

Insights

THE EUROPEAN COMMISSION'S NEW ARTICLE 102 GUIDELINES: KEY OBSERVATIONS AND IMPLICATIONS

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What is an abuse of dominance?

While holding a dominant position is not in itself unlawful, the competition law of the UK, EU and many other jurisdictions places a “*special responsibility*” on dominant companies not to abuse that position. Certain conduct and strategies that are legitimate when undertaken by non-dominant companies may not be available to dominant companies. Misunderstanding the concept of abuse can carry far-reaching consequences: fines potentially reaching into the billions (up to 10% of the worldwide turnover), costly litigation, and, in some cases, significant changes to a company’s business model and day-to-day commercial practices.

It is, therefore, critical for companies to understand the scope of the prohibition against the abuse of a dominant position, as set out in [Article 102 of the Treaty on the Functioning of the European Union](#) (“**Article 102 TFEU**”) and mirrored, in the UK in [Chapter II of the Competition Act 1998](#).

Why are there new Guidelines?

The new [Guidelines on the application of Article 102 TFEU to exclusionary abuses](#) (“**Guidelines**”) are part of a wider policy shift within the European Commission (the “**Commission**”), with increasing support from the EU Courts, from its previous 2009 guidance paper on exclusionary abuses (which has been withdrawn after the issuance of the Guidelines).

The Guidelines’ intended objective is to provide greater legal certainty to enable businesses (and their practitioners) to self-assess whether their conduct constitutes an exclusionary abuse of a dominant position. However, this only explains part of the story.

For a number of years, the Commission has been trying to roll back the more ‘economic’ approach of the 2009 guidance. In a [2023 Policy Brief](#), for example, the Commission warned against an “*unduly strict and dogmatic application*” of the as-efficient competitor (“**AEC**”) test. Some antitrust officials and commentators have criticised the effects-based approach as overly cumbersome, arguing that the 2009 guidance may have contributed to enforcement difficulties and litigation setbacks. This policy shift was also reflected in the adoption of the EU’s 2022 [Digital Markets Act](#),

which sits outside the Article 102 TFEU framework, and places blanket obligations on the behaviour of designated platforms/gatekeepers, leaving no room for justification of breaches of those obligations based on economic arguments. So, while the Guidelines bring together developments from case law, they also mark a departure from some of the more demanding aspects of the effects-based approach reflected in the 2009 guidance.

How are the Guidelines different to the Commission's previous guidance and the various court rulings?

The 2009 guidance was primarily an enforcement priorities policy document. By contrast, the Guidelines replace that comparatively brief, non-binding guidance and seek to provide greater predictability given that they will generally bind the Commission's own enforcement practice, absent a reasoned departure. As such, the Guidelines are highly relevant to the day-to-day operations of many businesses – from refreshing compliance policies and template commercial documents to pricing decisions, commercial negotiations with dominant companies, and decision-making processes more generally.

Specifically, the Guidelines set out an operational framework to assess whether conduct by a dominant company constitutes an exclusionary abuse, as opposed to exploitative abuses (e.g., excessive pricing), which fall outside their scope. To this end, they draw upon substantial case law and the Commission's decisional practice (no less than 50 court judgments and 40 Commission decisions in the past 20 years).

From that perspective, little in the content of the Guidelines is entirely new, and they broadly align with the case law of the European Courts (this contrasts with the more marked departure from Article 102 TFEU case law contemplated in the 2024 draft Guidelines). However, there are still a few places where the Commission's position seemingly goes beyond the current jurisprudence of the EU Courts. Such areas include the Guidelines':

- i. overall approach to presumptions and the evidentiary standard needed to establish that certain conduct is abusive;
- ii. approach to algorithmic pricing and the role that algorithms may play in facilitating coordination within markets characterised by collective dominance; and
- iii. policy decision to expressly recognise sustainability-related benefits as relevant efficiencies that are potentially capable of justifying otherwise exclusionary conduct.

These developments, arguably beyond the case law, are among the six key features of the new Guidelines highlighted in this article (and discussed further in the 'Deep Dive' section below):

- **"Competition on the merits" as the yardstick for determining whether conduct is abusive:**
Alongside capability to have exclusionary effects, the Commission assesses whether conduct

departs from competition on the merits when examining a potential distortion of effective competition.

