotive Data Publishers' Association (ADPA) welcomes the new Draft Guidelines on exclusionary abuses from the European Commission. The European Commission correctly highlights growing concerns about the concentration of market power in various sectors, especially in the context of the digital transformation of the European economy. Below, ADPA will provide some background information on the automotive aftermarket and the role of ADPA and its members, will have a closer look at new challenges and the role of Article 102 of the Treaty on the Functioning of the European Union (TFEU), before providing comments on the draft guidelines on exclusionary abuses.

1. About the automotive aftermarket and ADPA Members

The automotive aftermarket is a huge market: for replacement parts alone it represents more than €220 billion¹. Most of it is paid by consumers, either directly or indirectly (e.g. through insurance or leasing contracts), so maintaining a fair level of competition for such services is essential. However, vehicle manufacturers too often prevent the independent, multi-brand aftermarket from being able to compete effectively with them by imposing commercial practices or technical means which maintain consumers captive of their brand-specific aftermarket. In the automotive industry, independent operators play a crucial role in providing competitive pressure on dominant vehicle manufacturers and their authorised selective networks. Given the long lifespan of vehicles, their increasingly high purchase costs, technological complexity, and brand-specific aftermarkets, a robust independent aftermarket is essential for fostering effective competition on the internal market. This helps mitigate the risks of vendor lock-in, boosts consumer welfare by improving road mobility, makes it safer, more sustainable and more affordable, for everyone, everywhere and at any time on the internal market.

An essential part of this ecosystem, ADPA Members are worldwide pioneers and leaders for the reparability of increasingly complex goods providing aggregated, harmonised, intelligible and ready-to-use technical information for the reparation, maintenance and servicing of over 280 million vehicles from more than 40 different manufacturers on European roads, ensuring their roadworthiness, safety and environmental performance over their lifetime in a reliable, timely and affordable way. They thus play a crucial intermediate role on the aftermarket to provide (independent) operators with automotive data and information needed for the repair and maintenance of all vehicle's brands and types on the internal EU-market.



For more facts and figures on our sector and its economic footprint, and on its contribution to the safety, the sustainability and the affordability of road mobility, scan this QR code or visit our dedicated webpage <https://www.adpa.eu/facts-figures/>

¹ BCG & alii, *At the Crossroads: The European Aftermarket in 2030*, March 2021



2. New access challenges

The recent Draghi report on “The future of EU competitiveness”² confirms the key importance of the automotive sector for the European Union and acknowledges that the sector is undergoing the biggest structural transformation in over a century. In this report, the focus is mainly on industrial policy and the primary market in the automotive sector. However, the report also emphasises the need to fully implement the single market and states: “For priority sectors, the EU should aim as far as possible to be competitively neutral and regulation should be designed to facilitate market entry. The evidence is overwhelming that competition stimulates productivity, investment and innovation.”³

The recent report “Protecting competition in a changing world - Evidence on the evolution of competition in the EU during the past 25 years”⁴ states in the abstract: “As regards the impact of competition on competitiveness, the report recalls the **strong and consistent empirical evidence from the economic literature that industries experiencing greater competition show stronger productivity growth**, while weak competition undermines productivity growth. Productivity growth in turn is the main driver of both the competitiveness of EU firms and long-term growth. A new survey of EU-based exporting firms suggests that **effective domestic competition within the Single Market (i) is an important driver of their global export competitiveness – in particular effective competition in upstream goods markets – and (ii) for a majority of respondents does not constrain their scale in a way that would hinder their success on global export markets.**” In other words, effective competition on the internal market, enforces the competitiveness of the EU at global level, instead of weakening it, and thus should be encouraged.

One of the many new challenges in the automotive sector is digitalisation. Digitalisation has a profound impact on the automotive aftermarket and on the repair and maintenance of vehicles. It enables the creation of advanced diagnostic tools and software that allow mechanics to quickly and accurately identify vehicle issues (which are more and more “hidden” in the electronic architecture of the vehicles), which paves the way for predictive maintenance systems, which utilise data analytics and sensors to forecast potential failures and proactively schedule maintenance. Additionally, digital platforms and mobile applications offer vehicle owners’ convenient access to maintenance schedules and reminders, which minimises downtime and lowers repair costs. However, the ability of the independent operators to compete effectively on the automotive aftermarket and develop their independent services tools and parts, is seriously jeopardised due to the ongoing lack of effective access to in-vehicle data, functions and resources. Privacy - and (cyber-) safety and security issues can no longer be used as an excuse as adequate technical solutions are available⁵. Reality is that vehicle manufacturers, mostly vertically integrated multinationals, have no incentive to provide independent operators access, with whom they compete on the aftermarket(s). Vehicle manufacturers have become gatekeepers that can control (read and write) access to data, functions and resources of the vehicle.

