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European Union: Article 102 Guidelines on Exclusionary Abuses

More clarity on enforcement, no effects-based reset

In brief

After an extensive consultation that exposed deep divisions over the future direction of the European Commission's enforcement of abuse of dominance under Article 102 TFEU, the final Guidelines on exclusionary abuses were adopted on 3 September 2026.

The Guidelines give businesses a clearer framework of the Commission's thinking on the assessment and enforcement of exclusionary abuses. For the first time, the Guidelines bring together in a single comprehensive "manual" the decisional practice and case law on the assessment of dominance and distortion of effective competition, the application of those principles to particular types of exclusionary abuses, and the principles governing the assessment of objective justification.

Contents

Substantively, however, the Guidelines do not mark a return to effects-based enforcement. Rather, they give the Commission a discretionary framework for continued vigorous enforcement, with greater reliance on presumptions and conduct-specific analytical frameworks. Indeed, the economics-led framework that underpinned the 2009 Enforcement Priorities Paper is now expressly withdrawn. Presumptions remain central, and the as-efficient competitor principle remains largely confined to pricing conduct.

For businesses, Article 102 compliance remains highly fact-specific. The key question is not whether conduct has effects in the abstract, but which legal framework applies and what evidence will matter within it. Therefore, the Guidelines do not require a fundamental rethink for companies that have been following Article 102 case law and enforcement developments closely. Their principal contribution is to provide greater structure, additional guidance and a clearer indication of the evidence the Commission is likely to regard as relevant.

In more detail

Dominance is "generally unlikely" below 40%

The final Guidelines restore a useful benchmark from 2009: dominance is "generally unlikely" below a 40% market share[1]. While the Commission refers to this as a "soft safe harbour", it nevertheless reserves the possibility of intervention below that level in exceptional circumstances.[2] This is not new, but the rationale for it expressed in the Guidelines may cause businesses to stop and re-assess, particularly those familiar with concepts of economic dependency – "dominance can still be found in case of market shares below 40%, for example, **where customers are generally dependent on the undertaking concerned**" (emphasis added). The case law relied upon by the Commission is more commonly cited for the proposition that dominance may arise below 50% market share where other features of market structure reinforce market power (which in British Airways, found with a market share of 39.7%, included customer loyalty and the airline's commercial importance to travel agents, who were found to depend substantially on the income they received from it[3]), rather than for any standalone concept of customer dependency. The same is true of Gøttrup-Klim, which confirmed that dominance may be established at shares of approximately 32% to 36%, but by reference to additional factors such as the strength and number of competitors, rather than purely based on customer dependency.[4]

Countervailing buyer power

The final Guidelines largely maintain the Commission's existing approach to countervailing buyer power. While they confirm that customers may constrain suppliers by switching, sponsoring entry, vertically integrating or credibly threatening to do so[5], they stop short of giving buyer power materially greater weight in the dominance assessment. Businesses that argued during the consultation that retailer bargaining strength, private label competition and route-to-market constraints should play a larger role in assessing dominance are therefore unlikely to draw additional comfort from the final text. Moreover, key aspects of countervailing buyer power are elaborated on in the new Guidelines which:

- **Distinguish countervailing buyer power from ordinary bargaining power**. The ability to negotiate favourable terms is not in itself sufficient. Customers must be capable of constraining the supplier through credible outside options, such as switching quickly, sponsoring entry or vertically integrating.
- **Make the market-wide dimension of the assessment more explicit**. Countervailing buyer power is considered less likely where the supplier faces "a large number of dispersed buyers".
- **Identify additional factors that may limit the credibility of buyer power.** In particular, buyer power is less likely where switching is difficult or where customers would risk losing significant business if they stopped carrying the supplier's products.[6]

After-markets

One of the most useful additions to the Guidelines is the dedicated section on after-markets. The Commission accepts that "competition on the primary market may discipline the possible market power of the producer of the primary product in the after-market".[7] For this principle to be satisfied, the Commission identifies four cumulative conditions:

- Customers can make an informed choice, taking into account lifecycle-pricing, between the various suppliers in the primary market.
- Customers are likely to make such an informed choice.
- If an apparent policy of exploitation (such as a significant price increase or another form of deterioration in the conditions of supply) were to be pursued in the after-market, a sufficient number of customers would adapt their purchasing behaviour in the primary market; and
- Customers would adapt their purchasing behaviour within a reasonable amount of time.

