Co-funded by the
Erasmus+ Programme
of the European Union

Jean Monnet Network on EU Law Enforcement
Working Paper Series

The Resurrection of the Comfort Letter: Back to the Future?

Competition Law

Selçukhan Ünekbaş[♠]

Abstract

Pandemic-induced economic shocks saw the European Commission and national competition authorities adopt so-called comfort letters to provide guidance, assurance, and legal certainty to undertakings in order to help mitigate the detrimental effects of the crisis. Whereas it is true that desperate times may call for desperate measures, the fact that the Commission continues to issue comfort letters for initiatives with little relevance to the ongoing emergency raises questions. This article analyzes the reemergence of comfort letters from the viewpoints of legal basis and certainty. It finds that the foundations upon which the letters are constructed are shaky, which translates into the fostering of uncertainty. In that regard, it explores alternatives for Union enforcers to deploy a robust bespoke guidance regime for the future.

Keywords: European Union, competition, comfort letter, guidance, legal certainty

♠ PhD researcher at the European University Institute, Florence, Italy.

I. Introduction

This article addresses potential legal problems stemming from the increasing reliance on informal guidance, the so-called "comfort letters", by the European Commission. Appetite for providing relief via comfort letters has resurfaced with the advent of the pandemic. As part of its Temporary Framework, the Commission resurrected the procedure, providing assurance that companies implementing certain cooperation mechanisms do not contravene EU antitrust law.[1] Since then, comfort letters have been given to undertakings operating in "essential sectors", such as the medical equipment sector[2], pharmaceuticals[3], cloud-computing[4], and road transport[5]. In addition to the debatable question whether these sectors are indeed essential for European economies, the rekindled interest in comfort letters generates further concerns, two of which forms the focus of this article: legal basis and legal effects.

It is not obvious on which grounds the Commission draws competence to resort back to comfort letters. Well-known is the fact that the introduction of the Regulation 1/2003 discontinued the use of comfort letters – nowadays, undertakings are expected to self-assess their conduct to determine if they contravene antitrust rules. Although there exists a Commission Notice on informal guidance to novel questions related to EU antitrust law, it has never been used. Comfort letters also differ from "non-infringement decisions", another highly-unpopular method of guidance, as the latter may be rendered only *ex-post*, whereas comfort letters are geared toward *ex-ante* clarification.[6] Furthermore, it is unclear on which *competitive rationale* these letters are being issued: do they illustrate that the agreements in question are pro-competitive, or ancillary to a greater good?[7]

Comfort letters also raise questions regarding their effects. In such letters issued lately, the Commission is always cautious to remind that they do not comprise a formal decision. In other words, the letters do not produce binding legal effects, from which it follows that they are not "acts" within the meaning of Union law (Stevens, 1994). However, the letters could create reasonable expectations on behalf of their recipients, altering their legal situation against their rivals and the market in which they operate. Moreover, even recommendations or "position statements" may produce legal effects.[8] Lastly, legal certainty regarding the effects of comfort letters on national competition authorities and courts leave much to be desired (Stahler & Eliantonio, 2020).

The article does not aim to simply dismiss this trend as unlawful. It is sensible to expect that the use of such letters will continue, specifically vis-à-vis sustainability initiatives and digitalisation efforts (Stefano, 2020). In that regard, the article will provide reasoned recommendations to alleviate the confusion and improve legal certainty via recourse to existing legal avenues in an innovative manner. This is expected to contribute to managing the risks raised by comfort letters and ignite further debates on this contentious issue.

[1] 'Antitrust: Commission provides guidance on allowing limited cooperation among businesses, especially for critical hospital medicines during the coronavirus outbreak' (*European Commission Press Release*, 8 April 2020) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_618 accessed 20 May 2022.

[2] Commission, 'Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients' COMP/OG – D (2020/04403).

[3] Lewis Croft, 'Pharma sector to get second EU "comfort letter" for COVID cooperation' (*MLex*, 25 March 2021) https://content.mlex.com/#/content/1274967?referrer=search_linkclick accessed 20 May 2022.

[4] Commission, 'Feedback on the membership criteria and internal working rules of GAIA-X' COMP/C.6/SS/RI/vvd.

[5] Lerna Hornkohl & Anna Jorna, 'Uncharted legal territory? – European Commission fines Volkswagen and BMW for colluding on technical development in the area of emission cleaning' (*Kluwer Competition Law Blog*, 15 July 2021) http://competitionlawblog.kluwercompetitionlaw.com/2021/07/15/uncharted-legal-territory-european-commission-fines-volkswagen-and-bmw-for-colluding-on-technical-development-in-the-area-of-emission-cleaning/ accessed 20 May 2022.

[6] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L001/1.

[7] Giorgio Monti, 'Business Cooperation in Times of Emergency: The Role of Competition Law' (*Competition Policy International*, 10 May 2020) https://www.competitionpolicyinternational.com/business-cooperation-in-times-of-emergency-the-role-of-competition-law/#_ednref45 accessed 20 May 2022.

[8] Case 64/82 *Tradax v Commission* [1984] ECR II-1359, Opinion of AG Slynn.

