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THE COMMISSION'S NEW ARTICLE 102 TFEU GUIDELINES ON EXCLUSIONARY ABUSES:

a long-awaited framework, and what it means for dominant firms

FEATURED PRACTICE AREA:

Competition & Antitrust

INTRODUCTION

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On 3 September 2026, the European Commission published its Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings (Communication C(2026) 6118 final). The Guidelines replace the Commission's 2008 Guidance on its enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings and present a comprehensive, effects-based analytical framework covering the full range of exclusionary conduct addressed under Article 102 TFEU.

The Guidelines are not binding on national competition Authorities or national Courts, but they are widely expected to shape enforcement practice across the European Union and to influence both public enforcement and follow-on private damages litigation for years to come.

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OVERVIEW / KEY POINTS:

1. Why these Guidelines matter

The Guidelines modernise the Commission's enforcement approach in three distinct ways.

First, they convert the Commission's earlier "enforcement-priorities" guidance into a proper analytical framework, making them relevant not only to Commission enforcement but also to self-assessment by dominant firms and to national-authority and national-court application of Article 102 TFEU.

Second, they cover the whole spectrum of exclusionary conduct in a single instrument – from pricing abuses (predatory pricing, margin squeeze and rebates) to non-pricing abuses (exclusive dealing, tying and bundling, access restrictions, refusal to supply and self-preferencing) – and provide the analytical logic that connects them.

Third, the Guidelines constitute a useful, comprehensive guide that merges the Commission's enforcement practice with the case law of the Court of Justice of the European Union, bringing the two together into a single, coherent analytical framework for the first time.

2. Assessing dominance under the new Guidelines

The Guidelines include the rules on the assessment of dominance and cover both single and collective dominance. For single dominance, they consolidate the traditional factors:

- market position of the undertaking concerned and of its competitors,
- barriers to entry or expansion and
- countervailing buyer power.

While the Guidelines reaffirm the settled case-law position that no fixed market-share threshold automatically establishes dominance, it is clarified that market shares below 40% will generally suggest that dominance is unlikely, market shares between 40% and 50% may indicate dominance depending on the surrounding market conditions, and shares consistently above 50% will normally raise a rebuttable presumption of dominance that the undertaking may seek to displace with evidence to the contrary.

Other than that, the Commission still refers to two dominance-related concepts: (i) dominance in the after-market and (ii) collective dominance either arising from structural, contractual or other links between the undertakings concerned or from tacit coordination.

3. The general test for establishing abuse of dominance

The Guidelines provide for a general test which applies for determining whether a dominant undertaking's conduct is abusive. Such conduct is considered anti-competitive where it both (1) departs from competition on the merits and (2) is capable of having exclusionary effects.

"Competition on the merits" covers conduct that wins customers through better prices, quality, choice or innovation. Indicators of departure include breaches of other legal regimes (e.g. data protection) that harm a competition parameter and reliance on resources inherent to the dominant position.

"Capability to produce exclusionary effects" requires only that harm be more than hypothetical, not that it has actually occurred. The Guidelines apply three different intensities of analysis; (a) pricing conduct is generally tested against a hypothetical equally efficient competitor using a price-cost test; (b) non-pricing conduct often does not require that test, particularly in digital or ecosystem markets where even a less efficient rival can be a genuine constraint; and (c) multi-faceted conduct is assessed on a case-by-case basis. A non-exhaustive checklist of relevant factors includes the dominant undertaking's market position, market conditions (e.g. network effects), the position of affected competitors, the extent and duration of the conduct, the strategic importance of targeted customers, evidence of an exclusionary strategy, and actual market developments.

No proof of intent or of actual harm is required.

However, this general rule does not catch all types of conduct. In particular, specific types of conduct have a distinct dedicated test, while conduct shown capable of excluding an equally efficient competitor need not be separately tested for departure from the merits.

Example 1 – Restriction to access.

Restriction to access is abusive when it (a) departs from competition on the merits and (b) is capable of having exclusionary effects.

Typical examples include:

- disrupting supply to existing downstream customers placing ordinary orders;
- refusing or restricting access to an input developed for third-party use;
- failing to comply with legal, regulatory or contractual obligations limiting the undertaking's discretion over access; and
- imposing unfair or unreasonable access conditions (e.g., non-transparent pricing, or delayed responses to or conclusion of access requests).

Example 2 – Self-preferencing.

Self-preferencing is abusive when it (a) departs from competition on the merits and (b) is capable of having exclusionary effects.

