NEWSFLASH

NEW EU GUIDELINES ON EXCLUSIONARY ABUSES OF DOMINANCE

1. Background and Adoption

On 3 September 2026, the European Commission adopted Guidelines (C(2026) 6118 final) on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings. The Guidelines replaced the Commission's earlier Guidance on enforcement priorities. Although the new Guidelines supersede the earlier, they do not abandon its effects-based orientation, already reflected in the case law of the EU Courts as well as the Commission's related decisional practice. Rather, they systematise this approach.

2. Dominance Assessment and the 40% Market Share Safe Harbour

The Guidelines set out a framework for assessing whether one or more undertakings hold a dominant position, including in the context of digital ecosystems and aftermarkets. A notable feature is the Commission's indication that dominance is generally unlikely where an undertaking's market share is below 40%.

Separately, the Guidelines establish a general framework for determining whether conduct by a dominant undertaking constitutes an exclusionary abuse. In principle, the conduct must depart from competition on the merits and must be capable of producing exclusionary effects.

3. Justifications, Including Sustainability-Related Efficiencies

Dominant companies may justify otherwise problematic conduct by showing it is "objectively necessary" or that it produces efficiencies that counterbalance/outweigh its negative effects. The Commission clarifies that this efficiency defense can extend to sustainability-related practices, allowing dominant companies to justify exclusionary conduct on environmental/resilience grounds.

4. Enforcement Context

Article 102 TFEU has been one of the Commission's most important enforcement tools in recent years; leading to significant fines against Apple, Google and Microsoft for leveraging market power to disadvantage rivals. The new Guidelines do not alter these precedents; they rather aim to provide a clearer, more predictable analytical framework going forward, for both the Commission and NCAs.

5. Practical Takeaways

· The 40% threshold offers a useful tool in advising on dominance risk but should not be treated as a safe harbor in the strict sense.
· The sustainability/efficiency defense is a genuinely new route for dominant companies defending exclusionary conduct allegations· its use should be closely monitored as enforcement practice develops.
· The new aftermarkets section and the ecosystems/data-barriers guidance are particularly relevant for undertakings in digital and platform markets.

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