- **Less evidence needed to find an abuse where conduct is considered likely to be distortive:** In the 2024 draft Guidelines, the Commission attempted to introduce a series of explicit rebuttable presumptions, which went beyond the case law. While the final Guidelines revert to the position established in case law as regards such presumptions, the Commission seeks to afford itself a more flexible approach to the evidentiary burden required to establish abusive conduct, depending on the likely distortive nature of the conduct in question.
- **Collective dominance expanded:** Reflecting the digital economy, the Guidelines build up the concept of collective dominance by considering tacit coordination facilitated by pricing algorithms and automated decision-making tools.
- **Appreciation of dynamic market power, especially in after-markets and digital markets:** Reflecting the modern economy and society, the Guidelines address zero-price markets, innovation-intensive sectors and secondary markets, taking into account competition on dimensions beyond price and quality, such as number of users or transactions, or intensity of usage. This indicates that digital markets will continue to be scrutinised under both Article 102 TFEU and the Digital Markets Act regime.
- **Additional categories of exclusionary abuse:** Access restrictions, self-preferencing, certain forms of leveraging of digital ecosystems and conflicts of interest between regulatory and commercial functions are recognised as forms of abusive conduct, reflecting the recent case law.
- **Clearer guidance on efficiency and objective necessity defences:** There is significantly more detailed guidance and greater legal certainty as to the availability of efficiency and objective necessity defences. For example, the Commission recognises that, under certain circumstances, conduct which might otherwise be exclusionary may be objectively necessary to comply with legal, regulatory, technical or security requirements. However, the evidential burden to run these defences remains high.

Does this matter for non-UK/non-EU companies?

The Commission is a leading competition authority. Its policies and procedures are closely monitored by other agencies and courts. Although the UK has left the EU, the UK Competition and Markets Authority's ("**CMA**") existing guidance (a 2004 20-page [paper](#)) lacks an equivalent level of detail on abuse of dominance. It is entirely possible that the CMA will draw inspiration from the new Guidelines, as might the UK's Competition Appeal Tribunal and other courts, as claimants and defendants alike understandably run comparative legal arguments.

Further, and as has been seen in many notable cases against US companies, the Commission can investigate companies and conduct arising anywhere in the world (including the UK and US) under Article 102 TFEU and principles of public international law where there is a sufficient EU nexus. Therefore, the new Guidelines are highly relevant to any business with activities that touch the EU.

Why should non-dominant companies care?

The prohibition of abusive conduct by a dominant company matters equally to businesses with a significant market position and to those who interact with them, such as competitors, suppliers and customers. Businesses are often interested in whether the activities of larger competitors, customers or suppliers are compliant with their obligations under competition law. If they are not, there are various avenues that can be pursued to address the issue, including the bringing of a complaint to the Commission (or another competition authority) for investigation, or via private litigation.

Deep dive

Fundamental Departure from the 2009 Guidance: The Guidelines mark a significant evolution from a framework centred on discretionary enforcement priorities towards a more substantive instrument, akin to the established guidelines for horizontal agreements, vertical agreements and merger control. They largely reflect the developing Article 102 TFEU jurisprudence and provide a valuable collation of the case law. Although providing guidance on the Commission's likely administrative approach to assessing alleged abuses, there is an important caveat: these soft law Guidelines do not bind companies, their counsel, or the courts, which remain free to make arguments that may depart from the Guidelines where appropriate.

A. Competition on the merits replacing anticompetitive foreclosure? Principles for determining whether conduct is abusive.

The Guidelines substantially expand – and arguably broaden – the Commission's approach to identifying whether conduct is abusive. In particular, they place less emphasis on anticompetitive exclusionary effects, which was more central in the 2009 guidance. Rather, greater prominence is given to analysing whether potentially exclusionary conduct is capable of producing adverse effects on the competitive process and market structure more broadly. In so doing, it looks as if the Commission is attempting to move away from anticompetitive exclusionary effects, which are harmful to consumers, to mere exclusionary risks for competitors, thereby lowering the applicable standard for discharging its burden of proof. To a certain extent, this updated approach can be traced to recent judicial developments. More fundamentally, this selective wording is unlikely to go unnoticed. Potential claimants will no doubt seek to rely on it in support of a broader conception of exclusionary harm, while defendants are likely to favour a more restrictive interpretation.

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Two-limb Test: The Commission will typically assess whether conduct by a dominant company distorts effective competition by considering whether that conduct (i) departs from competition on the merits and (ii) is capable of having exclusionary effects.

That said, the Guidelines clarify that the two-limb framework is not required if:

- i. the conduct is harmful by its very nature,
- ii. a conduct-specific framework established by the EU Courts dispenses with a distinct two-stage analysis, or
- iii. the conduct is capable of excluding the hypothetical equally efficient competitor.

The notion of competition on the merits is used to distinguish conduct that reflects normal competitive rivalry, such as competing on price, quality, innovation or efficiency, from conduct that relies on the undertaking's market power to impair the competitive process. Moreover, exclusionary effects have been broadly defined to include raising entry barriers, hampering market access, constraining rivals' growth, or reducing rivals' incentive or ability to constrain the dominant firm. Helpfully, the Commission intends to underpin its allegations in specific cases through a theory of harm articulating the economic mechanism through which the conduct is capable of directly or indirectly harming consumers.

