

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

by

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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 re-emergence of comfort letters from the viewpoints of legal basis and certainty. It finds that the foundations upon which the letters are

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constructed are shaky, which translates into the fostering of uncertainty. In that regard, explored are alternatives for Union enforcers to deploy a robust bespoke guidance regime for the future.

Resumé

Les chocs économiques induits par la pandémie ont amené la Commission européenne et les autorités nationales de la concurrence à adopter des lettres dites de confort pour fournir des orientations, des assurances et une sécurité juridique aux entreprises afin de contribuer à atténuer les effets néfastes de la crise. S'il est vrai que les temps désespérés appellent des mesures désespérées, le fait que la Commission continue à émettre des lettres de confort pour des initiatives peu pertinentes par rapport à l'urgence actuelle soulève des questions. Cet article analyse la réapparition des lettres de confort au regard de la base juridique et de la certitude. Il constate que les fondements sur lesquels ces lettres sont construites sont fragiles, ce qui se traduit par un encouragement à l'incertitude. À cet égard, cet article explore les alternatives pour les autorités chargées de l'application de la législation de l'Union de mettre en place un solide régime d'orientation sur mesure pour l'avenir.

Key words: European Union; competition; comfort letter; guidance; legal certainty.

JEL: K21, L4, L5

I. Introduction

Comfort letters are informal tools primarily geared towards providing businesses with additional clarification on whether their practices, actual or potential, are likely to infringe European competition law. These letters have been used extensively before the procedural modernization of EU competition law; although the Commission has recently signalled its intentions to revitalize the procedure. This revival draws on a need to provide undertakings with greater ability to navigate the complexities of the digital economy, as well as to plan in accordance with the objectives of the Green Deal. However, reinvigorating the use of comfort letters is not without problems either.

This article addresses several of such potential legal problems stemming from the increasing reliance on informal guidance and the so-called 'comfort letters' by the European Commission. The 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 of whether these sectors are indeed essential for European economies, the rekindled interest in comfort letters generates further concerns, two of which form the focus of this article: the 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 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* clarifications.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 the letters issued lately, the Commission is always cautious to remind the recipients

¹ EC, ‘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 EC, ‘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 EC, ‘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.

that comfort letters 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.⁸ 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.⁹ Lastly, legal certainty regarding the effects of comfort letters on national competition authorities and courts leaves much to be desired.¹⁰

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 digitalization efforts.¹¹ 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.

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.¹² In essence, the notification system required every agreement capable of infringing Article 85 of the EEC Treaty (hereinafter 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

⁸ Dallal Stevens, ‘The “comfort letter”: old problems, new developments’ (1994) 15(2) *European Competition Law Review* 81.

⁹ Case 64/82 *Trdadax v Commission* [1984] ECR II-1359, Opinion of AG Slynn.

¹⁰ 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.

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

¹² Case C-234/89, *Stergios Delimitis v Henninger Brau* [1991] ECR I-00935.

relatively procedure-heavy requirements of Regulation 17.¹³ 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 Regulation 1/2003. Each of these candidates is examined below, in turn.

1. The (Not So?) Temporary Framework

COVID-19 generated ripple effects in global supply chains that affected a range of products.¹⁴ 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.¹⁵ In short, the Temporary Framework aims to match supply and demand, aggregate production and capacity

¹³ 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.

¹⁴ '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.

¹⁵ 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.

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 (that is 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 formulate 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.¹⁶ In that letter, the gathering and sharing of information between manufacturers were 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 vaccines.¹⁷ 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 these 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.¹⁸ GAIA-X is a consortium of technology companies concerned with developing technical specifications and harmonized rules for the 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

¹⁶ 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).

¹⁷ Commission, 'Comfort letter: cooperation at a Matchmaking Event – Towards COVID-19 vaccines upscale production' COMP/E-1/GV/BV/nb (2021/034137).

