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EU Dominance Guidelines: Implications for UK Competition Actions
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On 3 September 2026 the European Commission adopted new Guidelines on abusive exclusionary conduct under Article 102 Treaty on the Functioning of the European Union (TFEU). They are Commission soft law: they do not bind the Competition Appeal Tribunal (CAT), the High Court or the Competition and Markets Authority (CMA), and because they post-date IP completion day, they fall outside the mandatory duty in section 60A of the Competition Act 1998, which applies only to Commission decisions and statements made before 11.00 pm on 31 December 2020. Their practical value in UK litigation is as persuasive, comparative material: a consolidated account of the Commission's current thinking on dominance indicators, presumptions, causation, self-preferencing and the efficiency defence, which may inform argument in Chapter II proceedings and CAT collective actions without displacing the domestic legal test.

On 3 September 2026, the European Commission adopted its 2026 Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings (the "**Guidelines**"). The Guidelines consolidate the Commission's approach to exclusionary abuses and draw on the case law of the EU Courts and the Commission's enforcement experience. They follow a Call for Evidence launched in March 2023, a draft published in August 2024 and a subsequent stakeholder process. The Commission has now withdrawn the 2009 Guidance on enforcement priorities, although the Guidelines themselves provide, at para 246, that the 2009 Guidance will cease to apply 30 days after publication of the Guidelines in the Official Journal. The Guidelines were published in the Official Journal of the European Union on 9 September 2026, as OJ C/2026/4675, and the 2009 Guidance accordingly ceases to apply on 9 October 2026.

For UK-focused competition litigators, the more difficult question is what practical weight the new Guidelines should carry. They are Commission soft law and do not bind the Competition Appeal Tribunal (the "**CAT**"), the High Court or the Competition and Markets Authority (the "**CMA**"). Chapter II of the Competition Act 1998 – the domestic provision mirroring Article 102 prohibits abuse of a dominant position by a single undertaking; this is a distinct legal basis from Chapter I and Article 101, which prohibit anticompetitive agreements between two or more undertakings. More importantly, the statutory framework governing the treatment of Commission statements in UK competition proceedings needs to be distinguished carefully from the position under EU law. Section 60A(3) of the Competition Act 1998 inserted by the Competition (Amendment etc.) (EU Exit) Regulations 2019/2020 requires a court or tribunal to "*have regard to any relevant decision or statement of the European Commission made before IP completion day and not withdrawn*" (11.00 pm on 31 December 2020, the end of the post-Brexit transition period). The 2026 Guidelines post-date IP completion day by nearly six years and are therefore not within that mandatory statutory category. The Court of Appeal's recent decision in *Deckers UK Ltd v Up & Running (UK) Ltd* [2026] EWCA Civ 553 confirms how section 60A operates on this temporal boundary: pre-Brexit judgments of the Court of Justice remain presumptively binding, whereas post-Brexit EU material, decisions, judgments or, by the same logic, Commission guidance may be considered only as persuasive authority. The Guidelines may nevertheless be considered as persuasive material, particularly where they summarise EU case law that itself remains relevant to Chapter II, but they should not be presented as having binding or quasi-binding force in UK Chapter II proceedings.

Persuasive Material; Not a Domestic Rule Book

The Guidelines are potentially useful to UK practitioners because they systematise a substantial body of EU case law that remains relevant to the analysis of Article 102 – *Post Danmark I* (C-209/10) and *Post Danmark II* (C-23/14), *Intel* (C-413/14 P), *TeliaSonera Sverige* (C-52/09), *Servizio Elettrico Nazionale* (C-377/20), *European Superleague Company* (C-333/21), and the *Google Shopping* litigation (T-612/17, upheld on appeal in C-48/22 P) and, in appropriate cases, may inform the interpretation of Chapter II. But the distinction between pre- and post-IP-completion-day EU material matters. Recent UK authority confirms that post-IP-completion-day Commission guidance is not covered by the section 60A duty, although UK courts may take it into account where appropriate (see *Deckers*, above). The 2026 Guidelines should therefore be described as a potentially persuasive comparative or interpretive aid, rather than as a statement that UK courts or the CAT are required to follow.

Substantively, the Guidelines set out a structured framework under which conduct is assessed by reference to whether it departs from competition on the merits and is capable of producing exclusionary effects. The Guidelines emphasise that the assessment remains fact-specific and must take account of the relevant legal and economic context. They also recognise, at paras 99–101 echoing *Post Danmark II* and the General Court's ruling in *Google Shopping* that conduct need not be the sole cause of exclusionary effects and that, depending on the circumstances, a strict before-and-after counterfactual may not be required. The practical significance for UK litigation is therefore likely to be greatest at the level of economic analysis and framing of theories of harm, rather than because the Guidelines alter the domestic legal test.

A Useful Dominance Benchmark – But Not a Safe Harbour

The Guidelines (para 24) state that dominance is "*generally unlikely*" where the undertaking has a market share below 40 per cent, while expressly preserving the possibility of dominance below that level where other factors point to market power, such as customer dependence or serious capacity constraints faced by competitors. Conversely, the same paragraph states that a very large and sustained market share is, save in exceptional circumstances, evidence of dominance, particularly at 50 per cent or more. The 40 per cent figure should therefore not be described as a floor, a safe harbour, or a threshold above which dominance is established – it is a Commission enforcement-experience indicator within a broader, case-specific assessment. That distinction matters for CAT collective proceedings. Section 47B of the Competition Act 1998 requires the CAT to decide whether claims are eligible for collective proceedings, including whether they raise the same, similar or related issues of fact or law and are suitable to be brought collectively. *Merricks v Mastercard* [2020] UKSC 51 cautions against turning certification into an unnecessarily demanding merits exercise or mini-trial. The 40 per cent statement may nevertheless be relevant evidence where dominance is pleaded, but it should not be presented as doing more than it does.