Electrification is another challenge. Battery Electric Vehicles (BEVs) require more completeness and granularity of information for the servicing of traction batteries and safety information, related to the handling of the battery and the chemical, electrical and thermic hazards. To get the complete and required granularity of information is a major issue for the independent aftermarket operators that are not able to compete effectively without it.

These technical developments increase the market power of vehicle manufacturers over the brand-specific aftermarkets but also enable more commercial control and new commercial abilities, such as instant commercial offers over the Human-Machine Interface (HMI) in the vehicle based on continuous monitoring of the vehicle behaviour and long-term service contracts with privacy-data-share-consent signed at the moment of buying a vehicle.

² DRAGHI Mario, *The future of European Competitiveness*, September 2024, part B p. 140

³ Ibid, part A p. 13

⁴ European Commission, Directorate-General for Competition, COMP.PA01, *Protecting competition in a changing world - Evidence on the evolution of competition in the EU during the past 25 years*, 2024

⁵ ADPA & alii, *Creating a level playing field for vehicle data access: Secure On-board Telematics Platform Approach*, February 2021



3. Objectives of Article 102 TFEU and need for new policies in draft Guidelines

Dominant undertakings are considered “dominant” because they operate with insufficient checks from their competitive environment, such as their competitors, suppliers, and consumers⁶. They can exert significant market power without being “disciplined” by other stakeholders on the market. In response, Article 102 TFEU places a unique “special responsibility”⁷ on these dominant entities, prohibiting certain conduct that would be acceptable if performed by smaller, non-dominant firms. This implies an imbalance on the market, that demands the possibility to intervene with the instrument of Article 102 TFEU (to address abuses of dominance).

An important objective of Article 102 TFEU is to establish an internal market, including a system ensuring undistorted competition⁸, protecting the existence of effective competition on the internal market in the EU in the interest of consumer welfare, better choice, quality and innovation. To enhance the effectiveness of enforcement under Article 102 TFEU, it is essential to recognize that increasing digitalisation and electrification create many new and welcome opportunities, but also contribute to growing inequality and dependency. This necessitates prompt and effective interventions to protect fair and open competition within the internal market.

Fundamentally, dominant firms should be deterred by Article 102 TFEU and opt for compliance. Abusing their position should be at the risk of swift and vigorous enforcement by the Commission, National Competition Authorities (NCAs), and judicial bodies, that should mainly focus at immediately restoring undistorted competition on the internal market, instead of aiming at high fines. However, the past decade has shown extremely lengthy proceedings to enforce Article 102 TFEU. An increased complexity and legal uncertainty to fulfil the burden of proof combined with the active use of “complexity as instrument of defence” by dominant firms. Obviously, these complex lengthy proceedings incur high costs, making the instrument almost fully dysfunctional to rely upon for restoring fair competition, particularly in rapidly changing (digital) markets and for Small and Medium Enterprises (SMEs). Proceedings that drag on for years and years, allow dominant firms to persist in their anti-competitive practices without facing timely repercussions. Consequently, dominant parties that calculate the financial implications of non-compliance, likely conclude that it is more beneficial to continue their abusive behaviour while awaiting the outcome of protracted investigations and legal procedures.

Unfortunately, the deterrent effect on dominant undertakings becomes virtually non-existent, while the costs and duration of such proceedings will deter many “victims” from pursuing necessary legal challenges, especially given the potential for retaliation from dominant firms. Ultimately, these “victims” can only offer less innovative and competitive products and services to their solutions, or might even be forced to withdraw completely from the market.

Therefore, there is a strong need to change the European Commission’s policy and to communicate this explicitly in new guidelines, fostering predictability, uniformity, compliance, and proactive enforcement.

⁶ Case C-27/76 United Brands v Commission [1978] ECR 207, paragraph 65; Case C-85/76 Hoffmann-La Roche & Co. v Commission [1979] ECR 461, paragraph 38

⁷ Case C-322/81 Michelin v Commission, ECLI:EU:C:1983:313, paragraph 57

⁸ Art 3(3) TEU, Art. 3(1)b TFEU and Protocol No 27 (TEU and TFEU)



4. Key issues to address in the Guidelines on Exclusionary Abuses

This section outlines the primary issues that require attention or modification in the draft guidelines.

