

EC Redefines Playbook on Exclusionary Abuses: What Companies Need to Know

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On 3 September 2026, the European Commission (EC) adopted its long-awaited [guidelines](#) on exclusionary abuses under Article 102 of the Treaty on the Functioning of the European Union (TFEU), replacing the 2008 guidance on enforcement priorities. The guidelines serve to clarify the EC's enforcement of exclusionary abusive behaviour by companies holding a dominant market position.

The guidelines pursue three objectives:

- Enhancing legal certainty for market participants.
- Addressing the specificities of an ever-evolving competitive landscape, including the rapid growth of digital platforms and AI-driven business models.
- Promoting consistency with the case law of the EU courts on exclusionary conduct, including its application by national competition authorities and national courts.

The guidelines will officially replace the 2008 guidance on 10 October 2026.

[Assessing Dominance Under the Guidelines](#)

Article 102 TFEU prohibits dominant companies from abusing their market position by exclusionary or exploitative conduct. The guidelines, however, address only exclusionary conduct.

In the guidelines, the EC reinstates a 'soft safe harbour', confirming that a finding of dominance—a prerequisite for the application of Article 102 TFEU—is unlikely when a company holds a market share below 40%. However, specific circumstances such as customer dependence or competitors facing serious capacity limitations may still support a finding of dominance below that threshold. According to the guidelines, market shares above 50% would give rise to a presumption of dominance, which would be rebuttable only in exceptional circumstances.

For the digital economy, the guidelines introduce aspects that may be relevant for the assessment of dominance beyond market shares, such as data-driven advantages, AI-specific barriers to entry, significant upfront investment requirements and high sunk costs, lock-in effects, switching costs, behavioural biases, and network effects and other barriers arising in digital ecosystems of interlinked products, services, or platforms.

Three further elements are worth noting. The guidelines:

- Set out a cumulative four-prong **after-markets** test for finding dominance over secondary products or services tied to an installed base, even without dominance in the primary market.
- Place a greater emphasis on **buyer-side** dominance—confirming that Article 102 TFEU can also apply to companies exercising market power over their suppliers, not only over their customers.
- Propose two distinct routes for a finding of **collective dominance** (i.e. when two or more companies together hold enough market power to act like a single dominant company), one based on structural or contractual links between companies, the other on tacit coordination. The guidelines expressly flag **algorithmic pricing** as a potential enforcement trigger under the latter—a signal that, despite its rare use in past cases, the EC views this as a growing concern.

How the EC Will Assess Exclusionary Conduct

The guidelines retain the two-limb analytical framework reflected in established case law and the 2008 guidance. To establish that a dominant company's conduct distorts effective competition, the EC must show that the behaviour both departs from competition on the merits and can produce exclusionary effects that are more than hypothetical.

In making this assessment, the EC must articulate a coherent theory of harm, i.e. an economic mechanism by which the conduct in question can directly or indirectly harm consumers.

However, the EC is not required to prove that harm has materialised, or that the strategy was profitable for the dominant company. There is no de minimis threshold for applying Article 102 TFEU.

The guidelines identify three situations in which the two limbs do not have to be assessed separately:

- The EU courts have already developed a recognised analytical framework for the type of conduct in question (which, in practice, covers most exclusionary abuses).
- The conduct can exclude a hypothetical competitor that is as efficient as the dominant company.
- The conduct lacks any plausible commercial rationale other than restricting competition.

The guidelines contain presumptions for an abuse which the dominant company can rebut by demonstrating with adequate evidence that the conduct does not distort effective competition in the specific circumstances of the case. Most interestingly, the guidelines introduce a 'sliding scale' for evidence: the more harmful the practice, the lighter the EC's burden of proof, and vice versa.

