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Abuse of Dominance Guidelines: What Has Changed?

Brussels keeps its toughest presumption, and quietly softens another

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11 September 2026

The Commission's 2026 Article 102 Guidelines carry forward a two-thirds-old draft into final form largely intact, but the movement between the two is where the interesting detail sits. The category of conduct with no economic rationale beyond restricting competition "conduct that is by its very nature harmful to competition" survives essentially untouched and remains close to a presumption of illegality, subject to an open question the EU Courts have not yet resolved. By contrast, the draft's strongest language on tying (that certain effects "can be presumed") has been quietly dropped in favour of a lighter evidential shortcut. The efficiency defence has also been fleshed out in more technical detail, including an evidential-burden framework and, for the first time, express treatment of out-of-market and sustainability benefits – though on terms considerably narrower than the "sustainability defence" some commentary anticipated. For UK practitioners, the Guidelines remain persuasive rather than binding, particularly given the post-Brexit statutory framework.

Most commentary on the European Commission's newly adopted 2026 Guidelines on abusive exclusionary conduct (published in the Official Journal of the European Union on 9 September 2026 as OJ C/2026/4675) has focused on the headline items drawn from the Commission's announcement and accompanying materials: a consolidated framework for assessing dominance and exclusionary conduct, a clearer market-share indicator, and a more detailed efficiency defence. For litigators, however, some of the more interesting points lie in the movement between the 2024 draft and the final text – in particular, what the Commission retained, what it softened, and what that may mean for Article 102 enforcement in Brussels and for cases before the EU and national courts.

The Architecture: Three Steps

Before getting to the changes between draft and final, it is worth being precise about the framework the Guidelines formalise. They distinguish three questions: first, whether the undertaking is dominant; second, whether its conduct distorts effective competition; and third, where relevant, whether the conduct is objectively justified. Article 102 Treaty on the Functioning of the European Union (TFEU), and its UK domestic equivalent, Chapter II of the Competition Act 1998, address only this second question in the context of unilateral conduct by a dominant undertaking; the question of coordination between two or more undertakings is a matter for Article 101 and Chapter I, which are not addressed by these Guidelines. Within the second stage, the Guidelines generally examine whether the conduct departs from competition on the merits and whether it is capable of producing exclusionary effects, while recognising that in some scenarios the analysis can proceed without treating those as separate steps. The framework draws on, among other authorities, Servizio Elettrico Nazionale (C-377/20), Intel (C-413/14 P), and Unilever Italia (C-680/20).

The Guidelines also make clear that the assessment is fact-specific. In paragraph 72, they identify three situations that provide a strong indication that conduct departs from competition on the merits: providing misleading information, particularly to public authorities; misusing regulatory procedures or legal proceedings to make market entry more difficult; and violating rules in other areas of law, such as data protection or sustainability rules, where that violation negatively affects a relevant parameter of competition such as price, choice, quality or innovation. That does not turn every breach of another regulatory regime into an Article 102 infringement. Rather, the regulatory breach may be relevant evidence in the separate assessment of whether the conduct distorts effective competition.

The Provision That Survived: Conduct by Its Very Nature Harmful to Competition

Section 4.10 (paragraphs 197–201) addresses "conduct that is by its very nature harmful to competition". This captures a narrow category of conduct which the Guidelines describe by reference to conduct that has no economic interest for the dominant undertaking other than restricting competition. The Guidelines give examples including payments conditional on a customer not buying from, or delaying a switch to, a competitor; arrangements under which a distributor replaces a rival's product with the dominant undertaking's product; and the deliberate dismantling of infrastructure on which a rival depends, illustrated by the Lietuvos geležinkeliai litigation (C-42/21 P).

The Guidelines state in paragraph 199 that such conduct is "deemed as such" to distort effective competition. That is a particularly strong formulation, but it should not be described as an irrebuttable presumption of illegality. Paragraph 200 expressly notes an unresolved question as to whether a dominant undertaking may nevertheless show that, in the circumstances of the particular case, the conduct was not capable of producing exclusionary effects. The Commission considers that such a challenge is likely to succeed only very exceptionally. The Guidelines also indicate that this area may continue to develop with the case law of the EU Courts.

For litigators, the practical significance is therefore less that a category of conduct has become automatically unlawful, and more that characterisation may determine the intensity of the effects analysis. A claimant may seek to bring conduct within Section 4.10 and thereby rely on the Guidelines' strong treatment of that category. A defendant is likely to focus on whether the conduct genuinely has no economic rationale beyond restricting competition, or whether it belongs instead in a category requiring a conventional assessment of its capability to produce exclusionary effects.

The Provision That Got Quieter: Tying's Softened Language

The contrast with tying is striking. The 2024 draft stated that, where certain market and product characteristics were present, tying had a high potential to produce exclusionary effects and that those effects could be presumed. The final Guidelines use more cautious language in paragraph 177: those characteristics may, in certain circumstances, facilitate a conclusion that the tying is capable of producing exclusionary effects without a very elaborate analysis.

The change matters because it avoids the express or equivalent language of a "presumption" and uses an evidential shortcut. It is better understood as a change in the intensity of the analysis than as a change to the basic legal test. Paragraph 168 identifies the familiar elements of tying, including separate products, dominance in the tying market, coercion and capability of exclusionary effects. The final text therefore leaves the fourth limb in place while indicating that, in appropriate circumstances, it may be established without an extensive effects assessment.

