The Commission's New Guidelines on Exclusionary Abuses of a Dominant Position

30 SEPTEMBER 2026

Alex Barbu



Photo by Carl Gruner on Unsplash

A New Chapter in EU Competition Law

After three years of consultations and debate, the European Commission (the Commission) has finally delivered its *Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings* (the Guidelines) (European Commission, 2026a). The Guidelines formally replace the 2008 paper *Commission guidance on enforcement priorities related to abusive exclusionary conduct by dominant undertakings* (the Guidance Paper) and brings the Commission's administrative approach into line with fifteen years of case law from the Court of Justice of the European Union (the CJEU).

The economic impetus behind this initiative was both timely and necessary. Two decades of digital expansion have cemented so-called "winner-takes-all" dynamics across key European markets, making a predictable and consistent application of Article 102 essential (European Commission, 2026b).

In fast-moving platform sectors, traditional enforcement models frequently ran into a wall: lengthy administrative timelines and complex evidentiary hurdles meant that markets often tipped before enforcers could intervene. By issuing these Guidelines, the Commission wants to clear up ambiguity, encourage compliance before abuses can materialise, and offer both national regulators and dominant firms a clear benchmark for what crosses the legal line (para. 7).

The request for instruction was not just technical, but also economically driven. Simply put, legal uncertainty can postpone intervention until exclusionary effects have become well entrenched, making the restoration of effective competition considerably more difficult and expensive. The Guidelines hope to enable dominant undertakings to clearly identify practices and circumstances that may raise concerns under Article 102 TFEU, thereby improving ex ante compliance and deterrence, reducing both harmful conduct toward consumers and unnecessary costs that may have risen as a result of over-compliance.

Background

The new Guidelines replace the previous *Guidance Paper on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) to Abusive Exclusionary Conduct by Dominant Undertakings* (the Guidance Paper), which had been in effect since 2008 (European Commission, 2009), and provide analytical guidance tailored to the current economic realities and to developments in the case law of the EU courts (Moreno-Tapia et al., 2026) The Guidance Paper strongly supported the "more economic approach," stating that the Commission would focus its enforcement on conduct that had the greatest negative impact on consumers. The Guidance Paper was contentious from the start since its effects-based approach diverged from the EU courts' more formalistic approach (Killick et al., 2024).

Thus, in March 2023, the Commission responded to the 2008 situation with a substantial policy initiative: it amended the Guidance Paper with immediate effect, adopting a Communication that was published in the Official Journal just a few days after its original announcement. Prompted by an extensive body of case law comprising over thirty judgments by the Union courts concerning exclusionary practices, these revisions marked a clear retreat from the effects-based doctrine. This doctrinal recalibration is characterised by an increased judicial and regulatory tolerance for protecting rivals that are not as efficient as the dominant undertaking, coupled with

a deliberate curtailment of the role traditionally accorded to quantitative economic evidence (European Commission, 2023).

This all culminated in August 2024, when the Commission published draft Guidelines on the application of Article 102 TFEU to exclusionary conduct (the Draft Guidelines) for public consultation. The Draft Guidelines proposed rolling back the effects-based analysis by establishing a presumption that conduct falling within specific identified categories can have exclusionary implications (Latham & Watkins, 2024).

A New Unified Standard of Harm

The revised Guidelines drop earlier draft references to "conduct liable to be abusive" (European Commission, 2024) in favour of a single operative standard: whether the dominant firm's behaviour distorts effective competition.

That does not mean the familiar two-part inquiry has disappeared. Under paragraph 59, establishing a distortion of effective competition still requires showing that a commercial practice: 1) Departs from competition on the merits; and 2) Is objectively capable of producing exclusionary effects.

By focusing on capability rather than waiting for actual market foreclosure to materialise, the Commission protects its ability to intervene early. It dispenses with the need to prove these two elements separately in only three defined scenarios:

- Familiar, recognised categories of abuse with well-settled legal tests (such as predatory pricing or margin squeeze);
- Cases where the exclusion of an equally efficient competitor is clearly demonstrated; or
- Practices that are anticompetitive by their very nature, such as naked restrictions designed simply to keep competitors out (European Commission, 2026b, paras. 62-65).

To prevent this flexibility from sliding into arbitrary enforcement, the Guidelines explicitly require the Commission to present a concrete theory of harm (para. 57). Regulators cannot simply declare an action unfair; they must articulate an economic narrative explaining how the conduct restricts market access—whether by raising artificial barriers to entry, blunting innovation, inflating prices, or shrinking consumer choice.

What Has Been "Codified"?