Presumptions and Conduct by Its Very Nature Harmful to Competition

The Guidelines also develop a more explicit framework for presumptions in certain categories of conduct. Paras 197–201 address "*conduct that is by its very nature harmful to competition*", including conduct that has no economic interest for the dominant undertaking other than restricting competition, citing *Intel Corp. v Commission* (T-286/09 RENV) and *European Superleague Company*. The Guidelines indicate that such conduct falls manifestly outside competition on the merits and is very unlikely to produce consumer benefits. They also state that, where the relevant conditions are met, such conduct is treated as distorting effective competition, while acknowledging that the precise evidentiary position remains subject to further clarification by the EU Courts. This may be better described as a Commission framework for presumptive or abbreviated analysis than as a blanket rule that liability follows automatically from the label.

The implications for UK competition claims should also be stated carefully. Under the post-EU-exit Competition Act framework, a final "infringement decision" that binds the court or CAT under section 58A of the Competition Act 1998 (as substituted by Schedule 8, para 14 of the Consumer Rights Act 2015) is, broadly, a qualifying UK decision of the CMA or a Tribunal decision on appeal, defined by reference to section 47A(6). A new European Commission infringement decision made after IP completion day is not simply converted into a binding UK finding of infringement under that provision, save in the narrow category of cases in which the Commission retains "continued competence" under Article 92 of the EU Withdrawal Agreement. A Commission decision applying the Guidelines may still be relevant evidence in a UK claim, but it should not be described as conclusively establishing a UK Chapter II infringement.

Self-Preferencing: Important Clarification, But Not a Green Light

The Guidelines' treatment of self-preferencing at paras 190–196 is likely to be of interest in digital-market disputes, including those arising from the *Google Shopping* judgments and the Commission's decisional practice in *Amazon Marketplace* and *Amazon Buy Box* (AT.40462 and AT.40703). The Commission states that self-preferencing is assessed under the general principles: the conduct must depart from competition on the merits and be capable of producing exclusionary effects. It also identifies circumstances that may be relevant, including whether the leveraging market is an important source of business for competitors in the leveraged market and whether preferential treatment amounts to an unjustified difference in treatment.

Importantly, the Guidelines confirm, at para 196, that the *Bronner* indispensability conditions (C-7/97) do not apply to self-preferencing because it is treated as a different type of abuse from refusal to supply. That removes one potentially significant hurdle in an EU self-preferencing analysis, but it does not make self-preferencing presumptively abusive. Claimants would still need to address the applicable legal standard, including departure from competition on the merits and capability to produce exclusionary effects, on the facts of the case.

Efficiency, Sustainability and Objective Justification

The Guidelines do not create a freestanding "sustainability defence". They do, however, expressly recognise sustainability benefits as capable of forming part of an efficiency defence. Para 217 identifies examples of qualitative sustainability efficiencies, including reduced use of raw materials, less polluting production or distribution technologies, increased recyclability, more resilient infrastructure, reduced supply-chain disruption risks and the development of more sustainable products. Para 218 also recognises that sustainability benefits may translate into consumer benefits, including through lower costs of more sustainable products.

Where conduct has been found to distort effective competition, the efficiency defence remains demanding. Para 220 sets out four cumulative conditions: the conduct must allow efficiencies to be achieved; those efficiencies must counteract the negative effects on competition and consumers; the conduct must be necessary to achieve the efficiencies; and it must not eliminate effective competition. The Guidelines also require claimed efficiencies to be objective, concrete and verifiable and where reasonably possible, quantified. The reference to *Qualcomm (Predation)*, T-671/19, is therefore better understood as support for the formulation of the cumulative conditions, rather than as evidence that the General Court created a new sustainability doctrine.

For UK Chapter II litigation, the more defensible point is that the EU Guidelines create a potentially useful comparative reference point for arguments about objective justification and efficiencies, but they do not establish an equivalent UK Chapter II defence. The CMA's 2023 sustainability guidance concerns Chapter I agreements, not Chapter II abuse of dominance. Whether and how EU developments concerning sustainability efficiencies influence UK Chapter II analysis will depend on domestic statute and case law.

Funding, Quantum and Litigation Strategy

For funders and claimant firms considering prospective CAT collective proceedings, the Guidelines may be useful as a framework for identifying issues that will require economic evidence, particularly market definition and dominance, capability of exclusionary effects, causation, and the assessment of claimed efficiencies. That does not mean that the Guidelines materially lower the domestic threshold for certification or make a standalone claim more likely to succeed.

Conclusion

The 2026 Guidelines are likely to be relevant to UK competition litigation, but their significance should not be overstated. They are not binding UK law, and section 60A does not require UK courts or tribunals to have regard to a Commission statement adopted in 2026. Their practical value is more limited and more precise: they provide a consolidated account of the Commission’s current approach to Article 102 exclusionary conduct, reflect recent EU case law, and may provide persuasive comparative material when similar issues arise under Chapter II. For CAT practitioners, the most useful areas are likely to be the treatment of dominance indicators, presumptions, causation, self-preferencing and efficiency evidence. The Guidelines will not determine the outcome of a UK collective action, but they may form part of the material considered by parties, experts and the Tribunal when EU competition-law concepts arise.

This article is the first of three companion pieces on the new Guidelines. A second considers what changed between the 2024 consultation draft and the final text; a third examines the Guidelines' treatment of sustainability, including their relationship to Article 101 and Chapter I of the Competition Act 1998.

This article is for general information purposes only and does not constitute legal advice. If you would like to discuss the implications of the new Guidelines for a specific matter, please get in touch with the Competition team.