II. The Problem of Legal Basis

In contrast to Regulation 1/2003, the reign of Regulation 17 was marked by the notification procedure. Despite a few judgments to the contrary, the notification procedure was one of the features of the old regime that perpetuated a form-based analysis of competition rules.[9] In essence, the notification system required every agreement capable of infringing Article 85 of the EEC Treaty (hereinafter will be referred to as Article 101 TFEU for clarity) to be notified to the Commission. In turn, the Commission would individually exempt arrangements that satisfied the conditions not to restrict competition in the internal market. However, the enlargement of the Union, as well as the completion of the Single Market towards the end of the millennium, meant that the Commission started to feel overwhelmed with the sheer number of submissions it received. As a response, it aspired to practically bypass the relatively procedure-heavy requirements of Regulation 17 (Waelbroeck, 1986). The result was the creation of comfort letters, on which the Commission came to rely heavily over time. However, with the introduction and entry into force of Regulation 1/2003, the notification procedure was abolished, and undertakings were required to self-assess whether their conduct fell afoul of European competition law. Thus, the provisional validity of agreements fulfilling the conditions under Article 101 (3) would be transformed into a fully-fledged validity, without the need to seek a prior decision by a competition enforcer.

With the recent resurrection of comfort letters, one of the questions that sparks interest is the legal basis on which these letters are grounded. As regards the old system, even though comfort letters were not foreseen in Regulation 17, they were nevertheless conceived as mere shortcuts serving the powers possessed by the Commission, such as the authority to issue individual exemptions. However, having abolished the individual exemption/clearance system, Regulation 1/2003 does not equip the Commission with such powers. This begs the question: what are other suitable legal bases to which the recent proliferation of comfort letters may be linked? This chapter conducts this inquiry in detail. It considers three prominent candidates: the Temporary Framework for the pandemic, the Notice on informal guidance related to novel practices, and Article 10 of the Regulation 1/2003. Each of these candidates are examined below, in turn.

II.A. The (Not So?) Temporary Framework

COVID-19 generated ripple effects in global supply chains that affected a range of products.[10] At the early stages of the pandemic, Europe, much like other parts of the world, faced considerable disruptions in the manufacturing, supply, and distribution of medicines, medical equipment, and vaccines. Recognizing that undertakings in such a hostile environment may need to collaborate more intensely, the Commission adopted a Communication setting out a Temporary Framework for assessing antitrust issues related to business cooperation responding to the urgency.[11] In short, the Temporary Framework aims to match supply and demand, aggregate production and capacity information, identify essential products, and spur cooperation to ensure a steady supply of high-demand materials. Provided that such cooperation initiatives are objectively necessary, temporary, and proportionate to achieve their intended effects (i.e. to mitigate the detrimental effects of the pandemic), the Commission considers them as either unproblematic vis-à-vis Article 101 TFEU, or outside the purview of its enforcement priorities.

Whereas the Commission's initiatives are laudable, its subsequent practices present a number of hazards. Essentially, not all comfort letters issued by the Commission (and national authorities) pertain to the health crisis. In the early days, the Commission strictly adhered to its Temporary Framework, as it should due to the exceptional nature of the situation, to construct its letters. For instance, the first comfort letter after the termination of the old system was provided to Medicines for Europe, a trade association of pharmaceutical manufacturers.[12] In that letter, the gathering and sharing of information between manufacturers was deemed not to raise concerns under Article 101 TFEU, provided that the exchanges were necessary to improve the supply and dissemination of essential medicines to fight COVID-19. Similarly, in another comfort letter, the Commission gave assurance to a Matchmaking Event that congregated suppliers of raw materials, companies with production capacities, and other undertakings with relevant assets to coordinate the manufacturing of

[9] Case C-234/89, *Stergios Delimitis v Henninger Brau* [1991] ECR I-00935.

[10] 'Why supply-chain problems aren't going away' (*Economist,* 29 January 2022) https://www.economist.com/business/2022/01/29/why-supply-chain-problems-arent-going-away accessed 20 May 2022.

[11] Commission, 'Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak' (Communication) 2020 C/116/02.

[12] Commission, 'Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients' COMP/OG – D(2020/044003).

vaccines.[13] Whereas such an organization entailed substantial exchanges of information, the Commission nonetheless decided that it does not contravene Article 101, provided that the exchanges were indispensable to attain their objectives.

Whereas the aforementioned two examples seem in conformity with the Temporary Framework, subsequent letters do not. The most obvious example in this regard is the letter given to GAIA-X.[14] GAIA-X is a consortium of technology companies concerned with developing technical specifications and harmonized rules for secure sharing, portability, and interoperability of user data. The letter views this initiative in light of recent developments underlining the importance of data and cloud services, placing it within the framework of Important Projects of Common European Interest. The letter also recognizes that, as a result of safeguards proposed by GAIA-X, the inherent anticompetitive effects of the consortium seem mitigated, leading the Commission to conclude that the initiative generates no appreciable impact under Article 101. Another pertinent example is the recent *Emissions* case.[15] This case dealt with a cartel between automobile manufacturers that aimed to diminish technical progress in certain emission filtering systems. Since it was the first cartel decision concerned not with prices but technical development, the case presented novelties. As a result, Commissioner Vestager announced that the addressees of the decision, along with a fine, will receive a comfort letter outlining the correct way to cooperate on technical matters without breaching competition rules. The letter has also been published as a guidance for similarly situated businesses.[16]

In addition to letters issued by the Commission, national competition authorities of EU Member States were also actively providing comfort to businesses (Hosseini, 2021). Whereas some of these initiatives indeed addressed public health-related concerns, others pertained to wholly different situations and industries.[17] In that regard, industries as diverse as automotive[18], energy[19], banking[20], and real estate[21] received some form of letter that provides comfort as to the compatibility of business practices with antitrust rules. The trends suggest that the reemergence of comfort letters, even if they are considered as 'soft law', had a clear impact on the practices of national authorities as well (Stahler & Eliantonio, 2020).

