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# The Commission's Institutional Transparency: Informal Guidance Letters in EU Competition Law

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SUMMARY: 1. Introduction: the Decentralised Enforcement of Competition Law and the Need for Guidance. - 2. The Procedural Framework of Informal Guidance Letters. - 3. Informal Guidance Letters on Sustainability and Digitalisation. - 4. Conclusion: the Distinct Benefits and Inherent Limitations of Informal Guidance Letters

## 1. *Introduction: the Decentralised Enforcement of Competition Law and the Need for Guidance*

Following the entry into force of Regulation (EC) 1/2003,[1] EU antitrust rules have been enforced by the Commission and the national competition authorities (hereinafter, "NCAs") within a multi-level enforcement system.[2] Regulation (EC) 1/2003 notably abolished the Commission's exclusive power to grant "individual exemptions" to anti-competitive agreements[3] and

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[1] 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 (hereinafter, "Regulation (EC) 1/2003").

[2] Although this work focuses on antitrust rules, *i.e.*, those rules concerning agreements and unilateral conduct, it is noteworthy that the underlying assessment framework in interpreting and applying antitrust rules follows similar steps in merger control and State aid when it is oriented by guidance measures, such as notices, guidelines, and block exemption regulations. CJEU, 2 April 2009, Case C-260/07, *Pedro IV Servicios SL v Total España SA*, para. 36; O. STEFAN, *Soft Law in EU Competition and State Aid: An Imperfect Solution to Grand Regulatory Challenges*, in C. COLOMBO, K. WRIGHT, M. ELIANTONIO (eds.), *The Evolving Governance of EU Competition Law in a Time of Disruptions - A Constitutional Perspective*, Oxford, 2024, pp. 213-231; R. WHISH, D. BAILEY, *Competition Law*, 10th edn, Oxford, 2021, pp. 52-53, 172-176, 212-215, 219-223, 256-257 and 866.

[3] The term "exemption" refers to the former enforcement regime under Regulation (EEC) 17/1962, under which undertakings were required to notify their agreements to the Commission to obtain an individual exemption pursuant to what is now set out in Article 101(3) TFEU. Article 1 of Regulation (EC) 1/2003 abolished this notification system,

decentralised the enforcement of Articles 81 and 82 of the Treaty establishing the European Community (hereinafter, "TEC") to NCAs.[4] This paradigm shift requires undertakings to self-assess whether their agreements and unilateral conduct infringe antitrust rules and whether they satisfy the conditions for "exemption" underpinned by countervailing benefits.[5] At the same time, NCAs now share responsibility with the Commission for the efficient, effective and coherent application of Articles 101 and 102 TFEU (former Articles 81 and 82 TEC).[6]

It is true that, under Article 2 of Regulation (EC) 1/2003, the authority alleging an infringement must prove a breach of Article 101(1) or Article 102 TFEU, whereas the undertaking bears the burden of proving that its conduct fulfils the criteria of Article 101(3) TFEU or qualifies for an efficiency defence under Article 102 TFEU.[7] However, the interpretation of these provisions by both the undertaking and the authority relies on a concrete legal and economic assessment of the practice's function. Consequently, the prohibitions laid down in Articles 101 and 102 TFEU should be applied *ope legis*[8] and based on a "unitary reasoning", despite the distributed burden of proof.[9] As a result of

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rendering the exceptions in Article 101(3) TFEU – that is, the potential benefits and conditions under which restrictive agreements may be permitted – directly applicable. The informal guidance letters examined in this work recall the functions of the so-called "comfort letters" previously issued under Regulation (EEC) 17/1962. Although not formally recognised by the Treaty or the Regulation, comfort letters formed part of the Commission's administrative practice, offering informal reassurance either that Article 85(1) EEC was inapplicable or that an exemption under Article 85(3) could be envisaged, without producing binding legal effects. R. WHISH, D. BAILEY, *op. cit.*, pp. 172-175.

[4] Regulation (EC) 1/2003, cit., Article 5.