¹⁸ Commission, 'Feedback on the membership criteria and internal working rules of GAIA-X' COMP/C.6/SS/RI/vvd.

initiative generates no appreciable impact under Article 101. Another pertinent example is the recent *Emissions* case.¹⁹ 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 guidance for similarly situated businesses.²⁰

In addition to letters issued by the Commission, national competition authorities of EU Member States were also actively providing reassurance to businesses.²¹ Whereas some of these initiatives indeed addressed public health-related concerns, others pertained to wholly different situations and industries.²² In that regard, industries as diverse as automotive,²³ energy,²⁴ banking,²⁵ and real estate²⁶ received some form of letters that provide reassurance as to the compatibility of certain business practices with antitrust rules. Trends suggest that the re-emergence of comfort letters, even if they are considered ‘soft law’, had a clear impact on the practices of national authorities as well.²⁷

¹⁹ *Car Emissions* (Case AT. 40178) Commission Decision C(2021) 4955 [2021] OJ C458.

²⁰ The question whether publication of a comfort letter increases the strength of its legal effects is addressed in the next chapter.

²¹ 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.

²² 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.

²³ ‘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.

²⁴ ‘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.

²⁵ 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.

²⁶ 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.

²⁷ Stahler & Eliantonio (n 10).

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 to 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 to automobile manufacturers as ‘comfort letters’. However, as will be examined further below, the fact that a document is not named in a certain way does not automatically mean that its contents are also substantially changed.²⁸ In European competition law, ‘substance’ trumps ‘form’.²⁹

2. Informal Guidance on Novel Practices

Many commentators lamented the diminished opportunities for the Commission to provide guidance to undertakings with the abrogation of Regulation 17.³⁰ 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 from 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.³¹ Thus, the pertinent question is how to reconcile such a system, which preserves the ability to issue individual guidance letters, with the re-emergence of comfort letters?

²⁸ 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.

²⁹ Case C-99/79, *Lancome v Etos* [1980] ECR I-02511.

³⁰ 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).

³¹ 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).

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.³² 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.³³

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.

3. 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 1/2003.³⁴ In the early days of the reform, scholars thought that the resulting deficiencies in predictability may be resolved by

³² Commission, ‘Report on Competition Policy 2020’ (Staff Working Document) SWD(2021) 177 final.

³³ Commission, ‘Ten Years of Antitrust Enforcement under Regulation 1/2003’ SWD(2014) 230/2.

³⁴ Jonathan Faull & Ali Nikpay, *The EU Law of Competition* (3rd Edition, OUP 2014).

the Commission by adopting non-infringement decisions under Article 10.³⁵ However, these hopes have not materialized. As with guidance letters, 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 'on request' of 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.³⁶

In addition to the aforementioned ambiguities, the new comfort letters also resurrect older concerns. For instance, agreements that are the 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, 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 within the newly issued comfort letters arguably do, with the Commission's administrative freedom, even in times of crisis.³⁷ 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 regard to their capability to produce legal effects. In particular, the intriguing question is whether comfort letters

³⁵ 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).

³⁶ Alan Riley, 'EC Antitrust Modernisation' (2003) 11 *European Competition Law Review* 604.

³⁷ 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.

are to be accorded binding force. This chapter examines this question in light of case law dating back to the days of Regulation 17 with a view of the escalating 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 17.³⁸ Literature was divided on this issue. Several commentators argued that comfort letters were nothing more than informal administrative proceedings with little to no value; by contrast, other scholars asserted 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.³⁹ 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 free to take into account a comfort letter issued for an agreement under scrutiny, they were nevertheless not bound by it.⁴⁰ In other words, the letters possessed no external binding qualities.⁴¹ 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’.⁴² For instance, in the case *Inntrepreneur v. Masons*, an English court distinguished situations where a comfort letter is issued by the European Commission.⁴³ Attaching considerable weight to the letter in question, the court ventured as far as to suggest that the Commission may have even ‘...intended national courts to take these letters as having an equivalent legal effect to formal decisions...’⁴⁴ Still, the fact remains 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.⁴⁵

³⁸ Eric Hinton, ‘European Community Competition Law, Subsidiarity, and the National Courts’ (1997) 11(2) Brigham Young University Journal of Public Law 301.