It is true that, although some comfort letters do not concern issues related to the protection of public health, they are (particularly the ones issued by NCAs) nevertheless designed to cushion the harmful effects of the pandemic on unprepared enterprises. By contrast, the letters sent to GAIA-X, and automobile manufacturers, clearly do not rest on an urgency rationale. Here, it is possible to spot that, unlike the ones addressed to undertakings operating in the health sector, the Commission was careful not to title the documents sent to GAIA-X and automobile manufacturers as "comfort letters". However, as will be examined further below, the fact that a document was not named in a certain way does not automatically mean that its contents are also substantially altered.[22] In European competition law, substance trumps form.[23]

II.B. Informal Guidance on Novel Practices

[13] Commission, 'Comfort letter: cooperation at a Matchmaking Event – Towards COVID19 vaccines upscale production' COMP/E-1/GV/BV/nb (2021/034137).
[14] Commission, 'Feedback on the membership criteria and internal working rules of GAIA-X' COMP/C.6/SS/RI/vvd.
[15] *Car Emissions* (Case AT. 40178) C(2021) 4955 [2021] OJ C458.
[16] The question whether publication of a comfort letter increases the strength of its legal effects is addressed in the next chapter.
[17] Enzo Marasa et al., 'The Italian Competition Authority Publishes its Communication on Cooperation Agreements in the Context of the Covid-19 Pandemic' (*Concurrences*, 27 May 2020) https://www.concurrences.com/en/bulletin/news-issues/may-2020/the-italian-competition-authority-publishes-its-communication-on-cooperation accessed 20 May 2022.
[18] 'The German Federal Cartel Office's Comfort Letter on COVID-19 Related Restructurings' (*Latham & Watkins Antitrust Briefing*, 10 June 2020) https://de.lw.com/thoughtLeadership/TheFCOsComfortLetteronCOVID-19relatedRestructurings accessed 20 May 2022.
[19] 'Fuel sales at motorway petrol stations - Tank & Rast's new award model does not violate competition law' (*Bundeskartellamt Press Release*, 9 March 2022) https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/09_03_2022_Tank&Rast.html;jsessionid=58FC6BDCDE626BBF47E63E6557EC8EAF.2_cid387?nn=3591568 accessed 20 May 2022.
[20] Nicholas Hirst, 'Antitrust enforcement in Europe's real economy risks being put on hold' (*MLex*, 4 September 2020) https://content.mlex.com/#/content/1220535?referrer=search_linkclick accessed 20 May 2022.
[21] Pierre Arhel, 'Activité de l'Autorité de la concurrence en 2020' (*Actu Juridique*, 23 July 2021) https://www.actu-juridique.fr/affaires/activite-de-lautorite-de-la-concurrence-en-2020/ accessed 20 May 2022.
[22] Indeed, commentators viewed both documents as comfort letters: Andrea Stahl, 'Gleiss Lutz Obtains a 'Comfort Letter' from the European Commission for the European Cloud Project Gaia-X' (*Gleiss Lutz*, 24 November 2021) https://www.gleisslutz.com/en/Gleiss-Lutz_Gaia-X_Comfort-Letter.html accessed 20 May 2022.
[23] Case C-99/79, *Lancome v Etos* [1980] ECR I-02511.

Many commentators lamented the diminished opportunities for the Commission to provide guidance to undertakings with the abrogation of Regulation 17 (Munari, 2014). In a bid to fill the vacuum, the Commission produced numerous notices and guidance documents, setting out the application of the *de minimis* principle, the "effect on trade between Member States" concept, the assessment of agreements under Article 101 (3), and enforcement priorities regarding abuses of dominance. Coupled with a wealth of guidance by the Courts, the competition law landscape was considered adequately clear for undertakings to self-evaluate their conduct.

Nevertheless, the Commission reserved the right to issue informal guidance to undertakings, in exceptional circumstances, as a backstop. Despite the aforementioned sources of information, in situations presenting truly novel problems, undertakings are at freedom to seek individual support from the Commission as to the legality of a business initiative.[24] Thus, the pertinent question is, how to reconcile such a system that preserves the ability to issue individual guidance letters with the reemergence of comfort letters?

