

The European Commission's Article 102 guidelines: key observations and what they mean for dominant firms

Introduction

On 3 September 2026, the European Commission adopted its highly anticipated [guidelines](#) on abusive exclusionary conduct under Article 102 TFEU (the Article 102 guidelines). The guidelines formally withdraw the Commission's 2009 Guidance Paper on enforcement priorities, which had been in place for nearly two decades.

The Commission's earlier draft (published for consultation in August 2024) was widely criticised for introducing formalistic presumptions unsupported by the case law and failing to enhance legal certainty for dominant or potentially dominant undertakings (see our [previous briefing](#)).

The intervening period also saw a number of landmark Article 102 rulings from the European Court of Justice (CJ) – including in *Google Shopping*, *Android Auto* and most recently *Google Android* – leading the Commission to postpone publication of the final guidelines to take account of the court's findings.

The result is final guidelines which more closely resemble the current state of Article 102 than the earlier draft, and which attempt to synthesise the case law's evolving – and not always easily reconciled – strands into a coherent framework. Yet that does not necessarily mean greater clarity for dominant firms, particularly given recent rulings have themselves fuelled uncertainty around key concepts while tightening the rules for dominant undertakings (see our [recent briefing](#)).

Key observations

- **Rowing back from presumptions: the Commission has dialled down its most controversial proposal** – The draft guidelines adopted an extensive presumptions-based framework. The approach was heavily criticised for lacking support in CJ case law, reversing the

burden of proof and creating form-based distinctions. The final guidelines significantly soften this approach. They note that the more a given conduct is considered generally likely to distort effective competition, the less case-specific evidence is required to prove that is the case (and vice versa) – so, while self-preferencing must be shown to distort effective competition, conduct which is by its very nature harmful to competition is deemed to do so. Presumptions still feature, but in a way which finds support in CJ case law – for example, exclusive dealing is subject to a rebuttable presumption that it distorts effective competition, the guidelines recognising (in line with *Intel*) that the dominant undertaking can submit evidence to rebut that presumption.

In a similar vein, the final guidelines reinstate the “soft safe harbour” for market shares below 40% – stating that, based on the Commission's experience, dominance is “generally unlikely” below that level. This soft safe harbour, which originally appeared in the Commission's 2009 Guidance Paper, had been conspicuously absent from the draft guidelines.

- **Two-stage test for determining abuse (but with important carve-outs)** – The final guidelines adopt a two-stage test for determining whether conduct by a dominant firm distorts effective competition:
 - Does the conduct depart from competition on the merits; and
 - Is it capable of having exclusionary effects?

But the guidelines also identify three scenarios where separate analysis of both limbs is not required, which in practice may reduce the two-stage test to a conceptual framework rather than a meaningful procedural hurdle for the Commission: (a) where the

EU courts have developed a specific analytical framework; (b) where the conduct is capable of excluding a hypothetical equally efficient competitor, if that test is appropriate; and (c) where the conduct is by its very nature harmful to competition, for example because it has no economic interest for the dominant undertaking other than restricting competition.

- **Competition on the merits: greater elaboration but ambiguity remains** – Like the draft guidelines, the final guidelines contain a dedicated section on the meaning of “competition on the merits”, which as discussed in our [recent briefing](#) remains far from settled following the CJ’s recent rulings. At the extremes, the guidelines state (consistent with the case law):
 - Conduct is likely within competition on the merits when it broadens consumer choice by putting new goods on the market or increasing the quantity or quality of the goods.
 - Conduct is “manifestly outside” competition on the merits when it is by its very nature harmful to competition - for example, because it has no economic interest for the dominant undertaking other than restricting competition.¹

For conduct falling between these extremes, the guidelines state:

- There is a “strong indication” of a departure from competition on the merits where conduct involves providing misleading information, misusing regulatory procedures or legal proceedings to prevent or make it more difficult for competitors to enter, or violating rules in other areas of law in a way that negatively affects a parameter of competition.
- Other factors “may” also be relevant, depending on the specific circumstances. These include preventing consumers from exercising their choice based on product merits and biased or

discriminatory treatment that favours the dominant undertaking over competitors.

For firms looking to self-assess, this provides limited comfort.

The guidelines also state (based on the *SEN* case) that the use of resources or means inherent to a dominant position “plays an important role” in establishing a departure from competition on the merits. While the CJ’s approach makes sense on the facts of *SEN* – where it applied to very specific circumstances in which the “resources” were derived from a statutory monopoly – in other contexts it could open the door to the Commission taking an overly broad view of the relevant “resources” (for example, treating demand won through competition on the merits as inherent to the holding of the dominant position) which would ultimately penalise dominance itself, contrary to longstanding case law.

- **Declining relevance of as-efficient competitors** – The guidelines codify the declining relevance of the as-efficient competitor principle following the CJ’s ruling in *Google Android* (see our [previous briefing](#)). They distinguish between pricing conduct and non-pricing conduct:²
 - The assessment of pricing conduct (predatory pricing, margin squeeze and conditional rebates) typically uses a price-cost test to determine whether the conduct is capable of excluding a hypothetical equally efficient competitor. If it is, the Commission need not separately prove a departure from competition on the merits.
 - Non-pricing conduct may be assessed either by reference to whether it can exclude a hypothetical equally efficient competitor, or by reference to other exclusionary effects in respect of which the concept of a hypothetical equally efficient competitor is not relevant. That may be the case for example in digital markets, which are characterised by innovation, access to data,

¹ Such conduct has its own dedicated section in the final guidelines.

² The guidelines also discuss the approach to take with respect to conduct encompassing both pricing and non-pricing conduct, referred to as “multi-faceted conduct” – the type of analysis to be carried out will be determined on a case-by-case basis, and conduct predominantly consisting of non-pricing behaviour may not require a price-cost test to assess the price-based component. This approach may lead to the Commission artificially sidestepping the obligation to conduct a proper price-cost analysis for alleged pricing infringements simply by grouping them with non-pricing conduct.

multi-sidedness, user behaviour and network effects – or where an equally efficient competitor could not realistically emerge.

In summary, for pricing conduct, the as-efficient competitor test remains the key self-assessment tool. For non-pricing conduct – particularly in digital markets – dominant firms can no longer assume that conduct replicable by an equally efficient competitor is safe.

- **Causation: no obligation to conduct counterfactual analysis** – Consistent with *Google Shopping* and *Google Android*, the guidelines confirm that the Commission need not rely on a counterfactual analysis to establish a causal link between conduct and its exclusionary effects, particularly where the

conduct makes it very difficult or impossible to ascertain the causes of market developments. This removes a potential line of defence for dominant firms.

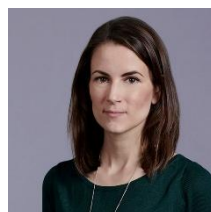
Conclusion

The guidelines follow a period of extraordinary judicial activity which has reshaped the contours of Article 102. The direction of travel is clear – the Commission enjoys ever more discretion in finding that conduct departs from competition on the merits and that it has an actual or potential effect on competition. With further landmark rulings from the EU courts on the horizon - including in *Google Adtech* and *Meta WhatsApp* - the rapid pace of Article 102's evolution shows no signs of slowing.

Contact



Tina Zhuo
Partner
T: +44(0)20 9070 4312
E: Tina.Zhuo@slaughterandmay.com



Annalisa Tosdevin
Knowledge Counsel
T: +44(0)20 9070 4555
E: Annalisa.Tosdevin@slaughterandmay.com

London

T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels

T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong

T +852 2521 0551
F +852 2845 2125

Beijing

T +86 10 5965 0600
F +86 10 5965 0650

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