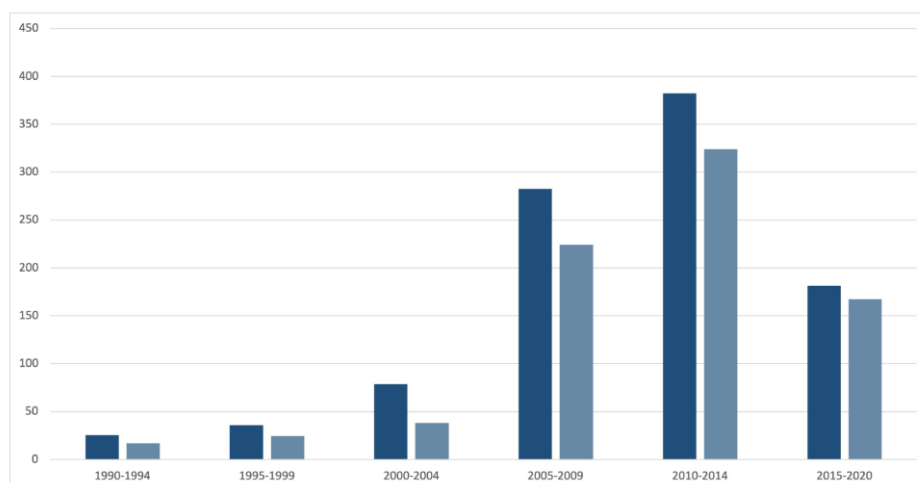


## **Contribution to the Commission's consultation on the draft Guidelines on exclusionary abuses of dominance**

The Federal Ministry for Economic Affairs and Climate Action welcomes the Commission's goal of a more workable enforcement of Article 102 TFEU in its draft Guidelines on exclusionary abuses of dominance. The current dysfunctions in enforcement, in particular the length and complexity of proceedings, threaten the rule of law and need to be addressed also through the new Guidelines (see below I.). The Guidelines are an important step in enhancing the administrability of the enforcement regime. In particular the shift towards a more rule-based approach including the necessary clarification regarding the limited field of application of the as efficient competitor (AEC) test is welcome (II.). To even better achieve the goal of a more workable enforcement, several proposals for the Guidelines are made (III.) and further steps beyond the Guidelines suggested (IV.).

### **I. The failing Art. 102 TFEU enforcement and the goal of a more workable enforcement**

The "dysfunctionalities in enforcing Article 102 TFEU"<sup>1</sup> by the Commission are well-documented: The median duration of adversarial Commission proceedings was 61 months in the period from 2004 to 2007; from 2016 to 2019, it was 88 months. The two last decisions in adversarial proceedings in the period until 2023, Google Search (AdSense) and Qualcomm (predation), lasted 111 months (or 9.3 years) and 122 months (or 10.2 years), respectively. Adding the Court proceedings, these numbers show that the enforcement system is failing and needs to be fixed. As a sign of added complexity, the number of pages in abuse of dominance decisions by the Commission has multiplied over the last 30 years. The following graph shows the arithmetic and median length in pages of Commission abuse of dominance decisions:



To cite an example: In the Commission's Intel decision, the AEC test spans more than 150 pages; it has been estimated that conducting the test alone took up two years. AMD had submitted the formal complaint in this case in 2000. The Court case has ended now 24 years later.

Several factors have been at play in this overall development: The Commission's embracement of the more economic approach for individual cases at the end of the 1990s; interests by law firms and economic consultancies to lengthen procedures on behalf of firms; the ECJ increasing procedural, evidentiary and substantive hurdles for the Commission.

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<sup>1</sup> Schweitzer & de Ridder, How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission's Future Guidelines on Exclusionary Abuses, *Journal of European Competition Law & Practice*, 2024, 15(4), 222–243.

## **II. Necessary initiative**

Against this background, we welcome the initiative for adopting Guidelines on exclusionary abuses of dominance. Adopting Guidelines is a necessary, but not sufficient, step to enhance the administrability of the Article 102 TFEU regime in line with the existing jurisprudence of the Union Courts. Bearing in mind their role and limits, we welcome that the Guidelines contribute to a more coherent and comprehensive interpretation of Article 102 TFEU by identifying general substantive and evidentiary principles and filling conceptual gaps. We welcome that the Guidelines start with a restatement of the plurality of goals of Article 102 TFEU and in competition policy in general, including innovation.