At first glance, guidance letters and comfort letters display some similarities. Both provide administrative pathfinding to undertakings in exceptional circumstances; both letters are published; and neither generates internal or external binding effects. Hence, it is intriguing why the Commission did not resort to utilizing an existing mechanism, such as the one in question, instead of resurrecting an old system rife with controversies. The answer, as submitted by the Commission, relates to urgency. Indeed, due to potentially lengthy procedural requirements of those mechanisms, an ad-hoc system of comfort letters conferring on the Commission the ability to rapidly issue recommendations and insurance to undertakings seemed necessary.[25] Taken at face value, such an argument seems understandable. After all, in their current form, guidance letters represent an "all loss, no gain" situation. The notice sets out a number of criteria, all of which have to be cumulatively satisfied, in order for the Commission to *consider* giving a guidance letter that ultimately provides little assurance to its recipient. As the Commission itself concedes, over the years since the entry into force of Regulation 1/2003, few undertakings approached it to obtain guidance letters, and none succeeded.[26]

However, the fact that an existing mechanism is too onerous to use should not distract from the controversies surrounding the comfort letters issued lately. While it is understandable for the Commission to explore alternatives to the guidance letter system for concerns related to the public health emergency, the same cannot be said about technological or ecological initiatives. The sense of urgency surrounding the pandemic does not exist vis-à-vis the development of innovative cloud systems (at least under competition law). Therefore, it is worthy of note that the Commission shied away from using an existing mechanism, however arduous, to deal with novel competition law issues, such as non-price cartels, in favor of a supposedly ad-hoc system.

II.C. Non-infringement Decisions

As iterated earlier, the shift from individual and specific guidance to collective and general guidance precluded the provision of assurances to undertakings after Regulation 1/2003 (Faull & Nikpay, 2014). In the early days of reform, scholars thought that the resulting deficiencies in predictability may be resolved by the Commission via adopting non-infringement decisions under Article 10 (Cortese, 2014). However, these hopes have not materialized. As with guidance letters, the recent comfort letters share some similarities with the non-infringement procedure. For instance, both hinge on public interests. Nevertheless, the fact that non-infringement decisions can only be issued at the Commission's own initiative, as opposed to requests from undertakings, means that resurfaced comfort letters are inherently at odds with the Article 10 procedure. The Commission may be reluctant to answer clarification requests via non-infringement decisions lest the latter mutates into the old notification procedure (Riley, 2003).

In addition to the aforementioned ambiguities, the new letters also resurrect older concerns. For instance, the agreements subject of a letter may be challenged before national courts through private enforcement. This prospect effectively perverts the whole point of a comfort letter, which is to provide businesses with legal certainty. Moreover, as the Temporary Framework suggests, the Commission may also close a comfort letter by stating that the business arrangement in question is outside the remit of its enforcement priorities ("discomfort letter"). It is true that the Commission is rightfully to be accorded discretion when it comes to deciding on its priorities. However, the case law also suggests that it may be difficult to reconcile the exclusion of anticompetitive agreements falling under the "by object" category, as some of the arrangements contained

[24] Commission, 'Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)' (2004/C 101/06).
[25] Commission, 'Report on Competition Policy 2020' (Staff Working Document) SWD(2021) 177 final.
[26] Commission, 'Ten Years of Antitrust Enforcement under Regulation 1/2003' SWD(2014) 230/2.

within the newly issued letters arguably do, with the Commission's administrative freedom, even in times of crisis.[27] As can be seen, it is difficult to decide whether the return of the comfort letter increases or decreases clarity for businesses. In that regard, the next chapter analyzes the problems surrounding comfort letters from a legal certainty perspective.

III. The Problem of Legal Certainty

Since the early days of integration, comfort letters have been the subject of dispute before the Union Courts with regards to their capability to produce legal effects. In particular, the intriguing question is whether comfort letters are to be accorded binding force. This chapter examines that question in light of the case law dating back to the days of Regulation 17 with a view of the burgeoning reality of today.

The potentially binding effects of comfort letters was one of the most contentious questions surrounding the application of European competition law under the system laid down by Regulation 17 (Hinton, 1997). The literature was divided on the issue. Several commentators argued that comfort letters were nothing more than informal administrative proceedings with little to no value, against scholars asserting that such letters were capable of affecting the legal positions of their addressees to such an extent that they should be classified as binding measures (Korah, 1981). Of particular importance was the danger that, due to the principle of direct effect, affected parties were entitled to bring the contents of a comfort letter, such as an agreement, before a national court. As clarified by the Court of Justice in a series of judgments (known as the "Perfumes" cases), although national courts were at freedom to take into account a comfort letter issued for an agreement under scrutiny, they were nevertheless not bound by it.[28] In other words, the letters possessed no external binding qualities.[29] With that being said, in practice, national courts would rarely second-guess a comfort letter rendered by the Commission, due to the latter's "psychological effect" (Leskinen & Karlsson, 1999). For instance, in the case *Inntrepreneur v. Masons*, an English court distinguished situations where a comfort letter is issued by the European Commission.[30] According considerable weight to the letter in question, the court ventured as far to suggest that the Commission may have even "…intended national courts to take these letters as having an equivalent legal effect to formal decisions…" (Shaw & Ligustro, 1992). Still, it remains the fact that, despite practices to the contrary, comfort letters produced no external binding effects, since the Court of Justice explicitly equipped the national courts with the ability to issue contravening judgments.[31]