In the application of the two-limb framework, there is no requirement to prove actual exclusionary effects as long as the prospect of such effects is more than hypothetical. In addition, the Commission has modernised its approach to identifying exclusionary effects: in addition to the traditional analysis of effects from a pricing standpoint, they further develop the analytical framework to consider non-price parameters of competition, in keeping with the draft merger guidelines ([see our article for more information on the draft merger guidelines](#)).

One of the most hotly debated aspects of the Guidelines is the treatment of the AEC test. The Commission has sought to clarify that the AEC test remains an important evidential tool, particularly in pricing cases, while maintaining that it is not a mandatory analytical framework in every investigation, in particular for digital/ecosystem cases. For the Commission, in these cases exclusionary effects of the conduct may not be adequately captured by the AEC framework.

At the same time, the final text reflects the limits imposed by the case law. The Court of Justice confirmed that, where a dominant company submits an AEC analysis during the administrative procedure, the Commission must engage with it and assess its probative value. More recently, it has confirmed that while the AEC principle is an important evidential tool, it is not a universal legal standard that must be applied in every investigation.

Seemingly to compensate for giving up most of the rebuttable presumptions it had sought to establish in the 2024 draft Guidelines, the Commission has adopted a more fluid approach to its

evidentiary burden to establish that conduct is distortive. The extent of evidence needed to establish that conduct is abusive is calibrated to the nature of the conduct under scrutiny: the more a given practice is generally considered likely to distort effective competition, the less case-specific evidence is required to establish that it indeed does, and vice versa. The application of this approach in future investigations will be watched closely by businesses, and could well be tested further before the courts.

B. Concept of market power: different from dominance

Market power is the ability of a firm to behave independently of its competitors, customers or consumers without being constrained by competitive pressures. While the fundamental test for assessing market power remains unchanged, the Guidelines have expanded the concept of market power in line with the recent case law and a contemporary understanding of how competition operates, particularly in digital and innovation-driven markets as well as highly concentrated ones. This means that businesses whose market position may not have been captured under the traditional sales/revenue-based market shares should pay closer attention. There is also a greater appreciation of dynamic competitive effects (in line with the Commission's approach in its draft merger guidelines), although the focus remains somewhat on entry and expansion. The key changes in this section of the Guidelines are discussed below.

Collective Dominance: The Guidelines attempt to reinvigorate the concept of collective dominance, which has been rarely used in practice. Pricing algorithms are explicitly identified as a mechanism by which tacit coordination between competitors (and, therefore, collective dominance) may emerge. The Commission considers pricing algorithms through the well-established framework for identifying collective dominance through tacit coordination, namely: the ability to reach a common understanding of how coordination should work, monitor compliance, deter deviations, and maintain stability against external competitive pressures. Businesses will need to assess whether parallel behaviour enabled by pricing algorithms, automated decision-making tools or lawful information-sharing arrangements could contribute to a finding of collective dominance.

Aftermarkets and Digital Markets: The Guidelines advance the Commission's analytical framework for aftermarkets, providing greater clarity on the circumstances in which market power may be assessed in secondary markets linked to a primary product or service. The Commission posits that while a digital platform operator may face vigorous competition for users in a primary market, for example such as smartphones, it may possess market power in a platform-specific or operating system-specific defined aftermarket (for example, app distribution) where users and developers may be strongly connected to the platform ecosystem concerned. The Commission considers that such ecosystem effects, including potentially high switching costs away from a platform ecosystem may justify a separate assessment of dominance in the secondary market. In addition, the Guidelines include explicit guidance on assessing dominance in zero-price markets and innovation-intensive sectors, reflecting how competition may occur on dimensions other than price, such as the number of users or transactions, or intensity of usage.

Overall, the expanded approach to market power signals a broader and more flexible analytical framework, which the Commission considers is better adapted to the realities of modern markets while mostly remaining anchored in established principles. At the same time, it affords the Commission greater scope to identify and establish market power in a wider range of circumstances.

C. Forms of exclusionary abuse

The Guidelines can be used by businesses as a compliance checklist. For instance, businesses operating on more than one level of supply should consider whether their commercial choices favour their own services, restrict access or leverage power from one market into another.

New Exclusionary Abuses: The discussion of specific forms of conduct has expanded greatly from the 2009 guidance. An eye-catching development is the inclusion of new forms of abusive conduct, namely: access restrictions, self-preferencing, leveraging of ecosystems and naked restrictions. Although the conceptual flexibility of Article 102 TFEU has long been accepted, the identification and inclusion of these new abuses is a good reminder to businesses of the ever-growing range of conduct that the Commission may investigate.