4.1. Using more legal presumptions and reducing evidentiary burden

The European Commission has a duty to keep Article 102 TFEU up to date as an effective instrument to maintain undistorted competition on the internal market. To enhance the efficiency of proceedings under Article 102 TFEU and prevent it from becoming ineffective, the guidelines should clarify that, among others, digitalisation, electrification and Artificial Intelligence (AI) structurally increased the (already existing) imbalance on the market(s) in abuse cases. This, combined with the need for swift interventions to restore undistorted competition in rapidly evolving markets, warrants a policy-shift on the evidentiary burden and the legal standard of proof.

For typically harmful conduct the presumption of the concept of "abuse-by-object" could be used (like restrictions by object under Article 101 TFEU). A plausible link must exist between the abuse-by-object and the resulting harm. This goes beyond the "naked restrictions" proposed in the current draft guidelines that only address the capability to produce exclusionary effects, (paragraph 60.c draft guidelines). The guidelines should provide clear examples of such conduct. One of the examples could relate to vertically integrated companies that are in a gatekeeper's position, in the sense that they control access to essential inputs for competitors, on brand-specific aftermarkets. In abuse-by-object scenarios, a rebuttable presumption of abusive conduct arises, allowing the dominant firm to contest the presumption through an efficiency-defence.

This shift in the burden of proof makes the proceedings more effective, and remains proportional, because the dominant firm is the only one in possession of detailed evidence needed to demonstrate that any anti-competitive effects are outweighed by pro-competitive benefits. However, pro-competitive justifications that nonetheless fail to prevent harm to the competitive structures, or for which less restrictive measures would suffice (as per a proportionality test), cannot serve as a valid efficiency-defence.

In the draft guidelines⁹, the European Commission asserts that conduct from a dominant firm is considered abusive only if it deviates from competition on the merits, placing the burden of proof on the European Commission. Demonstrating that competition on the merits did not occur imposes a "negative" burden of proof that is often challenging to fulfil.

The recent Google Shopping case¹⁰ illustrates that it is not always necessary to show that a behaviour diverges from competition on the merits. There are situations where competing firms are prevented from even entering the market. Furthermore, paragraphs 47 and 53 draft guidelines indicate that conduct that meets criteria of specific legal test criteria falls outside the scope of competition on the merits. However, also in these instances it might not have been necessary in the first place to substantiate that competition on the merits did not take place. This might be the case, for example in certain "access restriction" cases (para 163-166 draft guidelines), for example, in the automotive aftermarket, when independent operators may be unable to perform their independent activities if they cannot adequately interoperate with embedded management software or get access to some (digital) parts codes.

⁹ See (among others) paragraphs 14, 45, 50, and 164 draft guidelines

¹⁰ Case C-48/22, Google LLC and Alphabet Inc. v Commission, 10 September 2024, ELI:EU:C:2024:726, paragraph 165



Another ongoing discussion is whether there is the need for an As-Efficient Competitor test (AEC-test). ADPA fully agrees with the statement in the draft guidelines¹¹ that the assessment whether a conduct is capable of having exclusionary effects does not require showing that the actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking. That results from the recent Google Shopping case¹², and the recent Intel case¹³ does not alter this. Important in the latter case was that the European Commission itself opted to perform an AEC-analysis and made it an important argument in its assessment to determine that the rebate scheme at issue was capable of having foreclosure effects. Thus, under these circumstances the AEC-test became important, although it actually wouldn't have been necessary to perform the AEC-test.

4.2. In-vehicle data access, refusal to supply and access restrictions

The recently amended Supplementary Guidelines¹⁴ to the Motor Vehicle Block Exemption Regulation states in paragraph 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.”

In the draft guidelines a distinction is made between conduct that is subject to a specific legal test of “refusal to supply”¹⁵ and conduct that has no specific legal test “access restrictions”¹⁶. The distinction mentioned is that a refusal to supply refers to situations where a dominant undertaking “has developed an input exclusively or mainly for its own use” and that access restrictions encompass unfair access conditions (instead of outright refusals). Considering conduct in which access to vehicle-generated data would be withheld from an independent operator that requests access, the vehicle manufacturer cannot claim that the vehicle-generated data are an input exclusively or mainly for its own use. Indeed, the vehicle-generated data are not generated by the vehicle manufacturer, and the system is, in the first place, developed for the use of the driver and the fleet operators.