[5] Commission, 'Evaluation of Regulations 1/2003 and 773/2004', 5 September 2024, 216 final, pp. 17-19.

[6] *Ibidem*; D. CHALMERS, G. DAVIES, G. MONTI, *European Union Law - Text and Materials*, 4th edn, Cambridge, 2019, pp. 900-903.

[7] F. GHEZZI, G. OLIVIERI, *Diritto Antitrust*, 3rd edn, Torino, 2023, pp. 143-145.

[8] Regulation (EC) 1/2003, cit., Article 1.

[9] In contrast to the so-called "rule of reason" applied in the United States – which allows for a single-stage balancing of pro- and anti-competitive effects – the European Union maintains the two-step approach to the interpretation and application of competition law. However, the analysis advanced in this work is grounded in the unitary mode of reasoning, as reconstructed by the case law of the CJEU. This unitary reasoning applies both to the self-assessment carried out by private actors in formulating their competitive strategies and to public enforcement by competition authorities. For a detailed analysis of the unitary reasoning adopted by private actors and competition authorities when (self-)assessing the legal and economic function of agreements and other competitive conducts, see CJEU, 27 June 2024, Case C-201/19 P, *Servier SAS and Others v European Commission*; 30 January 2020, Case C-307/18, *Generics (UK) Ltd and Others v Competition and Markets Authority*, paras 103-107; M. LIBERTINI, *Diritto della Concorrenza dell'Unione Europea*, Milano, 2014, pp. 145-154.

this *ope legis* application, the argument advanced here is that undertakings and competition authorities may adopt a narrower interpretation of Article 101(1) or Article 102 TFEU with a view to pro-actively supporting public interest objectives embedded within EU competition policy.

EU competition policy has consistently adapted to evolving societal challenges.[10] In recent years, it has gained renewed momentum in light of the so-called "twin transitions" of sustainability and digitalisation, as outlined in the Commission's Communication 'A competition policy fit for new challenges'.[11] The revised policy seeks to support the sustainable and digital transformation of society, «while allowing customers and consumers a fair share of the resulting benefits».[12] To this end, it promotes a flexible yet robust enforcement approach, capable of incentivising pro-competitive practices that advances sustainability and digitalisation, while safeguarding legal certainty for undertakings.

This dynamic model of (self-)assessment entails inherent risks of fragmentation and legal uncertainty, especially if left without guidance.[13] While the Commission no longer formally approves individual agreements, it has acknowledged the enduring need to provide clarity and orientation to market participants, particularly in relation to novel or complex issues.[14] This

[10] The terms "competition policy" and "competition law" are often used interchangeably in academic discourse, reflecting their close interrelation; however, they denote distinct concepts for the purposes of the present work. Competition policy refers broadly to the strategies and set of measures – such as informal guidance letters, notices, guidelines and block exemption regulations – adopted by public authorities to promote competition and prevent anticompetitive practices. It also includes the evolving interpretation and application of competition law through public and private enforcement. By contrast, competition law refers to the specific legal rules that give effect to the policy objectives, addressing practices such as restrictive agreements, abuse of dominance, concentrations, and State aid that may harm competition. While competition policy is operationalised through competition law, developments in competition law enforcement likewise inform and reshape policy orientation. For a similar perspective, compare with the definitions provided by A. JONES, B. SUFRIN, N. DUNNE, *EU Competition Law: Text, Cases and Materials*, 8th edn, Oxford, 2023, p. 2; E. FOX, D. GERARD, *EU Competition Law – Cases, Texts and Context*, 2nd edn, *Edward Elgar*, Cheltenham, 2023, pp. 1-16.

[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A competition policy fit for new challenges, 18 November 2021, COM 713 final (hereinafter, "A competition policy fit for new challenges").

[12] *Ibidem*, p. 6. Interestingly, the Commission adopted the exact wording of Article 101(3) TFEU, which sets out the exception to the prohibition of anti-competitive agreements.

[13] For historical and empirical findings on the divergent approaches and conclusions adopted by national competition authorities, see O. BROOK, *Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities*, in *CMLR*, Vol. 56, no. 1, 2019, p. 121 ff.