Rebuttable Presumptions: One of the most controversial aspects of the 2024 draft Guidelines was the Commission's attempt to expand the circumstances in which certain forms of conduct could be presumed to be exclusionary. In those cases, the burden would have shifted to the company under investigation to prove that its conduct is not abusive, rather than the standard approach which requires the Commission to make its case. In a victory for legal certainty – and thus a welcome outcome for many businesses – the final Guidelines reduce the categories of conduct for which the explicit rebuttable presumption applies from five in the 2024 draft Guidelines (exclusive supply or purchasing agreements, exclusivity rebates, predatory pricing, margin squeeze and tying) to just one: exclusive dealing. However, and as discussed above, the Commission has instead afforded itself flexibility in the evidentiary burden necessary for establishing abusive conduct, depending on how likely it is that such conduct would be distortive.

The removal of the explicit rebuttable presumptions for most conduct has somewhat curtailed the Commission's ambition to shift the burden of proof onto dominant companies – which was part of its aim to reduce investigation timelines. However, it is worth noting that the Guidelines still do not mention either the presumption of innocence or the benefit of doubt principles.

The Guidelines allow the Commission to produce less case-specific evidence where the conduct is more generally considered to be likely to produce distortive effects (although it remains to be seen whether the courts will embrace this approach). As a consequence, companies under investigation should, in most cases, still expect to face a rigorous examination and heavy evidentiary burden.

D. Objective justifications: efficiency and necessity defences

Another significant development is the substantial guidance on what is required to run an efficiency or an objective necessity defence for conduct that would otherwise be considered exclusionary and anticompetitive. This section of the Guidelines could be helpful for businesses whose conduct is linked to, for example, product integration, security, investment recovery, innovation, resilience or sustainability. Nonetheless, there remain substantial obstacles to overcome to successfully run either of these defences, which have seldom succeeded in practice before the EU Courts.

Objective Necessity Defence: This requires the conduct to be objectively necessary to achieve a legitimate aim. It will be accepted only if the measures are proportionate, meaning no less restrictive means are available. In practice, this is a demanding standard to meet. The Guidelines outline the test for distinguishing genuine objective necessity from retroactive rationalisation, which should assist businesses in identifying at an early stage whether this argument is viable. The defence may stem from the pursuit of a genuine and objectively defined public interest objective, or a technical justification to maintain or improve performance. It could also be based on legitimate commercial considerations, such as protection of the integrity or security of an entity's services.

Efficiency Defence: In keeping with the Commission's approach to assessing competitor collaborations and mergers, the types of efficiencies that can be considered in an abuse of dominance investigation go beyond cost to include qualitative efficiencies (including sustainability). However, and as will be familiar to businesses with prior experience of Commission investigations, there is a significant evidentiary burden to overcome when running an efficiency defence.

To succeed with an efficiency defence, the dominant company must satisfy four cumulative conditions:

- i. the efficiencies are achieved (i.e., the efficiencies are real, objective and likely to result from the conduct in question, rather than being merely speculative or hypothetical);
- ii. the efficiencies counteract any negative effects on competition and consumers;
- iii. the conduct is necessary to achieve the efficiencies; and
- iv. the conduct does not eliminate effective competition.

The claimed efficiencies must be "*objective, concrete and verifiable*" supported by contemporaneous internal documents or other evidence, and quantified where reasonably possible or otherwise described in detail with magnitude estimates.

The Guidelines explicitly incorporate sustainability into the competitive assessment framework, defining "*quality*" broadly to cover sustainability and other factors that are not directly related to the product, such as resource efficiency and durability. Indeed, placing these characteristics within the

concept of quality means that sustainability benefits, for instance, can be seen as an output of competition occurring on the merits. However, there remains a familiar obstacle when it comes to the interaction between efficiencies arguments and EU competition law: the efficiencies generated must at least compensate the consumers directly affected by the conduct. This is a well-known issue for sustainability/climate change-related efficiencies in particular, as it is seemingly not straightforward to demonstrate that a particular group of consumers will receive the benefit of such efficiencies (although this concept remains relatively untested in practice).

Conclusion

The Guidelines represent a significant milestone for competition policy in the EU and, to some extent, across all jurisdictions applying competition law modelled on the EU position. They are both a consolidation of the existing position and a roadmap for the future. In some respects, this guidance may be welcomed by businesses. The Guidelines' intended goal of consolidating and operationalising the assessment of potentially abusive conduct into a structured framework is laudable, and should enhance predictability.

At the same time, the Guidelines are not the final word. They do not bind the courts. And in the grey areas where the Commission's approach is not clearly set out, or is untested by the courts, legal uncertainty and the risk of enforcement remain.

If you would like to discuss how the Commission's approach to investigating potential infringements of competition law might affect your business, please contact the authors or your usual BCLP contact.

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