The change is also a useful reminder to practitioners that the 2024 draft should no longer be treated as a reliable statement of the Commission's current position.

Rebates and Exclusive Dealing: An Intermediate Position

The Guidelines describe exclusive dealing as having a high potential to produce exclusionary effects and set out a framework for assessing that conduct.

For rebates that are not conditional on exclusivity, paragraph 142 identifies a range of relevant factors, including the dominant undertaking's degree of market power, the duration and market coverage of the scheme, whether the undertaking is an unavoidable trading partner, the size and structure of the rebate, whether the scheme is retroactive or incremental, the reference period and the characteristics of the customers concerned. The Guidelines also recognise that evidence of an exclusionary strategy may be relevant, while maintaining that abuse of dominance is an objective concept and does not generally require proof of an intention to exclude.

The result is a fact-intensive framework. For litigation purposes, that is likely to increase the importance of contemporaneous documents, economic evidence and evidence concerning the actual operation and coverage of the scheme. It does not, however, follow that every case involving rebates will necessarily require a lengthy effects trial.

Sustainability: An Efficiency Argument, Not a Standalone Defence

The final Guidelines do not create a separate "sustainability defence". Instead, they expressly recognise that sustainability benefits can constitute qualitative efficiencies within the existing efficiency defence. Paragraphs 217 and 218 give examples including reduced use of raw materials, less polluting production or distribution technologies, greater product recyclability, more resilient infrastructure, reduced supply-chain disruption, the development of more sustainable products and shorter time-to-market.

Where conduct has been found to distort effective competition, those efficiencies are considered as part of an objective justification. Paragraph 220 sets out four cumulative conditions: the conduct must allow efficiencies to be achieved; the efficiencies must counteract the negative effects of the conduct on competition and consumers; the conduct must be necessary to achieve the efficiencies; and the conduct must not eliminate effective competition. The Guidelines further state that the assessment operates on a 'sliding scale' (paragraph 222) and that conduct found to be by its very nature harmful to competition is very unlikely to satisfy the four conditions.

The evidential burden is correspondingly important. Paragraphs 223–229 state that claimed efficiencies must be objective, concrete and verifiable and identify contemporaneous internal documents, financial and accounting material, historical examples, external expert evidence and applicable economic models as relevant evidence. Where reasonably possible, efficiencies should be quantified. The Guidelines also recognise that some qualitative or longer-term efficiencies may be difficult to quantify, in which case the undertaking must provide a sufficiently concrete and verifiable account of the claimed consumer benefit.

The final text goes further than simply recognising in-market benefits. Paragraphs 237–238 address out-of-market efficiencies, including collective sustainability benefits, but impose additional conditions concerning the identification of beneficiaries, the overlap between affected consumers and beneficiaries, and the extent to which the relevant benefits counterbalance the harm caused by the conduct. That makes the sustainability provisions potentially important, but not straightforward to deploy.

UK Perspective

For UK practitioners, the implications should be stated cautiously. The Guidelines are an EU Commission communication and do not bind UK courts, the Competition Appeal Tribunal or the Competition and Markets Authority in their application of Chapter II of the Competition Act 1998 (the domestic prohibition on abuse of a dominant position, distinct from Chapter I's prohibition on anticompetitive agreements). Section 60A(3) of the Competition Act 1998 confines the mandatory duty to have regard to a Commission decision or statement to those made before IP completion day (11.00 pm on 31 December 2020); the Guidelines, adopted nearly six years later, fall outside that category. As the Court of Appeal recognised in Deckers UK Ltd v Up & Running (UK) Ltd [2026] EWCA Civ 553, post-Brexit EU material of this kind carries persuasive weight at most. The Guidelines may nevertheless be of comparative interest, particularly because they consolidate recent EU case law relevant to the development of UK abuse-of-dominance principles, but their precise domestic weight should not be overstated.

Nor should the final Guidelines be treated as determining the outcome of UK collective proceedings. A European Commission infringement decision does not automatically bind a UK court or the CAT: section 58A of the Competition Act 1998, as substituted by Schedule 8, paragraph 14 of the Consumer Rights Act 2015, confines that binding effect to a qualifying decision within section 47A(6) — broadly, a CMA decision or a Tribunal decision on appeal,save in the narrow category of cases in which the Commission retains continued competence under Article 92 of the EU Withdrawal Agreement. Where a UK claim relies on a Commission decision applying the Guidelines, practitioners should treat it as relevant evidence rather than assume it establishes a UK infringement.

Conclusion

The most defensible reading of the final Guidelines is therefore not that the Commission has introduced a series of new shortcuts, but that it has drawn clearer distinctions between different forms of conduct. Some categories receive particularly strong treatment; others remain dependent on a detailed assessment of context and effects; and tying sits somewhere in between after the removal of the draft's express presumption. The final text rewards close attention to the precise category into which conduct falls, the evidential basis for any claimed effects or efficiencies, and the distinction between propositions that reflect settled EU case law and propositions on which the Commission is expressing its own current view. That is likely to matter more in practice than the headline description of the Guidelines as either "tougher" or "softer" than the draft.

This article is the second of three companion pieces on the new Guidelines, alongside a piece on their implications for UK collective actions before the CAT and a piece on their treatment of sustainability.

This article is for general information purposes only and does not constitute legal advice. If your organisation needs a considered view on how the adopted Guidelines affect a live or prospective matter, please get in touch with the Competition team.