The framework distinguishes between different categories of commercial behaviour and the legal tests to be applied in each case:

- For **pricing conduct** (e.g. predatory pricing, margin squeezes) the 'AEC test', i.e. whether the practice could eliminate an 'as efficient competitor', remains the primary tool.
- For **non-pricing conduct**, by contrast, the AEC test is relevant only in narrow, exceptional cases. The EC will instead rely on qualitative evidence and actual market developments—rather than a price-cost benchmark—to assess the non-price parameters of particular conduct. In digital markets and ecosystems

its assessment will focus on dynamic considerations, e.g. whether the conduct prevents competitors, actual or potential, from enjoying demand-related advantages, such as network and learning effects, and from exerting a stronger competitive constraint in the future. In narrower cases, where the emergence of an equally efficient competitor would be practically impossible, the EC will consider that even a less efficient competitor may exert a genuine constraint on the dominant company.

- **Mixed conduct** that combines pricing and non-pricing elements is assessed on its own terms, and the pricing component does not automatically attract the AEC test if non-pricing features dominate the overall practice.

Specific Types of Conduct

The guidelines set out a specific analytical framework the EC will follow for several types of conduct without significantly departing from established practice and case law in most instances.

- **Exclusive dealing.** The treatment of exclusive dealing in the guidelines is the most notable divergence from recent case law from the Court of Justice of the European Union, with the EC retaining the presumption that exclusivity obligations imposed by dominant companies distort effective competition once the factual existence of the obligation is established and effectively shifting the burden to the dominant company to prove otherwise.
- **Tying and bundling.** The guidelines adopt a case-specific approach, requiring a 'closer examination' of exclusionary effects depending on the circumstances.
- **Access restrictions.** The guidelines introduce access restrictions as a stand-alone category with a lower intervention threshold than refusal-to-supply cases. Unlike the refusal-to-supply framework, which requires the input to be indispensable, access restrictions can apply if the dominant company did not develop the input exclusively for its own use, removing the need to satisfy the indispensability criterion. This effectively widens the EC's scope for intervention.
- **Self-preferencing.** The guidelines confirm that there is no blanket rule that self-preferencing is abusive; however, companies that control conditions of access to a platform or ecosystem may face strict scrutiny.
- **Conduct that is by its very nature harmful to competition.** The guidelines identify a stand-alone category of conduct that holds 'no economic interest for the dominant undertaking other than that of restricting competition', such as pay-for-delay arrangements or dismantling infrastructure a competitor relies on. The EC considers any attempts to objectively justify such conduct are very unlikely to be successful.

How to Defend Commercial Practices

The most widely welcomed development in the guidelines is the expanded efficiency defence framework, offering companies more guidance on how to justify their conduct. However, the guidelines propose a rather high bar. The efficiencies presented by the dominant undertaking 'must be substantiated and must be objective, concrete and verifiable', including cost or qualitative efficiency arguments which can be long term or short term. The EC will assess these on a sliding scale depending on the likelihood of the conduct being harmful to competition.

Dominant entities can put forward either: (1) an objective necessity defence, based on legitimate commercial considerations or on technical justifications of the dominant entity; or (2) an efficiency defence, based on price, quality, innovation, or choice benefits for consumers which counterbalance or outweigh the harmful effects of the conduct.

Other key aspects of the revised framework include the recognition for the first time of sustainability benefits as legitimate qualitative efficiencies, as well as potential synergies realised in separate markets, i.e. out-of-market efficiencies, relevant for diversified businesses.

Takeaways

The guidelines constitute a heavy document of more than 70 pages citing a plethora of cases. However, they do not provide bright-line rules for self-assessment. Moreover, the EC has preserved a broad margin of manoeuvre and discretion of how to pursue cases, so companies should remain attentive to enforcement developments. The EC also seems to move away from the more economic, evidence-based approach to a system of presumptions, which raises the question of how much this shifts the burden of proof.

While the guidelines operate with presumptions and an approach of 'likeliness' of an abuse, the bar for companies to justify and defend particular conduct seems rather high. It follows that when there is a legitimate commercial or technical justification for certain behaviour, including considerations such as synergies in adjacent markets, the pursuit of green initiatives, and the protection of up-front investment or other costs, companies should properly and proactively document and quantify these efficiencies to be able to justify their behaviour.

The guidelines do not explicitly address the interplay between Article 102 TFEU and the Digital Markets Act; however, they signal that the two frameworks will continue to apply in parallel, leaving companies designated as 'gatekeepers' subject to overlapping and potentially inconsistent obligations.



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