The more pertinent question was whether comfort letters had an internal binding effect that obligates the Commission to stay faithful to an earlier letter (Ehrike, 1994). In order to resolve this dilemma, we should approach comfort letters with nuance. It is true that not all comfort letters were created equal. Throughout their lifecycle, the Commission aspired to strengthen the legal value of comfort letters via recourse to procedural and substantive measures. In the early days of their adoption, comfort letters were indeed basic administrative letters, usually signed by an official of DG IV. These basic letters helped the Commission alleviate its heavy workload by signifying that it had no intention to prosecute an agreement or behavior (McGowan & Wilks, 1995). In other words, they were "no-action" statements on behalf of the Commission (Toepke, 1990). As such, these comfort letters only provided administrative guidance and contained little to no legal reasoning, leading to the conclusion that they did not produce internally-binding legal effects.[32] As a response to requests from industry, the Commission wanted to change this enforcement landscape by introducing "enhanced" or "qualified" comfort letters (Whish, 1989). Also called formal or reinforced letters, these constituted a response, on behalf of the Commission, to supply undertakings with greater certainty so as to confer on the businesses the ability to reasonably plan ahead (Siragusa, 1997). The distinguishing feature of enhanced comfort letters was the fact that they were publicized, which gave third parties, whose rights may be affected by the issuance of such a letter, the chance to make their grievances known.[33]

Since the Perfume cases, the Court of Justice underlined that the Commission may not be estopped from taking further action due to a comfort letter issued earlier.[34] Furthermore, the rulings in *BVGD* and *Diamanthandel*

[27] Case C-209/07, *Beef Industry Development Society and Barry Brothers* [2008] ECR I-08637. As regards the oil crisis in the 1970s, see Case 77/77, *BP v Commission* [1978] ECR 01513.
[28] Case C-253/78, *Procureur de la République v Giry and Guerlain* [1980] ECR I-02327.
[29] Case C-70/93, *Bayerische Motorenwerke AG v ALD* [1995] ECR I-03439, Opinion of AG Tesauro.
[30] *Inntrepreneur Estates Ltd v Mason* [1993] 2 C.M.L.R. 293.
[31] Case T-241/97, *Stork Amsterdam v Commission* [2000] ECR II-00309.
[32] European Parliament, 'A Practitioner's View on the Role and Powers of National Competition Authorities' (IP/A/ECON/2016-06) https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578972/IPOL_STU(2016)578972_EN.pdf accessed 20 May 2022.
[33] Case T-7/93, *Langnese-Iglo v Commission* [1995] ECR II-01533.
[34] *Lancome v Etos* (n 32).

reaffirmed the position that the existence of a prior comfort letter cannot constitute an obstacle to an assessment by the Commission later on.[35] Effectively, the Courts refused to apply the notion of *venire contra factum proprium* when the Commission wanted to go back on a comfort letter. For instance, *Langnese-Iglo* concerned the reopening of proceedings against a series of agreements, for which the Commission transmitted a comfort letter earlier to assure the undertakings in question that it had no intentions to initiate an investigation. However, the Commission reopened proceedings and subsequently imposed a fine based on the same agreements later on, arguing that there were appreciable changes affecting the legal or factual context in which the letter was constructed. In their appeal, the undertakings complained that the Commission should only be allowed to renege on its comfort letters if the factual situation has been substantially altered. This may be the case if the relevant market in question witnesses the entrance of new competitors, or the erection of entry barriers, for example (Yeung, 1998). However, if the Commission were to be given free rein to reopen proceedings "merely because it changed its legal assessment", the rationale of a comfort letter would be compromised and its purpose would be rendered nugatory. The Court of First Instance rejected these arguments. Firstly, the Court explained that the comfort letter specifically highlighted that the Commission was entitled to initiate proceedings should new factual evidence arise. Therefore, a comfort letter cannot entirely bar the Commission from pursuing what is essentially a new case. Secondly, the Court derived from the principle *in toto et pars continetur* that, in a system where formal decisions, such as individual exemptions, can be questioned with regards to their suitability vis-à-vis further developments, it would be inappropriate to confer greater protection to undertakings in possession of an inferior guarantee in the form of a comfort letter.

The judgment in *Langnese-Iglo* presented the perils of relying on a comfort letter to carry on with an arrangement. As pointed out by Korah, in the likely event that a green-lighted agreement turns out to be a successful enterprise and generates market shares for the undertaking, it would be easy for the Commission to declare that the facts of the relevant market have changed and to initiate proceedings. This perverse outcome would produce uncertainty rather than eliminating it (Korah, 1996)

It is curious to note that the comfort letter in *Langnese-Iglo* was a basic one, addressed only towards the recipients without prior publication and debate. In fact, in its judgment, the Court repeatedly emphasized that a comfort letter cannot create legal certainty to the same extent as formal exemption or clearance decisions, precisely for a lack of publication.[36] This may mean that publication is key for a comfort letter to emanate binding effects. In addition to requests from stakeholders, it is likely that this judgment induced the Commission to opt for a formalized (enhanced) version of comfort letters, in which the contents of the letter would be published for interested parties to comment on. Nevertheless, the question whether these reinforced comfort letters would generate at least internal binding effects remained unsettled. Still, compared to basic comfort letters, the scholarship was much more uniform on this matter. For instance, Brown argued that a publicized comfort letter would mean that the Commission would be even more unlikely to deviate from its contents (Brown, 1992). Going a step further, Waelbroeck argued that publicly disseminated comfort letters should be *de facto* binding on the Commission (Waelbroeck, 1986). At the heart of these arguments was the fact that third parties and the public were given a chance to be heard. The publication of the letters also increased transparency. Moreover, public letters were regarded as guidance, at least to a certain extent, for other industry players as well. This led to the argument that the Commission should not be given unfettered freedom to contravene the implications of such letters at its leisure. Based on these assertions, and since nearly all of the comfort letters recently issued by the European Commission and national competition authorities have been published, could we argue that they produce binding effects, at least concerning the authorities?