³⁹ Valentine Korah, ‘Comfort Letters – Reflections on the Perfume Cases’ (1981) 6 European Law Review 14.

⁴⁰ Case C-253/78, *Procureur de la République v Giry and Guerlain* [1980] ECR I-02327.

⁴¹ Case C-70/93, *Bayerische Motorenwerke AG v ALD* [1995] ECR I-03439, Opinion of AG Tesouro.

⁴² 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).

⁴³ *Inntrepreneur Estates Ltd v Mason* [1993] 2 C.M.L.R. 293.

⁴⁴ Josephine Shaw & Aldo Ligustro, ‘United Kingdom and Italy’ in Peter Behrens (ed), *EEC competition rules in national courts* (Nomos 1992).

⁴⁵ Case T-241/97, *Stork Amsterdam v Commission* [2000] ECR II-00309.

The more pertinent question was whether comfort letters had an internal binding effect that obligates the Commission to stay faithful to an earlier letter.⁴⁶ In order to resolve this dilemma, a nuanced approach should be used with respect to comfort letters. 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 to alleviate its heavy workload by making it known that it had no intention to prosecute an agreement or behavior.⁴⁷ In other words, they were ‘no-action’ statements on behalf of the Commission.⁴⁸ 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 binding legal effects internally.⁴⁹ As a response to requests from the industry, the Commission wanted to change this enforcement landscape by introducing ‘enhanced’ or ‘qualified’ comfort letters.⁵⁰ Also called formal or reinforced letters, these letters constituted a response, on behalf of the Commission, to grant undertakings greater certainty so as to confer on the businesses the ability to reasonably plan ahead.⁵¹ The distinguishing feature of enhanced comfort letters was the fact that they were made available to the public, which gave third parties, whose rights may have been affected by the issuance of such a letter, the chance to make their grievances known.⁵²

Since the Perfume cases, the Court of Justice underlined that the Commission may not be stopped from taking further action due to a comfort letter it issued earlier.⁵³ Furthermore, the rulings in *BVGD* and *Diamanthatandel* reaffirmed the position that the existence of a prior comfort letter cannot constitute an obstacle to an assessment of the same practice by the Commission

⁴⁶ Ulrich Ehrike, ‘The binding nature of negative clearances and of comfort letters in European law’ (1994) 9 *Journal of International Banking Law* 339.

⁴⁷ Lee McGowan & Stephen Wilks, ‘The first supranational policy in the European Union: competition policy’ (1995) 28 *European Journal of Political Research* 141.

⁴⁸ Utz Toepke, ‘EC Competition Law: Commentary’ (1990) 59(2) *Antitrust Law Journal* 509.

⁴⁹ 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](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578972/IPOL_STU(2016)578972_EN.pdf)> accessed 20 May 2022.

⁵⁰ Richard Whish, *Competition Law* 2nd edition (Butterworth 1989).

⁵¹ 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.

⁵² Case T-7/93, *Langnese-Iglo v Commission* [1995] ECR II-01533.

⁵³ *Lancome v Etos* (n 29).

later on.⁵⁴ 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, which were the subject of a comfort letter issued earlier by the Commission that were sent to assure the undertakings in question that the authority had no intentions to initiate an investigation. However, the Commission reopened proceedings and subsequently imposed a fine for the same agreements later on, arguing that there were appreciable changes affecting the legal or factual context in which the letter was formulated. 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.⁵⁵ However, if the Commission was 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 inconsequential. The Court of First Instance rejected these arguments. Firstly, it explained that the comfort letter in question specifically stressed 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.⁵⁶

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

⁵⁴ Joined Cases T-108/07 and T-354/08, *Diamanthatdel A. Spira BVBA* [2013] ECLI:EU:T:2013:367.