The section is likely to be particularly relevant beyond traditional durable-goods markets. It may inform the assessment of digital ecosystems, proprietary interfaces, consumables, maintenance arrangements, software add-ons and other environments where customers become tied to a secondary product following an initial purchase.

Assessment whether conduct distorts effective competition: general principles

The Guidelines provide a useful analytical framework, at least at a conceptual level, to assess whether conduct by a dominant firm distorts effective competition and constitutes an exclusionary abuse. Specifically, the Commission explains that it is necessary to demonstrate that the conduct departs from competition on the merits and that it is capable of producing exclusionary effects. However, for specific types of conduct, distortion may be established without carrying out this two-step analysis: "this is the case where the conduct (1) fulfils the legal requirements established by the EU Courts under a specific analytical framework; (2) is capable of excluding a hypothetical as efficient-competitor (AEC); or (3) is by its very nature harmful to competition." [8]. See the table below for more detailed information on this category of abuse.

Many cases will therefore continue to turn on the classification of the conduct and the requirements of the relevant framework. Correctly identifying the relevant framework will be as important as the broader debate about the relationship between competition on the merits and effects.

"Theory of harm" has finally entered the Guidelines

The final Guidelines now expressly recognise the importance of articulating a theory of harm: the economic mechanism through which the conduct is capable of harming consumers in its specific legal and economic context.[9]

This is a welcome improvement. It should encourage a more disciplined assessment of how the conduct is said to harm competition and provide businesses with a stronger basis for challenging an alleged disconnect between the conduct, the mechanism of foreclosure and the claimed consumer harm.

Causation matters more than before

The Guidelines place greater emphasis on actual market developments and on whether alleged exclusionary effects can genuinely be attributed to the conduct at issue. Relevant evidence may include rival expansion, entry, customer behaviour, market performance and other developments affecting competitive outcomes. Importantly, the Commission acknowledges that exclusionary effects must be attributable to the conduct, even if the conduct need not be the sole cause.[10]

This is a significant improvement, which gives greater prominence to real-world evidence and market outcomes. It stops short of requiring a full but-for analysis in every case, but it provides businesses with a much stronger basis for arguing that observed market outcomes stem from factors other than the conduct under investigation.

Evidence that rivals faced capacity constraints, strategic mistakes, regulatory obstacles, weak product offerings or other disadvantages may therefore be relevant not merely to the scale of any effects, but to causation itself.

Presumptions remain a feature of the regime…

The consultation process did not displace the Commission's reliance on presumptions. The Guidelines distinguish between conduct for which exclusionary capability must be demonstrated, conduct subject to a rebuttable presumption of such capability, and conduct regarded as by its very nature harmful to competition. Exclusive dealing and certain pricing practices remain subject to enforcement-friendly analytical structures.[11] See the table below for more detailed information on this category of abuse.

This remains one of the clearest points of departure from the philosophy of the 2009 Guidance Paper. Businesses should therefore assume that presumptions remain a central compliance risk under Article 102.

Classification also matters for conduct the Guidelines do not address expressly. Disparagement gets no section of its own, appearing only in a footnote to the discussion of departure from competition on the merits, citing Vifor.[12] That placement is telling. It is neither subject to a presumption nor listed as by its very nature harmful,[13] so the Commission must affirmatively prove exclusionary capability.[14]

…but the guidance on rebuttal is better

One of the most welcome improvements is the fuller explanation of how a dominant undertaking may rebut a presumption or show that conduct is not capable of exclusion in the specific circumstances. Relevant evidence may include coverage, duration and intensity; the position of the undertaking and its rivals; barriers to entry and expansion; customer behaviour; market performance; and evidence that rivals have entered, expanded or otherwise remained effective.[15]

The practical implication is simple: contemporaneous evidence matters. Companies should preserve evidence on contestability, customer switching, rival responses and market developments so they can rely on this when faced with inquiries or investigations by regulators.

The AEC test has regained ground in pricing cases

The draft guidelines were heavily criticised for marginalising the as-efficient-competitor (AEC) principle. The final Guidelines take a more balanced approach. They recognise that the capability to exclude an equally efficient competitor is particularly relevant in pricing cases and retain price-cost analysis within the frameworks for predation, margin squeeze and certain rebates[16].

The AEC test is therefore not dead. But it is not the organising principle of Article 102 enforcement. It survives as an important analytical tool, particularly in pricing cases, rather than as a universal requirement.

