Competition Law Newsletter

European Commission Adopts New Guidelines on the Application of Article 102 TFEU on Exclusionary Abuses of Dominance

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European Commission Adopts New Guidelines on the Application of Article 102 TFEU on Exclusionary Abuses of Dominance

On 3 September 2026 the European Commission (the "***Commission***") published its long-awaited Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings (the "***Guidelines***") introducing a modern and economically grounded framework, which seeks to address exclusionary abuses effectively. According to the Commission, the Guidelines, which draw on the case law of the EU Courts and the Commission's decisional practice, aim to contribute to the modernization of EU policy, enhance legal certainty and promote greater consistency in the enforcement of Article 102 TFEU by National Competition Authorities and national courts. Some of the key elements of the new Guidelines include the assessment of dominance, the criteria for determining whether conduct departs from competition on the merits and is capable of producing exclusionary effects, the analytical framework applicable to specific types of conduct and the principles governing the assessment of objective justification.

More specifically:

- **Assessment of dominance:** Market share is an important factor as a sustained market share, of 50% or more, constitutes, save in exceptional circumstances, evidence of a dominant position. Dominance is generally unlikely where an undertaking holds a market share below 40%, although a dominant position may nevertheless be established, in particular, where customers are dependent on the undertaking concerned or competing undertakings face serious capacity limitations. The Guidelines also provide further guidance on the assessment of barriers to entry and expansion, identifying, among other factors, data-driven advantages, lock-in effects and network effects as potentially significant indicators of market power. Notably, the Guidelines also address the assessment of dominance in after-markets, i.e. markets for the supply of products used in connection with what is typically a relatively durable product that has already been acquired.

- **Conduct distorting effective competition:** The Commission relies on a “theory of harm” to assess whether conduct is capable of harming consumers, based on two criteria, i) whether the conduct departs from competition on the merits and ii) whether it is capable of having exclusionary effects. Establishing that conduct is capable of having exclusionary effects requires more than a merely hypothetical possibility of exclusion.

  With regard to the “equally efficient competitor” test, in the case of pricing conduct, the test examines whether the conduct is capable of excluding a hypothetical equally efficient competitor. By contrast, in case of non-pricing conduct, in digital markets and ecosystems, the application of such a test might not be meaningful, and other forms of evidence may be more relevant.

- **Specific types of conduct:** The Guidelines provide guidance on various forms of conduct for which the EU Courts have developed analytical frameworks to assess whether the conduct is capable of distorting effective competition. These include, among others, predatory pricing, margin squeeze, rebates, tying and bundling, refusal to supply, and self-preferencing.

  It is worth noting that exclusive dealing falls under the presumption that it distorts effective competition. The dominant undertaking may rebut this presumption by demonstrating in particular, that the exclusivity is of limited coverage and duration, that there were no competing suppliers capable of serving the customers concerned and that rivals remain able to compete effectively for the relevant customer demand.

  Finally, the Guidelines address conduct that is by its very nature harmful to competition, for example where the dominant undertaking has no economic interest in engaging in the conduct other than restricting competition.

- **Assessment of objective justifications:** Conduct that may distort effective competition can nevertheless fall outside the prohibition set in Article 102 TFEU where the dominant undertaking can demonstrate that the conduct is objectively necessary or that it generates efficiencies that counterbalance or outweigh the negative effect of the conduct (“efficiency defence”). Objective necessity may arise from legitimate commercial considerations or from the pursuit of a public interest objective. The efficiency defence, meanwhile, encompasses all objective economic efficiencies that a dominant undertaking may invoke, including cost efficiencies and qualitative efficiencies.

The Guidelines now replace the 2009 Guidance on the Commission's enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings. They are expected to play a significant role in shaping the future enforcement of Article 102 TFEU and represent a substantial improvement over the first draft published in 2024. It will be particularly interesting to see how the Commission applies the Guidelines in practice.

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