⁵⁵ Karen Yeung, ‘Privatizing Competition Regulation’ (1998) 18(4) *Oxford Journal of Legal Studies* 581.

⁵⁶ 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.

fact, in its judgment, the Court repeatedly emphasized that a comfort letter cannot create legal certainty to the same extent as a formal exemption or a clearance decision, precisely for the lack of publication.⁵⁷ 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 of whether these reinforced comfort letters would generate at least internal binding effects remained unsettled. Still, compared to basic comfort letters, 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.⁵⁸ Going a step further, Waelbroeck argued that publicly disseminated comfort letters should be *de facto* binding on the Commission.⁵⁹ The fact that third parties and the public were given a chance to be heard was at the heart of these arguments. 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 it be argued 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.⁶⁰ 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 from the Union administration have a right to entertain reasonable expectations.⁶¹ However, according to the Court, the sole fact that a comfort letter was

⁵⁷ *Langnese-Iglo* (n 52), para 36.

⁵⁸ Adrian Brown, 'Notification of agreements to the EC Commission: whether to submit to a flawed system' (1992) 17(4) *European Law Review* 323.

⁵⁹ Waelbroeck (n 13).

⁶⁰ Case T-65/89, *Van Den Bergh Foods* [2003] ECR II-00389.

⁶¹ *Ibid* para 192.

publicized cannot lead to a conclusion that legitimate expectations arise. Therefore, the Court saw no illegality in the Commission's opening of an infringement procedure despite the existence of an earlier reinforced comfort letter.⁶² 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 taking action.⁶³

Whereas the Court's position is rather clear on the matter, diverging views may be found in a number of subsequent Advocate-General (hereinafter: AG) opinions. For example, in *Austria Asphalt*, AG Kokott reasoned that, even though they are 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.⁶⁴ Furthermore, in *JCB Service*, AG Jacobs's opinion was that the issuance of a publicized comfort letter may give rise to a '...legitimate belief that the practices notified do not constitute an infringement...'.⁶⁵ 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 appropriate route suggests that a letter's publication is one of a number of relevant considerations – it is 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.⁶⁶ Instead, comfort letters should be assessed vis-à-vis other relevant factors (including, in addition to whether they were published and whether third parties were allowed to voice their opinions) that are the basis of the decision to issue the comfort letter; the wording and general substance of the letter; and whether the decision-maker adopting the letter was granted the authority to complete that task in an appropriate manner.⁶⁷ Such a comprehensive approach to comfort letters would conform

⁶² The Commission is also not obliged to withdraw the comfort letter before initiating proceedings. See Case T-24/93, *Compagnie Maritime Belge Transports SA* [1996] ECR II-01201.

⁶³ Case C-170/83, *Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C. Sas.* [1984] ECR I-02999.

⁶⁴ Case C-248/16, *Austria Asphalt* [2017], Opinion of AG Kokott.

⁶⁵ Case C-167/04 P, *JCB Service v Commission* [2006] ECR I-08935, Opinion of AG Jacobs.

⁶⁶ 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.

⁶⁷ 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*

to the recent realist turn at the Court of Justice, where the Court accepts the superiority of contextual circumstances surrounding a case.⁶⁸

To conclude, whereas it can be confidently stated 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 to argue in some instances 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. Discussion: What is the Rationale Behind the Resurrection of Comfort Letters?

As the preceding chapters highlighted, it is unclear what the Commission intends to achieve by resurrecting the use of comfort letters. Even though the Commission argues that it takes steps to increase legal certainty for businesses, it has been demonstrated that if anything, the renewed use of such letters gives rise to legal uncertainty. It is obvious that the Commission pursues administrative economizing. Comfort letters arguably provide fast and timely responses to undertakings in need of legal clarification. However, the ensuing benefits should be weighed against potential drawbacks, the primary element of which is uncertainty, and the potentially chilling effects on innovation and business initiative as a result. In light of this state of play, it seems reasonable to argue that the Commission is driven by another, ulterior motive, and one of the vehicles through which that goal is to be achieved is informal guidance in the form of comfort letters. This chapter argues that this goal is the introduction of non-economic considerations into EU competition law enforcement.

