Competition & Antitrust

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At a glance

On 3 September 2026, the European Commission (the "**Commission"**) adopted its long-awaited **Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings** (the **"Guidelines"**). The Guidelines replace the Commission's 2009 Guidance Paper on enforcement priorities, which will be withdrawn 30 days after publication of the Guidelines in the Official Journal.

The Guidelines are an important milestone in the evolution of Article 102 enforcement. Their significance, however, lies less in creating a new substantive regime than in the Commission's attempt to **bring together almost two decades of developments in the case law of the EU Courts and translate them into an operational framework** for assessing exclusionary conduct.

The final text also contains important changes from the Commission's 2024 draft, including a more nuanced treatment of presumptions and evidentiary standards, the reintroduction of an explicit reference to a theory of harm, and **important refinements to the treatment of dominance and the role of the as-efficient-competitor ("AEC") test**.

For businesses, the practical message is similarly nuanced: the Guidelines provide greater structure for self-assessment, but not necessarily greater latitude. **Dominant undertakings will need to understand which analytical framework applies to particular conduct, what competitive assessment that framework requires and what evidence will be needed to support their position.**

The Guidelines concern exclusionary abuses only, however the principles applicable to the assessment of dominance and objective justifications are also relevant for the assessment of exploitative conduct by dominant undertakings.

I. From enforcement priorities to a case-law-based framework

The 2009 Guidance Paper marked an important development in the Commission's approach to Article 102 TFEU. It articulated the Commission's **enforcement priorities** around concepts including anticompetitive foreclosure, consumer harm and, particularly for certain price-based conduct, the AEC test. It expressly did not, however, purport to constitute a statement of the law.

Since then, the EU Courts have **further developed and clarified the legal framework governing exclusionary abuses** through a series of important judgments, including in the *Intel* saga, *Servizio Elettrico Nazionale, Unilever Italia, Google Shopping, Google Android* and *Slovak Telekom*.

The new Guidelines seek to bring those developments together. Unlike the 2009 Guidance Paper, they are not framed as a statement of the Commission's enforcement priorities. They seek instead to systematize the principles emerging from the case law **of the EU Courts and translate them into an operational framework for the assessment of exclusionary conduct**. The Guidelines do not, however, create new law: **the interpretation of Article 102 TFEU ultimately remains a matter for the EU Courts**.

The Guidelines nevertheless remain grounded in an **effects-based assessment**. They organise that assessment around a more structured and differentiated framework, in which the applicable legal test and evidentiary requirements depend on the nature of the conduct concerned and the relevant case law.

II. What matters most?

1. Dominance: greater structure, but market shares remain only the starting point

The final Guidelines provide additional guidance on the assessment of dominance.

Notably, the final Guidelines **expressly state that dominance is generally unlikely where an undertaking holds a market share below 40%**, providing a useful reference point that was absent from the 2024 draft. This should not, however, be treated as a formal safe harbour: dominance remains a fact-specific assessment and may, in appropriate circumstances, be established below that level.

At the same time, the Guidelines emphasise sources of market power that may not be fully captured by market shares alone, including network effects, switching costs, customer lock-in, access to data and digital ecosystems. They also provide dedicated guidance on after-markets and retain the established principles applicable to collective dominance.

The practical implication is particularly relevant for digital, technology and data-intensive markets: **market share remains important, but the competitive significance of the above criteria may increasingly be central to the dominance analysis.**

2. The core assessment: competition on the merits and exclusionary effects

The Guidelines organise the assessment of exclusionary abuse around two central concepts: whether conduct departs from **competition on the merits** and whether it is capable of producing **exclusionary effects**.

These concepts do not, however, translate into a single uniform test applicable to every type of conduct. The Guidelines distinguish between practices governed by **specific analytical frameworks developed in the case law**, conduct assessed under the general framework with conduct-specific guidance, and exceptional practices considered, by their very nature, capable of distorting effective competition.

One notable development from the 2024 draft is the express reappearance of the **theory of harm**, reinforcing that identifying the mechanism through which conduct is capable of harming the competitive process remains part of the analysis, even within the Guidelines' more structured framework.

The practical question is therefore not simply whether conduct disadvantages a competitor. It is **how the conduct affects the competitive process and which legal and evidentiary framework applies to that assessment**.

3. Legal presumptions remain - but within a more differentiated evidentiary framework

The use of presumptions was among the most debated features of the 2024 draft. The final Guidelines retain an important role for presumptions (in principle, rebuttable), but abandon the draft's broader categorisation in favour of a more differentiated framework.

In essence, **the legal characterisation of the conduct is central to determining the intensity of the case-specific assessment required**. Where the EU Courts have developed a specific analytical framework, satisfaction of the relevant conditions may have corresponding evidentiary consequences. Other practices -including self-preferencing, access restrictions and certain rebate schemes- remain subject to a broader assessment of their legal and economic context.