Union Courts had a chance to evaluate these arguments in a number of cases, with *Van Den Bergh Foods* featuring a stark stance on behalf of the Court. In that case, the Commission took a favorable view of the applicant's distribution agreements, as amended, and made its view public both in a press release, and through the Official Journal.[37] Two years later, the applicant received a statement of objections from the Commission that explained the agreements in question did not generate the expected results. In its appeal, Van Den Bergh Foods Ltd argued that the Commission's conduct contravened the principle of legitimate expectations. Recalling existing case law on the principle, the Court underlined that individuals given precise assurances by the Union administration have a right to entertain reasonable expectations.[38] However, according to the Court, the sole fact that a comfort letter was publicized cannot lead to a conclusion where legitimate expectations

[35] Joined Cases T-108/07 and T-354/08, *Diamanthandel A. Spira BVBA* [2013] ECLI:EU:T:2013:367.
[36] *Langnese-Iglo* (n 58), para 36.
[37] Case T-65/89, Van Den Bergh Foods [2003] ECR II-00389.
[38] Ibid para 192.

arise. Therefore, the Court saw no illegality in the Commission's opening of an infringement procedure despite the existence of a reinforced comfort letter.[39] It seems the Court analogized the judgment in *Van Den Bergh Foods* to the ruling in *Hydrotherm/Andreoli*, in which a publication indicating an intention, on behalf of the Commission, to issue a comfort letter could not preclude a national court from acting.[40]

Whereas the Court's position is rather clear on the matter, diverging views may be found in a number of subsequent Advocate-General opinions. For example, in *Austria Asphalt*, AG Kokott reasoned that, even though not binding, comfort letters establish grounds on which market actors can base their self-assessment exercises vis-à-vis the compatibility of their conduct with competition laws.[41] Furthermore, in *JCB Service*, AG Jacobs opined that the issuance of a publicized comfort letter may give rise to a "…legitimate belief that the practices notified do not constitute an infringement…".[42] In light of this ambiguity, the effects of reinforced comfort letters remain vague. Accordingly, it is unclear to what extent the newly issued comfort letters produce binding effects on the Commission.

It is reasonable to argue that the problem of (internal) legal effects cannot be examined only in the light of whether the comfort letter is publicized. The more sensible route suggests that publication is one of a number of considerations, necessary but nevertheless insufficient on its own. After all, the classification of a Commission measure solely on the basis of its formality runs counter to the fact that European competition law is concerned with substance over form.[43] Instead, comfort letters should be assessed vis-à-vis other relevant factors, including, in addition to whether they were published and third parties were allowed to voice their opinions, by whom the decision to issue the comfort letter was taken, the wording and general substance of the letter, and whether the decision-maker adopting the letter was delegated with the authority to complete that task in an appropriate manner.[44] Such a comprehensive approach to comfort letters would conform to the recent realist turn at the Court of Justice, where the Court accepts the superiority of contextual circumstances surrounding a case (Kukovec, 2021).

To conclude, whereas we can confidently state that basic comfort letters carry no formal weight, especially externally vis-à-vis national courts, reinforced comfort letters whose contents were made publicly available for third parties to comment on necessitate a deeper analysis. In that regard, having regard to the factual and legal context in which the letters were constructed, it may be possible in some instances to argue that a reinforced comfort letter should bind the Commission. For clarity, this does not mean that the Commission would relinquish all routes of enforcement after it issues such a letter. Similar to commitment decisions under Article 9 of the Regulation 1/2003, a material change in the facts supplied may require the reopening of proceedings. What it does mean, however, is that the *bona fide* reliance of the addressee of the letter on the conclusions to be drawn from the contents of that letter should be accorded a certain extent of protection.

IV. Conclusions

Although the above analysis presented the plethora of questions surrounding the resurrection of comfort letters, they may be here to stay. In 2020, Olivier Guersent, Director-General of Competition at the Commission, stated that post-crisis, EU may continue using comfort letters to "enable green or digital projects".[45] Very recently, Commissioner Vestager signaled that she wishes to overhaul the informal guidance notice by loosening its strict conditions to provide undertakings with bespoke advice.[46] These initiatives come after an