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.

⁶⁸ Damjan Kukovec, 'The realist trend of the Court of Justice of the European Union' EUJ LAW Working Paper No. 2021/11 <<https://cadmus.eui.eu/handle/1814/72658>> accessed 20 May 2022.

The EU has been rather adamant in its goal never to let a crisis go to waste. Enshrined in the words of one of its founders, Jean Monnet, Europe is continuously being forged in crises, and is a sum of the solutions adopted as a response to those crises. As such, measures adopted in times of crisis tend to linger after the state of emergency elapses. For instance, the Next Generation EU program induced by the pandemic seeks to transcend the health crisis and extend into the future. Similar scenarios can be observed as regards some of the stability measures adopted for the Eurozone crisis, and the security mechanisms related to the recent migration crisis.⁶⁹

The situation with the comfort letters presents a similar state of affairs. 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, support has to be given to authors claiming that the Commission's motives point towards the introduction of non-economic considerations into its enforcement paradigm. For instance, the Commission may use comfort letters as a tool to adopt a supportive approach towards projects with innovative potential, or that have a 'green' dimension.⁷⁰ Indeed, the objectives of the 'twin-transition', namely the digital and green reformulation of Union policy apparatus, provide fertile ground for the proliferation of informal guidance.⁷¹ Among other tools, the Commission could then use comfort letters, to create 'normative breaks', and use them as springboards to break free of the burdens of economic efficiencies.⁷² Aside from this normative goal, other motivations may be at play as well. One of these aspirations may be to remedy the informal guidance vacuum as created by the introduction of Regulation 1/2003. However, as specified, the merits and demerits of this approach invite careful examination.

As explained above, many commentators lamented the diminished opportunity for the Commission to enlighten undertakings on whether their conduct falls afoul of competition rules.⁷³ Indeed, in essence, serving undertakings with informal guidance as regards their business practices can

⁶⁹ Bruno de Witte, 'EU emergency law and its impact on the EU legal order' (2022) 59 *Common Market Law Review* 3.

⁷⁰ Malgorzata Kozak, 'Competition Law and the COVID-19 Pandemic – Towards More Room for Public Interest Objectives?' (2021) 17(3) *Utrecht Law Review* 118.

⁷¹ 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.

⁷² 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; 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.

⁷³ Munari (n 30).

be rather valuable, especially in areas presenting novel challenges of legal classification or interpretation. This is especially true for less experienced jurisdictions, such as Member States that only recently joined the Union. It may simply be too much to ask from practitioners in emerging competition law jurisdictions to self-assess potentially highly complex business initiatives. As such, no objection is raised here against more guidance. What is objectionable, however, is the conduit with which the Commission decided to transmit that guidance. Aside from their deficiencies vis-à-vis legal basis and legal certainty, comfort letters also suffer from two other weaknesses.

The first pertains to equality. Issuing comfort letters is subject to the sole discretion of the European Commission. Furthermore, in light of the prevailing state of European law as inscribed by the Courts, comfort letters are incapable of being legally challenged. This renders their usage rather speculative. In particular, it would be unclear who gets a formal decision and who gets a comfort letter instead. While the European Commission may be trusted to act in conformity with the principle of equality before the law, it is necessary to be mindful of the fact that the Commission's actions double as an example for national competition authorities as well. As recently acknowledged by the General Court, the impartiality and independence of some of these authorities is questionable.⁷⁴ Thus, there is a clear danger that the renewed interest in comfort letters may provide a pretext for administrative actions whose compatibility with the rule of law may be dubious.