(Still) no de minimis safe harbour, but coverage still matters

The Guidelines retain the controversial statement that there is no de minimis threshold for infringement. Nor, we are told, is it sufficient to show that the unaffected part of the market could still accommodate a limited number of competitors.[17]

That said, coverage remains relevant. The Commission identifies the share of demand or customers affected, together with the duration, intensity and strategic significance of the conduct, as factors that may inform the assessment of exclusionary capability and rebuttal evidence.[18]

The practical implication is that a rebate, discount or exclusivity arrangement affecting only a limited share of demand may still raise concerns if it targets strategically important customers or contestable demand. The relevant question is not simply how much of the market is covered, but which customers are covered, for how long and with what implications for rivals.

Focus on specific types of abuses

Applying the general principles from case law, and, as the Commission puts it, its intention to "explain its position with regard to issues that have not been dealt with in the case law, or that are subject to interpretation" and to "further develop its practice taking into account developments in the case-law, economic theory, the evolution of markets and competition dynamics", the

Commission provides detailed guidance on specific types of abuses. As noted above, the applicable analytical framework varies by category of conduct, and correct classification will often determine both the standard of proof and the evidence that matters.

Abuse	Commission's key takeaway
Conduct subject to specific analytical framework	
Exclusive dealing and Exclusivity rebates	Exclusive purchasing obligations and exclusivity rebates are subject to a rebuttable presumption that they are capable of distorting effective competition.
Predatory pricing	• If prices are below average variable costs (AVC), the pricing conduct is to be considered predatory. • If prices are below average total costs (ATC) but above AVC, the pricing conduct is to be regarded as predatory if it is part of a plan to eliminate or reduce competition. • If prices are above ATC, the pricing conduct cannot be regarded as predatory.
Margin squeeze	A negative AEC margin remains a powerful indicator of abuse. Indispensability is not required and, as with predation, recoupment need not be shown.
Refusal to supply	Guidelines reflect Bronner[19]: The input must remain indispensable and the refusal must be capable of eliminating all effective competition.
Tying and bundling	No presumption of abuse. The assessment remains highly fact-specific and focused on foreclosure risk in the tied market.
Conduct assessed under the general principles	
Conditional rebates that are not exclusive	The AEC principle (and the cost/price AEC test) has regained ground. The key question remains whether an equally efficient rival could match the rebate scheme. This is broadly consistent with the 2009 framework.
Access restrictions	One of the most important distinctions in the Guidelines. Unlike refusal to supply, indispensability is not always required. The Commission preserves broader intervention powers against conduct that degrades, delays or restricts access. This is a much lower standard than Bronner.
Self-preferencing	No general rule that self-preferencing is problematic from a competition standpoint: depending on the specific situations, self-preferencing may distort effective competition.
Conduct that is by its very nature harmful to competition	
Payments conditional on customers not selling, or postponing the sale of, a specific competitor's products	Conduct that is by its very nature harmful to competition represents the most restrictive category under the Guidelines. For these practices, the Commission considers that their anticompetitive character follows from the nature of the conduct itself, meaning that extensive effects analysis will often be unnecessary. The scope for rebutting such findings or relying on objective justifications and efficiencies is likely to be very limited. Businesses should therefore treat any conduct falling within this category as presenting particularly significant Article 102 risk.
Arrangements with distributors to replace competing products with the dominant undertaking's products under threat of withdrawing discounts	
Active dismantling of infrastructure on which a competitor relies to compete effectively	
Rules or sanctions adopted by a dominant undertaking holding both regulatory and commercial functions that give it discretion to deny competitors market access, without transparent, objective, precise and non-discriminatory safeguards	

Objective necessity and efficiencies, including sustainability, get more airtime

Objective necessity and efficiencies are among the areas most improved in the final text. The Guidelines draw a clearer distinction between objective necessity and efficiencies and contain a significantly richer discussion of legitimate commercial considerations, technical necessity, public health and safety, resilience, innovation, sustainability and, in certain circumstances, out-of-market benefits.[20]

The grounds for objective necessity are now set out more concretely. Alongside legitimate commercial considerations and technical justifications, the Guidelines expressly recognise genuine and objectively defined public interest objectives, including evidence-based public health objectives, product safety, network safety and contribution to the European Union's resilience.[21] The defence remains subject to proportionality.[22]

On efficiencies, four cumulative conditions apply: the conduct allows efficiencies to be achieved; those efficiencies counteract the negative effects on competition and consumers; the conduct is necessary to achieve them; and it does not eliminate effective competition.[23]

Sustainability benefits are recognised as a form of qualitative efficiency, for example where the conduct enables less polluting production, greater recyclability or a reduced risk of supply chain disruption. The Commission appears to accept that out-of-market benefits may be relevant to the efficiencies analysis, giving the example of sustainability efficiencies.[24] They may be taken into account where the consumers harmed and those benefiting are substantially the same. Whether this proves significant in practice remains to be seen, but it arguably gives businesses greater scope to rely on broader societal benefits than was previously recognised.