[39] The Commission is not obliged to withdraw the comfort letter before initiating proceedings, either. See Case T-24/93, *Compagnie Maritime Belge Transports SA* [1996] ECR II-01201.
[40] Case C-170/83, *Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C. Sas.* [1984] ECR I-02999.
[41] Case C-248/16, *Austria Asphalt* [2017], Opinion of AG Kokott.
[42] Case C-167/04 P, *JCB Service v Commission* [2006] ECR I-08935, Opinion of AG Jacobs.
[43] Pablo Ibanez-Colomo, 'Indispensability and Abuse of Dominance: From *Commercial Solvents* to *Slovak Telekom* and *Google Shopping*' (2020) 10 (9) Journal of European Competition Law & Practice 532.
[44] This line of reasoning seems in line with the *Nefarma* judgment. See, Case T-113/89, *Nederlandse Associatie van de Farmaceutische Industrie "Nefarma" and Bond van Groothandelaren in het Farmaceutische Bedrijf v Commission of the European Communities* [1990] ECR II-00797. For an evaluation of delegation of duties, see Case 5/85, *AKZO Chemie BV* [1986] ECR I-02585.
[45] Nicholas Hirst, 'EU might revive antitrust guidance post-crisis to enable green or digital projects, senior official says' (*MLex*, 8 September 2020) https://content.mlex.com/#/content/1220934?referrer=search_linkclick accessed 20 May 2022.
[46] Lewis Crofts & Nicholas Hirst, 'Keystone EU antitrust law will get fresh look for a "digital decade", Vestager says' (*MLex*, 31 March 2022) https://content.mlex.com/#/content/1368865?referrer=search_linkclick accessed 20 May 2022.

opinion by the EU Court of Auditors, which advised the Commission to adapt its tools to novel developments in competition law.[47]

As iterated throughout this article, the newly-issued comfort letters represent broader considerations that stretch beyond the boundaries of the health crisis induced by the pandemic. In that regard, we are in agreement with authors claiming that the Commission's motives point towards the introduction of non-economic considerations into its enforcement paradigm (Kozak, 2021; Galash, 2021; Van Rompuy, 2020; Costa-Cabral, 2020).[48] In other words, the resurrection of comfort letters may be one vehicle among many to break free of the yoke of economic efficiencies[49] and strive towards achieving the objectives of the twin transition (Majcher & Robertson, 2021). As apparent from the statements of senior Commission officials, the guidance letter mechanism seems to be the likely candidate through which the resurrection of comfort letters will be formalized. This seems in line with the findings of the German Competition Law Commission, which recommended the introduction of a streamlined, voluntary notification procedure that concerns novel and economically significant questions on the application of European competition law for increased legal certainty.[50]

In our view, adopting Article 10 decisions also carries significant potential. Firstly, the fact that non-infringement decisions are already grounded upon the Regulation 1/2003 gives the Commission a head start. Secondly, as Recital 14 also envisages, the non-infringement procedure intends to further Union interests, in particular through clarifying the legality of new practices against competition laws. Several scholars alluded that the public interest dimension may also be triggered by significant Union goals, such as large-scale infrastructure projects (Dunne, 2020; Montag & Rozenfeld, 2003). Therefore, Article 10 promises to be a suitable venue for green-lighting initiatives of Union interest, such as the GAIA-X consortium. Thirdly, even though Article 10 decisions are to be taken of the Commission's own accord, it may be possible to analogize non-infringement decisions to exemption decisions under older case law.[51] As the Court pointed out in *Automec II*, recipients of a favorable comfort letter can require the Commission to proceed to a formal decision (Korah, 1994). Although exemptions do not exist anymore, since only the Commission is empowered to adopt a non-infringement decision, and NCAs are incapable of issuing negative clearance decisions, a case can be made that the Commission, if it granted a comfort letter, can be compelled to adopt a non-infringement decision when pressed.[52] Lastly, it would be all the more beneficial for undertakings and business certainty, if the Commission operates such a mechanism akin to a reasoned opinion, which would produce stronger legal effects (Pijetlovic, 2004).

All in all, it is apparent that the resurrection of the comfort letters brings about more uncertainties than clarifications. Although only time will tell the avenues through which the Commission ends up travelling to formalize the procedure, one thing seems solid: the post-post modernization era in European competition law has begun (Van Rompuy, 2020). This article aspired to delineate the contours of controversy surrounding but one aspect of that journey. In that regard, the proliferation of individual guidance, coupled with a robust framework with clear demarcation of legal effects, promises to be a valuable tool to render European competition law fit for the challenges that lie ahead.

[47] European Court of Auditors, 'The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight' (2020) Special Report No. 24 https://www.eca.europa.eu/Lists/ECADocuments/SR20_24/SR_Competition_policy_EN.pdf accessed 20 May 2022.

[48] Lennard Michaux, 'Sustainability and competition law: the resurrection of comfort letters?' (*CCM Blog*, 17 November 2021) https://law.kuleuven.be/ccm/blog/?p=259 accessed 20 May 2022.

[49] Case C-377/20, *Servizio Elettrico Nazionale and others* [2021], Opinion of AG Rantos.

[50] 'A new competition framework for the digital economy' (2019) Competition Law 4.0 Commission Report https://www.bmwk.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=2 accessed 20 May 2022.

[51] Case T-24/90, *Automec Srl* [1992] ECR II-2223.

[52] Case C-375/09, *Tele2 Polska* [2011] ECR I-03055.

References.

Adrian Brown, 'Notification of agreements to the EC Commission: whether to submit to a flawed system' (1992) 17 (4) European Law Review 323.

Alan Riley, 'EC Antitrust Modernisation' (2003) 11 European Competition Law Review 604.