However, as the evidentiary burden is much lower under access restrictions than under refusal to supply, it is a fundamental question that should be clarified in the draft guidelines.

From the perspective of an effective and functional Article 102 TFEU instrument in the digital economy, it is fundamental that dominant undertakings cannot protect their interests best by outright refusals to provide (digital) access to competitors, thus relying on the higher evidentiary burden, and subsequent more complex and lengthy proceedings that frustrate competition for a longer duration in the digital economy. This could distort effective competition on the (digital) internal market structurally, thus losing the advantages of a competitive internal market with more innovation, higher quality and lower prices.

Although the European Court of Justice’s (ECJ) case law supports the refusal to supply criteria in the draft guidelines, it cannot have been the intention to stimulate outright access refusals. The updated guidelines on exclusionary abuses should reference and expand upon paragraph 68a of the Supplementary Guidelines to the Motor Vehicle Block Exemption Regulation (MVBBER) and the distinction between “refusal to supply” and “access restrictions”, aiming at offering more legal certainty, supporting more uniformity and facilitating self-assessment and compliance, and making it easier for SMEs to assert their rights.

¹¹ Paragraph 73 draft guidelines

¹² Case C-48/22, Google LLC and Alphabet Inc. v Commission , 10 September 2024, op. cit., paragraph 264

¹³ Case C-240/22 P, Commission v Intel Corporation, 24 October 2024, 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

¹⁴ 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, 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, paragraph 68a

¹⁵ Paragraphs 96-106 draft guidelines

¹⁶ Paragraphs 163-166 draft guidelines



4.3. Emphasis on compliance, deterrence and robust enforcement

The instrument of Article 102 TFEU should support undistorted competition in the internal market and protect its competitive structure. To avoid further impairment of these objectives, the following adjustments to the draft guidelines are proposed:

Legal certainty & compliance: The guidelines should include more examples of conduct under specific circumstances that could lead to an abuse. Clear illustrations of aftermarket abuses will support SMEs and help dominant firms in seeking compliance, thereby encouraging proactive compliance. Examples could be provided of digital and/or physical anti-competitive foreclosure and/or access restrictions to spare parts and captive parts, Repair and Maintenance Information (RMI) and On-Board Diagnostics (OBD) information, vehicle-generated data, functions and resources (read and write, and remote access), to software updates and to cybersecurity relevant information (disproportional). As indicated above, one of the examples should relate to vertically integrated companies that are in a gatekeeper's position, in the sense that they control access to essential inputs for competitors, on brand-specific aftermarkets. Another example could be used to clarify the distinction between refusal to supply and access restrictions in the context of paragraph 68a amended of the Supplementary Guidelines¹⁷ to the MVBBER.

Policy of the European Commission: Pursuing more smaller, straightforward cases would improve enforcement. Many smaller actions occurring across the European Union with similar effects in various Member States may appear too minor for NCAs to tackle, yet collectively they restore undistorted competition on the internal market. Handling more and smaller cases allows the European Commission to take calculated risks, focusing strictly on necessary evidence, rather than concentrating on a few large cases that can become mired in extensive investigations and proceedings (resulting in a dysfunctional Article 102 TFEU instrument from the perspective of preserving undistorted competition).

Vigorous enforcement: Active enforcement is essential to maintain deterrence. Currently, dominant firms may weigh the costs of ceasing abusive conduct against the potential long-term advantages of altering market structures. With the increasing ease of eliminating competition in digital markets, these factors should be considered in the enforcement of Article 102 TFEU and reflected in the new guidelines.

¹⁷ 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, 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, paragraph 68a



Conclusion

ADPA welcomes and supports the European Commission's new draft guidelines on exclusionary abuses, acknowledging the increasing concentration in various sectors. The current enforcement processes under Article 102 are often lengthy and complex, leading to diminished deterrence against dominant firms engaging in anti-competitive practices.

The automotive aftermarket is a significant market in the EU, where competition from independent operators is crucial for maintaining competitive pressure, enhancing consumer choice, offering affordable services and parts, stimulating high quality and fostering innovation. Effective competition and consumer welfare go hand in hand in the automotive aftermarket. The evolving landscape of the automotive aftermarket, particularly driven by digitalisation and electrification, presents many welcome opportunities but also entails more risks of exclusionary abuse that necessitate a robust response from the regulatory side.