The Guidelines introduce a clear tripartite distinction that was not present in the Draft Guidelines:

- Pricing conduct (predatory pricing, margin squeeze, conditional rebates): assessed based on whether it can exclude a hypothetical equally efficient competitor (European Commission, 2026b);
- Non-pricing conduct: which may, but need not, be assessed based on the equally efficient competitor concept; and which, in "exceptional circumstances", could require a price-cost test to non-pricing behaviour(European

Commission, 2026b; Google and Alphabet v. Commission (Google Shopping), 2024, paras. 224-225);

● Multifaceted conduct (combinations of pricing and non-pricing elements): analysed case-by-case against the core feature of the behaviour European Commission, 2026, paras. 97-98).

This structure mirrors recent judgments like *Google Shopping* (C-48/22 P) and *Google Android* (C-738/22 P), where the Court of Justice agreed that forcing authorities to run price-cost tests on digital platform features sets an unrealistic evidentiary standard.

Even so, this approach creates an uncomfortable tension for companies defending themselves. In *Unilever Italia* (C-680/20), the Court held that while authorities don't have to carry out an as-efficient competitor (AEC) test for non-pricing conduct on their own initiative, they cannot simply ignore sound economic counter-evidence put forward by the dominant firm (Unilever Italia Mkt. Operations Srl v. Autoria Garante della Concorrenza e del Mercato, 2023, para. 60). The Guidelines acknowledge this ruling, but by labelling price-cost analyses for non-pricing practices as "exceptional," there is a concern that the Commission could put dominant firms in a position where proving their conduct was legitimate commercial competition could become much steeper in practice.

Causation Without Mandatory Counterfactuals: Built for Speed

The dedicated section on causation (Section 3.3.3) shows a regulator clearly focused on making cases easier to bring (European Commission 2026b). The Commission makes clear that an abusive practice does not need to stem directly from a dominant position, nor does it have to be the sole cause of market foreclosure. Proving that the behaviour made anticompetitive effects more likely to happen is enough.

Most importantly, the Guidelines state that the Commission is not systematically required to construct a formal counterfactual scenario when assessing causation. In modern digital markets, modelling an alternate universe—trying to prove how a startup would have grown had a dominant platform not acted—is notoriously difficult and can stall enforcement for years. By letting go of mandatory counterfactual models, the Commission gains speed, relying instead on internal corporate documents, behavioural evidence, and the observable structure of the market.

Conclusion

The final Article 102 Guidelines achieve something the Commission needed to do for a long time: they bring official guidance into harmony with court decisions, retiring an outdated 2008 paper that had drifted far from everyday competition enforcement. By centring enforcement around

structural contestability and grounded theories of harm, the Commission equips itself to act more decisively in digital ecosystems.

Yet, regulatory convenience inevitably involves strategic tradeoffs. By circumscribing the application of the AEC test, lowering causation thresholds, and anchoring distortion in prospective capability, the Guidelines risk blurring the frontier between legitimate, robust competition on the merits and unlawful exclusionary behaviour. The decisive test in the coming enforcement cycle will be whether this streamlined administrative architecture can achieve timely market interventions without undermining the legal certainty undertakings require to take commercial risks and compete vigorously.

Bibliography

European Commission. (2009). *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. Official Journal of the European Union*, C 45, 7–20.

European Commission. (2023). *Amendments to the Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. Official Journal of the European Union*, C 116, 1–5.

European Commission. (2024). Draft guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings. Directorate-General for Competition.

European Commission. (2026). *Commission adopts EU guidelines on exclusionary abuses of dominance* (Press Release IP/26/1769). European Commission Press Corner.

European Commission. (2026, September 9). *Communication from the Commission—Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings (C/2026/6118). Official Journal of the European Union, C/2026/4675.*

Google and Alphabet v. Commission (Google Android), Case C-738/22 P, EU:C:2026:533 (CJEU July 2, 2026).

Google and Alphabet v. Commission (Google Shopping), Case C-48/22 P, EU:C:2024:726 (CJEU September 10, 2024).

Berg, W., Esteva Mosso, C., Giraud, A., Little, D., Milleville, T., & Wileur, J. (2024, September 3). *A less economic approach? European Commission consults on drafi guidelines for exclusionary conduct* (Antitrust Client Briefing No. 3302). Latham & Watkins.

Killick, J., Komninos, A., & Citron, P. (2024, August 21). *The European Commission moves away from economics and proposes a presumption-based approach in its drafi guidelines on exclusionary abuses*. White & Case LLP.

Moreno-Tapia, I., García Vázquez, P., & Sancha Calvo, L. (2026, September 16). *New European guidelines on exclusionary abusive conduct by dominant undertakings*. Cuatrecasas Legal Insights.

Unilever Italia Mkt. Operations Srl v. Autorità Garante della Concorrenza e del Mercato, Case C-680/20, EU:C:2023:33 (CJEU January 19, 2023).