Relevant factors include:

- whether competitors have no effective alternative to the leveraging market as a source of business;
- whether the preferential treatment is unjustified, for instance because it is inconsistent with the dominant undertaking's own business logic or with an expectation of neutrality; and
- whether it is likely to sway user behaviour regardless of the actual merits of the favoured product.

4. Beyond the general test: specific categories of conduct and naked restrictions

The Guidelines address specific categories of conduct to which a specific price-cost test or distinct conditions apply for establishing abuse of dominance.

These types of conduct include:

- **predatory pricing:** pricing is considered predatory and thus abusive if (a) the prices are below average variable costs or (b) if the prices exceed average variable costs but are below average total costs and constitute part of a plan to eliminate or reduce competition; selective predatory pricing is also considered anti-competitive;
- **margin squeeze:** a vertically integrated dominant firm setting its upstream and downstream prices at a level that prevents an equally efficient downstream competitor from operating profitably on a lasting basis;
- **rebates that are not conditional on exclusivity:** volume, target, retroactive and similar discount schemes which, although not formally requiring exclusive sourcing, may generate loyalty-inducing, foreclosure effects; where the rebate can be quantified, a price-cost test applies (effective price below AAC[1], or below LRAIC[2] combined with an exclusionary plan, indicates abuse); otherwise, the assessment is based on the general criteria taking into account factors such as market power, extent of the conduct, retroactivity, individualisation and length of the reference period;
- **exclusive dealing:** obligations or rebates, whether de jure or de facto, that tie a customer or supplier exclusively, or almost exclusively, to the dominant undertaking are presumed to distort effective competition; this presumption is rebuttable, notably where the coverage or duration of the arrangement is limited, or where the exclusionary effect is shown to be purely hypothetical, while retroactive and share-based rebates are flagged as particularly exclusionary;
- **tying and bundling:** conditioning the sale of one product (the “tying” product) on the purchase of a separate second product (the “tied” product), or bundling them, by an undertaking dominant in the tying market, where customers cannot obtain the tying product alone (coercion) and the conduct is capable of having exclusionary effects;
- **refusal to supply:** a dominant undertaking that owns an input developed solely for its own use, and refuses to grant a competitor access to it, will only be found to abuse its dominance where two cumulative conditions are met: the input is indispensable and the refusal is capable of eliminating all effective competition from the requesting undertaking.

Other than that, the general test does not apply in the case of conduct that is by its very nature harmful to competition, i.e. conduct with no economic rationale for the dominant undertaking other than restricting competition which therefore falls manifestly outside competition on the merits and is deemed, without a separate effects analysis, to distort effective competition (subject only to a very narrow possibility of rebuttal). Examples include:

- payments to customers conditional on not buying from, or delaying purchases from, a specific competitor;
- inducing distributors to switch from a competitor's product to the dominant undertaking's own under threat of losing discounts;
- actively dismantling infrastructure relied upon by a competitor; and,

where the dominant undertaking combines a regulatory and a commercial role, applying access rules or sanctions that lack transparent, objective and non-discriminatory criteria, giving it discretionary power to exclude competitors from the market.

[1] Average Avoidable Costs.
[2] Long Run Average Incremental Costs.

5. Defences: when abusive conduct may still escape Article 102 TFEU

Conduct found to distort effective competition may still escape the Article 102 TFEU prohibition where the dominant undertaking shows that it is objectively justified, through either:

- an **objective necessity** defence – based on an overriding reason, such as protecting the dominant undertaking's legitimate commercial interests, technical considerations (e.g. the need to maintain or improve product performance), or a public health, safety or other public-interest objective to which the conduct is proportionate; or

- an **efficiency defence** – based on showing that the conduct allows the dominant undertaking to compete more effectively on price, quality, innovation or choice, producing consumer benefits that counterbalance or outweigh the competitive harm, subject to four cumulative conditions: verifiable efficiencies, a fair share of the benefit passed on to consumers, indispensability of the conduct to achieve those efficiencies, and no elimination of effective competition.

6. Six key take-aways for dominant firms

Putting the Guidelines' key messages together, dominant undertakings should bear in mind the following:

•"Departure from competition on the merits" is now the pivot of the test
•Effects analysis is calibrated by category of conduct
•The refusal-to-supply and rebates frameworks are both clarified
•Self-preferencing and access restrictions are now distinct categories
•Naked restrictions are presumed to distort competition, with almost no room for rebuttal
•Objective justifications remain narrow.

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For any questions regarding the new Article 102 TFEU Guidelines on exclusionary abuses and its practical impact, feel free to contact us

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