With increasing market inequalities, there is a pressing need for effective interventions under Article 102 TFEU to maintain undistorted competition on the internal market. ADPA believes that aiming at more compliance should be a priority, that can be enhanced by providing more legal certainty. In that respect the draft guidelines should provide a lot of clear examples of abuses in different sectors (including the automotive aftermarket). More clarity should also be provided e.g. regarding the burden of proof and the distinction between refusal to supply and access restrictions.

In addition, deterrence should be increased by speedy, vigorous and active enforcement. To speed up proceedings the burden of proof should be shifted more to the dominant firms in possession of the evidence. ADPA also is of the opinion that undistorted competition on the internal market could be better maintained if the European Commission and the NCAs would pursue much more and smaller cases. The court cases will provide also more legal certainty and will enhance compliance.



Annex 1 - Used acronyms

- ADPA** Automotive Data Publishers Association
- AEC** As-Efficient Competitor
- AI** Artificial Intelligence
- BEV** Battery Electric Vehicle
- ECJ** European Court of Justice
- EU** European Union
- HMI** Human-Machine Interface
- MVBER** Motor Vehicle Block Exemption Regulation
- NCA**s National Competition Authorities
- OBD** On-Board Diagnostics
- RMI** Repair and Maintenance Information
- SME**s Small and Medium Enterprises
- TEU** Treaty on European Union
- TFEU** Treaty on the Functioning of the European Union

Annex 2 - References

Regulatory texts

- Motor Vehicle Block Exemption Regulation 2023/822, April 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.LI.2023.102.01.0001.01.ENG&toc=OJ%3AL%3A2023%3A102I%3ATOC>
- 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, April 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.CI.2023.133.01.0001.01.ENG&toc=OJ%3AC%3A2023%3A133I%3ATOC>
- Treaty on the Functioning of the European Union, 2007, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

Caselaw

- Case C-27/76 United Brands v Commission, <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A61976CJ0027>
- Case C-85/76 Hoffmann-La Roche & Co. v Commission, <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A61976CJ0085>
- Case C-322/81 Michelin v Commission, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61981CJ0322>
- Case C-48/22, Google LLC and Alphabet Inc. v Commission, https://eur-lex.europa.eu/case/EN/C_48_22_P
- Case C-240/22 P, Commission v Intel Corporation, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022CJ0240&qid=1730309041068>

Studies and reports

- ADPA & alii, *Creating a level playing field for vehicle data access: Secure On-board Telematics Platform Approach*, February 2021, <https://www.adpa.eu/wp-content/uploads/2024/05/2021-02-S-OTP-Paper-vFin.pdf>
- BCG & alii, *At the Crossroads: The European Aftermarket in 2030*, March 2021, <https://www.bcg.com/crossroads-european-aftermarket-2030>
- DRAGHI Mario, *The future of European Competitiveness*, September 2024, https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en#paragraph_47059
- European Commission, Directorate-General for Competition, COMP.PA01, *Protecting competition in a changing world - Evidence on the evolution of competition in the EU during the past 25 years*, 2024, https://competition-policy.ec.europa.eu/system/files/2024-06/KD0924494enn_Protecting_competition_in_a_changing_world_staff_report_2024.pdf



About ADPA Members


ADPA Members are worldwide pioneers and leaders for the reparability of increasingly complex goods providing aggregated, harmonised, intelligible and ready-to-use technical information for the repair, maintenance and servicing of over 280 million vehicles from more than 40 different manufacturers on European roads ensuring their roadworthiness, safety and environmental performance over their lifetime in a reliable, timely and affordable way.


About ADPA - Automotive Data Publishers' Association


ADPA, the Automotive Data Publishers' Association, aims to ensure fair access to automotive data and information needed for servicing, repairing and maintaining road vehicles.

It advocates for international, European and national legislations maintaining and improving competition and consumers' choice in the automotive aftermarket by preventing or limiting the establishment of brand-specific monopolies.

Founded in 2016 and based in Brussels, ADPA is a Member of AFCAR, the Alliance for the Freedom of Car Repair in the European Union, and FAAS, the Forum on Automotive Aftermarket Sustainability.

 Boulevard de la Woluwe 42
1200 Brussels
Belgium

 secretariat@adpa.eu

 +32 2 887 64 00

 www.adpa.eu

 [@ADPA_eu](https://twitter.com/ADPA_eu)

 [/adpaeu](https://www.linkedin.com/company/adpaeu)

 [/adpaeu](https://www.youtube.com/channel/UC...)

©ADPA 2024