At the other end of the spectrum, the Guidelines identify a narrow category of conduct regarded as **"by its very nature" harmful to competition**, including, in particular, conduct **that has no economic interest for the dominant undertaking other than restricting competition**. Rebuttal in such circumstances is expected to be exceptional.

The key compliance implication is therefore not that effects analysis has disappeared. Rather, **correctly characterising the conduct becomes critical to identifying what must be established - and by whom.**

4. The AEC test: important, but not a universal test

The Guidelines also clarify the role of the **as-efficient-competitor test**, an issue that has featured prominently in the debate and case law on Article 102 since the 2009 Guidance Paper.

For certain price-based practices, including predatory pricing and margin squeeze, price-cost analysis remains integral to the applicable legal framework. AEC-related analysis may also be relevant to other pricing practices, depending on their nature and circumstances.

At the same time, consistent with the case law, the Guidelines make clear that the AEC test is **not a universal legal test for exclusionary abuse**. In particular, where competition takes place through parameters such as quality, innovation, choice or access to data, exclusionary capability may need to be assessed through other evidence.

Importantly, the Guidelines also reflect the judgments in *Intel* and *Unilever Italia*: where a dominant undertaking submits relevant AEC evidence in seeking to demonstrate that its conduct is not capable of producing exclusionary effects, that evidence cannot simply be disregarded.

The final framework therefore gives the AEC test a significant but **context-dependent** role, rather than treating it as the organising principle for Article 102 enforcement generally.

5. Digital markets are now firmly embedded in the Article 102 framework

The Guidelines also demonstrate how far Article 102 enforcement has evolved since 2009. Concepts developed through more recent enforcement and case law -including **self-preferencing, data-related advantages and restrictions on access**- are integrated into the broader Article 102 framework.

The Guidelines therefore reinforce the relevance of Article 102 in markets where competition takes place not only on price, but also through **innovation, quality, access, interoperability, data and ecosystem dynamics**.

6. Objective justification and efficiencies: contemporaneous evidence is key

The Guidelines provide substantially more detailed guidance on **objective necessity and efficiencies**, including considerations relating to product and network safety, supply-chain resilience and sustainability-related efficiencies.

The burden of substantiating an objective justification or efficiencies rests with the dominant undertaking, including, where applicable, as regards the necessity or indispensability of the conduct and the benefits resulting from it.

The practical lesson is therefore not necessarily that the available defences have become categorically narrower or broader. Rather, **commercial rationale and claimed efficiencies should be identified and substantiated when the relevant conduct is designed and implemented - not reconstructed after an investigation has begun.**

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III. The Greek perspective

The Guidelines are also likely to become an important reference point for the Hellenic Competition Commission (“**HCC**”) when applying Article 102 TFEU and the corresponding prohibition of abuse of dominance under Greek competition law.

Given the close interaction between EU and national enforcement within the European Competition Network, businesses with significant positions in Greek markets should expect the Guidelines’ analytical framework -including its approach to dominance, conduct-specific frameworks, presumptions and digital-market considerations- to inform future enforcement and compliance assessments in Greece.

IV. What should businesses do?

The Guidelines do not mean that every commercial practice of a dominant undertaking needs to be redesigned. They do, however, provide a **timely opportunity for a targeted reassessment of practices carrying potential Article 102 exposure**.

Dominant or potentially dominant businesses should in particular consider:

- **reassessing market position** where market power may arise from data, network effects, ecosystems, switching costs or after-market dynamics in addition to market shares;
- **reviewing higher-risk commercial practices**, including exclusivity arrangements, rebates, pricing structures, tying and bundling, access conditions and self-preferencing;
- identifying at an early stage **which analytical framework applies** to a contemplated commercial strategy and what evidence is likely to be relevant;
- examining whether existing **compliance assessments** remain robust in light of the Guidelines; and
- maintaining **contemporaneous and verifiable evidence** supporting legitimate commercial rationales, objective necessities and efficiencies.

The bigger picture

The final Guidelines are neither a return to formalism nor simply a continuation of the 2009 Guidance Paper under a different label. Rather, they reflect the **evolution of Article 102 through almost two decades of EU case law and enforcement experience**, and the Commission’s attempt to translate that evolution into a coherent and workable framework for enforcement and self-assessment.

That provides businesses with greater analytical structure, but it also places renewed importance on **legal characterisation and evidence**. For dominant and potentially dominant undertakings, the central questions are therefore increasingly: **What is the nature of the conduct? Which legal framework governs it? Through what mechanism could it affect effective competition? And what evidence supports its competitive assessment or justification?**

Those questions should increasingly form part of Article 102 compliance **before, rather than after, commercially significant strategies are implemented**.

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