The burden remains demanding. The dominant undertaking must provide convincing, specific and verifiable evidence. Vague or theoretical assertions are insufficient, and the conduct must satisfy the relevant requirements of necessity, proportionality or indispensability.

The improvement is not a lower standard. It is a clearer explanation of the arguments and evidence that the Commission expects to see in practice. And ultimately the higher the potential of the dominant undertaking's conduct to harm competition, the less likely it is that the efficiency defence can be established.[25]

Finally, a targeted Article 102 compliance refresh

The Guidelines do not require businesses to engage in a wholesale rethink of their compliance guidance on exclusionary abuses. The Guidelines do provide businesses with a helpful framework for a targeted Article 102 compliance refresh, risk-assessing commercial practices and raising internal awareness of the evidence that may matter if conduct is later scrutinised.

In practice, businesses with strong or potentially dominant market positions should now consider:

- **Assessing existing practices against the new framework in the Guidelines,** including reviewing whether previous compliance assessments remain valid, mapping high-risk conduct against the relevant legal framework, particularly exclusivity arrangements and exclusivity-inducing rebates, determining which analytical framework applies to particular conduct, and identifying whether conduct may be assessed under a presumption-based or effects-based framework. Companies should also reassess dominance analyses where relevant, taking into account factors such as customer dependence and after-market dynamics highlighted in the Guidelines.
- **Focus on building contemporaneous evidence that will help rebut presumptions.** Strengthening contemporaneous evidence, including documents showing customer choice, rival constraints, switching, efficiencies, objective necessity, innovation benefits, R&D, sustainability benefits and legitimate commercial rationale.
- **Looking at possible efficiencies.** Necessity, proportionality and efficiencies will need to be supported by specific and verifiable evidence, not asserted after the event.

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[1] Guidelines on exclusionary abuses, para. 24.
[2] Guidelines on exclusionary abuses, para. 24.
[3] Case T-219/99, British Airways plc v Commission, EU:T:2003:343.
[4] Case C-250/92, Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA, EU:C:1994:413.
[5] Guidelines on exclusionary abuses, para. 36-37.
[6] Guidelines on exclusionary abuses, para. 36-37.
[7] Guidelines on exclusionary abuses, para. 39.
[8] Guidelines on exclusionary abuses, para. 63-65.
[9] Guidelines on exclusionary abuses, para. 64.
[10] Guidelines on exclusionary abuses, para. 99-107.
[11] Guidelines on exclusionary abuses, para. 114; 128; 155-159; conduct-specific sections in Chapter 4).
[12] Guidelines on exclusionary abuses, para. 72 and fn. 142, citing Commission decision of 22 July 2024 in Case AT.40577 – Vifor (IV iron products), para. 82, and Commission decision of 31 October 2024 in Case AT.40588 – Teva Copaxone, para. 1316.
[13] Guidelines on exclusionary abuses, paras. 155 and 128 (presumption applicable to exclusive dealing and margin squeeze) and paras. 197-198 (conduct by its very nature harmful to competition).
[14] Case AT.40577 – Vifor (IV iron products), para. 83 (three cumulative conditions) and Section 5.3.3.3, in particular paras. 189-199 (capability to produce exclusionary effects, including dissemination to almost 200,000 healthcare professionals).
[15] Guidelines on exclusionary abuses, para. 66-74; 100-107.
[16] Guidelines on exclusionary abuses, para. 84-90; 108-150.
[17] Guidelines on exclusionary abuses, para. 83.
[18] Guidelines on exclusionary abuses, para. 106, (d).
[19] Guidelines on exclusionary abuses, para. 8.
[20] Guidelines on exclusionary abuses, para. 202-245.
[21] Guidelines on exclusionary abuses, paras. 208-210.
[22] Guidelines on exclusionary abuses, para. 211.
[23] Guidelines on exclusionary abuses, para. 220.
[24] Guidelines on exclusionary abuses, para. 237.
[25] Guidelines on exclusionary abuses, para. 222.