We also welcome that the Guidelines make use of specific legal tests both with regard to the criterion of ‘competition on the merits’ as well as to the one on ‘capability to produce exclusionary effects’. We also support the goal of restricting a detailed economic analysis to those cases which do not fall into the ‘naked restriction’ or into the ‘specific legal test’ categories. We welcome the attempt to move away from the more economic approach in individual cases to an approach with economically informed rules and to limit a full economic analysis to cases where in line with the case law of the Union Courts this is necessary. More rule-based enforcement means less enforcement work and at the same time less discretion and more legal certainty for firms.

From the Union Court’s case law it can be deduced that the Commission has discretionary powers when choosing the appropriate method to identify anti-competitive behaviour. Therefore, it cannot be generally assumed that an AEC test is always appropriate and useful to identify anti-competitive behaviour. We also welcome the presumptions established by the Guidelines, which are very much in line with the Union Courts’ case law. We explicitly welcome the clarification that conduct must only be shown to have the capability to produce exclusionary effects.

Generally, we encourage the Commission’s approach to achieve results at reasonable costs and within a reasonable time frame. We think, however, that the Guidelines could go further with regard to some types of conduct in this regard (see below III.).

## **III. Proposals for an even more workable enforcement under the new Guidelines**

### *1. Signalling a time limit*

Given the goals of protecting competition and providing legal certainty, the aim for abuse of dominance proceedings for the Commission should be to have a maximum length of two to three years. This should be signalled in the Guidelines both to actors involved as well as to the Courts to underpin that time plays a crucial role in protecting competition. Against this background, the Guidelines should highlight that proceedings should be focused on all stages on the strictly necessary questions and facts. If cases are unduly long, a prohibition decision will in most cases be unable to fully remedy the damage to competition already caused by the anti-competitive conduct. In highly dynamic sectors, like digital markets, this risk is particularly high. Against this background, we explicitly underline the importance that “Article 102 TFEU is applied vigorously and effectively” (para. 4).

### *2. Super dominance*

We acknowledge that the Guidelines lists potential elements that may be relevant to the assessment of a conduct’s capability to produce exclusionary effects. We support that the extent of the dominant position should be an indicator that a conduct is capable of having such effects. In this context, we propose to introduce the term “super-dominance” and to specify which market share would indicate such a position.

### *3. Safe harbour for single dominance*

We would be open to the introduction of a soft safe harbour when assessing a dominant market position. As the Commission indicated in its 2008 Priorities, low market shares are generally a good

proxy for the absence of substantial market power. Therefore, it is unclear why the Commission did not include a reference to the fact “that dominance is not likely if the undertaking’s market share is below 40% in the relevant market” (para. 14 of the 2008 Priorities), while maintaining its flexibility for a different assessment in individual cases.

#### *4. Additional clarity*

As the Commission seeks to enhance legal certainty and help undertakings self-assess whether their conduct constitutes an exclusionary abuse, we encourage the Commission to consider to include guidance on what compliance behaviours and tests should be carried out to ensure that the company is not behaving abusively or to check companies' business strategies for exclusionary conduct. Also, the Commission might consider to supplement the Guidelines - like other guidelines - with practical (legally not-binding) examples.

#### **IV. Further steps in a comprehensive approach**

While we support the proposed Guidelines and call for their swift adoption (after they have been updated in light of the recent jurisdiction of the European Court of Justice e.g. *Google Shopping* and *Intel*), we believe that Guidelines can only be a starting point, since Guidelines can only clarify the substantive law within the interpretative framework defined by the Union Courts. To ensure a workable Art. 102 TFEU enforcement, we urge the Commission to consider further steps. Potential initiatives that might lead to more certainty and speed could be assessed in the re-evaluation of Regulation 1/2003. A legal framework for Art. 102 TFEU proceedings without fines but imposing remedies – as foreseen e.g. at national level – could also foster an effective enforcement of Article 102 TFEU under more workable rules for the Commission as enforcer.