The second is an effect of the deficiencies of legal certainty examined throughout the article. Upon closer inspection, comfort letters share many similarities with the commitment procedure under Article 9 of Regulation 1/2003. Indeed, comfort letters are 'case-specific, evidence-based, preliminary assessments', entailing a participative process.⁷⁵ In this manner, many of the criticisms directed towards the commitment procedure may be applicable to comfort letters as well.⁷⁶ Specifically, the Commission may utilize comfort letters to 'twist the arm' of undertakings, extracting disproportionate concessions by mandating significant alterations to planned business initiatives as a prerequisite of issuing a green light in the form of a comfort letter. Viewed through this lens, comfort letters may be characterized as a softer iteration of

⁷⁴ Case T-791/19, *Sped-Pro S.A. v European Commission* [2022] ECLI:EU:202267.

⁷⁵ Alfonso Lamadrid, 'The Old New Competition Tool?' (*Chillin' Competition Blog*, 15 October 2020) <<https://chillingcompetition.com/2020/10/15/the-old-new-competition-tool/>> accessed 13 June 2022; Oliver Bethell, Gavin Baird, & Alexander Waksman, 'Ensuring innovation through participative antitrust' (2020) 8 *Journal of Antitrust Enforcement* 30.

⁷⁶ Florian Wagner-von Papp, 'Best and even better practices in commitment procedures after *Arosa*: The dangers of abandoning the "struggle for competition law"' (2012) 49(3) *Common Market Law Review* 929.

the commitment procedure. By effectively managing a novel business initiative, the Commission can effectively use its ‘word’ as a carrot. The softer approach of a comfort letter may also double as a less interventionist and less aggressive form of market regulation. Since the contents of a comfort letter are essentially non-binding, any potentially disproportionate requirements included therein may be brushed aside as mere guideposts. However, the threat of a subsequent investigation is likely to rebut this claim – no sane undertaking would dare step outside the confines of a comfort letter, especially after equipping the Commission with considerable information related to its activities. Lastly, it is curious to note that comfort letters emerge after a period of criticism against the far-reaching implications of the commitment procedure. It is important to keep in mind that the Union Courts, probably reacting to such commentary, have also started to trim down the wide discretionary power that the Commission enjoys with the commitment procedure.⁷⁷ It is unclear whether the resurrection of comfort letters has been motivated by a dangerous attempt on the part of the Commission to fly under the commitment radar, or it is merely a by-product of a desire to engage more intensively with undertakings. However, it is rather clear that the two procedures share important similarities, which need to be addressed should a more institutionalized form of informal guidance enter the enforcement system.

V. 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, the EU may continue using comfort letters to ‘enable green or digital projects.’⁷⁸ 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.⁷⁹ These initiatives

⁷⁷ Case C-132/19, *Groupe Canal+ v Commission* [2020] ECLI:EU:C:2020:1007.

⁷⁸ 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.

⁷⁹ 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.

come after an opinion by the EU Court of Auditors, which advised the Commission to adapt its tools to novel developments in competition law.⁸⁰

As apparent from the statements of senior Commission officials, the ‘informal guidance 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, in order to increase legal certainty, the introduction of a streamlined, voluntary notification procedure that concerns novel and economically significant questions on the application of European competition law.⁸¹ Confirming this view, the Commission has just recently unveiled the fruits of its efforts to revise the informal guidance notice.⁸² The revised document includes provisions that somewhat confirm the discussion in Part IV. For instance, unlike the older mechanism, the new notice highlights that, in deciding whether to issue guidance, the Commission may consider the Union interest. The explicit inclusion of this provision may represent the willingness to utilize the guidance mechanism as a vehicle to advance Union-wide goals, such as the twin transition. Still, the revised document suffers from several deficiencies as did its predecessor. For instance, the Commission overrules the conferral of any binding effects on guidance letters, including internal binding effects. Similarly, the Commission sets out that the issuance of a guidance letter may be predicated on ‘...the existence or absence of certain factual circumstances.’ While it is only natural for the Commission to base its decisions on facts, the provision simultaneously evokes the feeling that it may be abused by the Commission to micromanage business initiatives, similar to the commitment procedure.⁸³

It has to be argued that, as an alternative or supplement to guidance letters, adopting Article 10 decisions also has significant potential. Firstly, the fact that non-infringement decisions are already grounded upon Regulation 1/2003 gives the Commission a head start. Secondly, as Recital 14 also envisages, the

⁸⁰ 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.