Ben Van Rompuy, 'How to Green-Light Sustainability Agreements?' (2020) 4 European Competition and Regulatory Law Review 257.

Bernardo Cortese, 'The Difficult Relationship between Administrative Authorities and the Judiciary in Antitrust Private Enforcement' in Cortese (ed), *EU competition law : between public and private enforcement* (Kluwer 2014).

Dallal Stevens, 'The "comfort letter": old problems, new developments' (1994) 15 (2) European Competition Law Review 81.

Damjan Kukovec, 'The realist trend of the Court of Justice of the European Union' EUI LAW Working Paper No. 2021/11 https://cadmus.eui.eu/handle/1814/72658 accessed 20 May 2022.

Denis Waelbroeck, 'New forms of settlement of antitrust cases and procedural safeguards: is Regulation 17 falling into abeyance?' (1986) 11 (4) European Law Review 268.

Eric Hinton, 'European Community Competition Law, Subsidiarity, and the National Courts' (1997) 11 (2) Brigham Young University Journal of Public Law 301.

Francesco Costa-Cabral, 'Future Mapping the Three Dimensions of EU Competition Law: Legislative Proposals and COVID-19 Framework' (2020) 7 (2) Journal of International and Comparative Law 307.

Francesco Munari, 'Antitrust Enforcement After the Entry into Force of Regulation No. 1/2003: The Interplay between the Commission and the NCAs and the Need for an Enhanced Role of National Courts' in Bernardo Cortese (ed), *EU competition law : between public and private enforcement* (Kluwer 2014).

Gianni de Stefano, 'COVID-19 and EU Competition Law: Bring the Informal Guidance On' (2020) 11 (3-4) JECLAP 121.

Jonathan Faull & Ali Nikpay, *The EU Law of Competition* (3rd Edition, OUP 2014)

Josephine Shaw & Aldo Ligustro, 'United Kingdom and Italy' in Peter Behrens (ed), *EEC competition rules in national courts* (Nomos 1992).

Karen Yeung, 'Privatizing Competition Regulation' (1998) 18 (4) Oxford Journal of Legal Studies 581.

Katarina Pijetlovic, 'Reform of EC antitrust enforcement: criticism of the new system is highly exaggerated' (2004) 25 (6) European Competition Law Review 356.

Klaudia Majcher & Viktoria Robertson, 'Doctrinal Challenges for a Privacy-Friendly and Green EU Competition Law' (2021) SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3778107 accessed 20 May 2022.

Leander Stahler & Mariolina Eliantonio, 'The Legal Effects of EU Competition Soft Law in the Decisions of National Competition Authorities: The Case of the Bundeskartellamt' (2020) 4 European Competition & Regulatory Law Review 273.

Lee McGowan & Stephen Wilks, 'The first supranational policy in the European Union: competition policy' (1995) 28 European Journal of Political Research 141.

Malgorzata Kozak, 'Competition Law and the COVID-19 Pandemic – Towards More Room for Public Interest Objectives?' (2021) 17 (3) Utrecht Law Review 118.

Mario Siragusa, 'The Millennium Approaches: Rethinking Article 85 and the Problems and Challenges in the Design and Enforcement of the EC Competition Rules' (1997) 21 (3) Fordham International Law Journal 650.

Mina Hosseini, 'A Covid Competition Dilemma: Legal and Ethical Challenges Regarding the Covid-19 Vaccine Policies during and after the Crisis' (2021) 6 Public Governance, Administration and Finances Law Review 51.

Niamh Dunne, 'Public Interest and EU Competition Law' (2020) 65 (2) The Antitrust Bulletin 256; Frank Montag & Andreas Rosenfeld, 'A Solution to the Problems? Regulation 1/2003 and the modernization of competition procedure' (2003) 2 Zeitschrift für Wettbewerbsrecht 107.

Pablo Ibanez-Colomo, 'Indispensability and Abuse of Dominance: From *Commercial Solvents* to *Slovak Telekom* and *Google Shopping*' (2020) 10 (9) Journal of European Competition Law & Practice 532.

Pekka Leskinen & Kent Karlsson, 'Postal Joint Ventures and EC Competition Law Considerations' in Michael Crew & Paul Kleindorfer (eds), *Emerging Competition in Postal and Delivery Services* (Springer 1999).

Richard Whish, *Competition Law* (Butterworth 1989).

Sven Galash, 'Protecting competition in times of crisis – the balancing act looked at from a land Down Under' (2021) 42 (8) European Competition Law Review 445.

Ulrich Ehrike, 'The binding nature of negative clearances and of comfort letters in European law' (1994) 9 Journal of International Banking Law 339.

Utz Toepke, 'EC Competition Law: Commentary' (1990) 59 (2) Antitrust Law Journal 509.

Valentine Korah, 'Comfort Letters – Reflections on the Perfume Cases' (1981) 6 European Law Review 14.

Valentine Korah, 'Restrictions on conduct and enforceability: Automec v Commission II' (1994) 15 (3) European Competition Law Review 175.

Valentine Korah, 'The Effect of the EEC Competition Rules on Distribution of Goods and Services in Europe' (1996) 1 International Intellectual Property Law & Policy 395.