⁸¹ Federal Ministry for Economic Affairs and Energy, ‘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.

⁸² Commission, ‘Update of the Informal Guidance Notice’ (*European Commission*, 24 May 2022) <https://ec.europa.eu/competition-policy/public-consultations/2022-informal-guidance-notice_en> accessed 13 June 2022.

⁸³ Finn Kydland & Edward Prescott, ‘Rules Rather than Discretion: The Inconsistency of Optimal Plans’ (1977) 85(3) *Journal of Political Economy* 473.

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.⁸⁴ 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.⁸⁵ As the Court pointed out in *Automec II*, recipients of a favorable comfort letter can require the Commission to proceed to a formal decision.⁸⁶ Exemptions do not exist anymore, since only the Commission is empowered to adopt a non-infringement decision, and NCAs are unable to issue negative clearance decisions. Therefore, 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.⁸⁷ 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.⁸⁸

Another alternative to comfort letters may require a slight shift in the Commission's thinking. The comfort letter and the guidance letter mechanisms, currently under refurbishment, are horizontal tools. In other words, they apply to virtually all conduct falling within the scope of EU antitrust laws. An alternative approach may adopt a vertical outlook instead, based on the characteristics of specific industries. Comfort letters effectively flip the switch in EU competition law from a *sic utere* principle to a prior restraint principle. This effectively means that – instead of businesses acting freely and only being prosecuted once there is sufficient suspicion regarding the legality of their activities – the Commission is empowered to operate as a *de facto* 'priest of the market', giving a blessing to business ventures deemed fit.⁸⁹ This precautionary

⁸⁴ 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.

⁸⁵ Case T-24/90, *Automec Srl* [1992] ECR II-2223.

⁸⁶ Valentine Korah, 'Restrictions on conduct and enforceability: *Automec v Commission II*' (1994) 15(3) *European Competition Law Review* 175.

⁸⁷ Case C-375/09, *Tele2 Polska* [2011] ECR I-03055.

⁸⁸ Katarina Pijetlovic, 'Reform of EC antitrust enforcement: criticism of the new system is highly exaggerated' (2004) 25 (6) *European Competition Law Review* 356.

⁸⁹ Timothy Sandefur, 'Pushing Back Against a Permission Society' (*Discourse Magazine*, 1 August 2022) <<https://www.discoursemagazine.com/politics/2022/08/01/pushing-back-against-a-permission-society/>> accessed 2 August 2022.

approach is likely to prove either unfeasible or ineffective against certain industries, such as dynamic platform markets; by contrast, they might be useful for sectors where potential damages are greater and more certain, such as environmental issues.⁹⁰ For example, the recent proposal for a Corporate Due Diligence Directive envisages several provisions that authorize the Commission to issue informal guidance letters and voluntary model contractual clauses for undertakings, with potential ramifications reaching competition law as well.⁹¹

All in all, it is apparent that the resurrection of comfort letters brings about more uncertainties than clarifications. Although only time will tell the avenues through which the Commission ends up traveling to formalize the procedure, one thing seems solid: the post-post modernization era in European competition law has begun.⁹² This article aspired to delineate the contours of the controversy surrounding only one aspect of this 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.

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⁹⁰ Aurelien Portuese, 'Precautionary Antitrust: A Precautionary Tale in European Competition Policy' in Mathis & Tor (eds), *Law and Economics of Regulation* (Springer 2021).

⁹¹ Selcukhan Unekbas, 'Diligence is Due Indeed: Competition Law as a Barrier to Sustainable Supply Chains?' (*Kluwer Competition Law Blog*, 4 July 2022) <<http://competitionlawblog.kluwercompetitionlaw.com/2022/07/04/diligence-is-due-indeed-competition-law-as-a-barrier-to-sustainable-supply-chains/>> accessed 2 August 2022.

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