[14] A competition policy fit for new challenges, *cit.*

work examines the role of the Commission's informal guidance letters as a significant instrument for enhancing legal certainty and institutional transparency, focusing on two recent instances addressing sustainability and digitalisation challenges.[15]

## 2. *The Procedural Framework of Informal Guidance Letters*

In its efforts to provide transparency within the multi-level enforcement system, and to reduce the risks of fragmentation and legal uncertainty inherent in the tension between rules and exceptions, the Commission relies on procedural mechanisms. Article 10 of Regulation (EC) 1/2003 provides that, where the EU public interest so requires, the Commission may adopt a "finding of inapplicability" declaring that Article 101 and/or Article 102 TFEU do not apply to a particular agreement or unilateral conduct. Undertakings are not entitled to request such a finding; however, Recital 14 of Regulation (EC) 1/2003 empowers the Commission to adopt such declarations to clarify the law and ensure coherent application across the Union. The same recital states that such declarations may prove particularly useful where new types of agreement or conduct arise in areas not yet covered by established case law or administrative practice. Nonetheless, the Commission has thus far refrained from adopting any formal finding of inapplicability under Article 10.[16]

In contrast to formal mechanisms such as declarations of inapplicability, the Commission increasingly resorts to informal procedural mechanisms to stimulate pro-competitive practices aligned with sustainability and digitalisation. As part of its competition policy, the Commission has revised a range of notices, guidelines and block exemption regulations, which shape the enforcement of competition law in practice.[17] Moreover, it stands ready to

[15] For an overview in Italian of the recent two guidance letters issued by the Commission, see L. BRANDOLI, *Orientamenti informali della Commissione europea: le prime guidance letters dall'aggiornamento del 2022*, in *EJ*, 1st September 2025, rivista.eurojus.it/orientamenti-informali-della-commissione-europea-le-prime-guidance-letters-dallaggiornamento-del-2022/ (accessed 8 September 2025).

[16] R. WHISH, D. BAILEY, *op. cit.*, p. 272.

[17] For a general overview of the numerous soft-law and hard-law instruments guiding the assessments carried out by undertakings and competition authorities, as revised by the Commission, see Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A competition policy fit for new challenges, 19 November 2021, COM 713 final/2' (hereinafter, "Annex to A competition policy fit for new challenges"). The revision process is still ongoing.

provide individualised responses to undertakings seeking to pursue sustainability and digitalisation while remaining compliant with EU competition law.[18] These responses take the form of the so-called "informal guidance letters".

Until the COVID-19 crisis, the Commission had not issued any such informal guidance. However, in 2020 it did provide informal guidance letters to undertakings operating in diverse sectors, such as medical equipment,[19] pharmaceuticals,[20] cloud-computing,[21] and road transport.[22] Some scholars argued that judicious use of "declarations of inapplicability" and "informal guidance" could allow the Commission to develop a body of interpretative precedents in support of the sustainable and digital transformation.[23] The importance of legal certainty for fostering innovation and investment is explicitly acknowledged in Recital 38 of Regulation (EC) 1/2003, which states that, where genuine uncertainty exists due to novel or unresolved questions of competition law, undertakings may seek "informal guidance" from the Commission.

Recital 38 and Article 10 of Regulation (EC) 1/2003 together respond to concerns raised by the abolition of the former system under which undertakings could notify agreements for individual exemption. In 2022, the Commission published a revised Notice on informal guidance concerning novel or unresolved questions arising under Articles 101 and 102 TFEU in individual cases (hereinafter, "Notice on informal guidance").[24] The Notice

[18] A competition policy fit for new challenges, *cit.*, pp. 11 and 15.

[19] Commission Press Release, 'Antitrust: Commission provides guidance on allowing limited cooperation among businesses, especially for critical hospital medicines during the coronavirus outbreak', 8 April 2020, ec.europa.eu/commission/presscorner/detail/%20en/ip_20_618 (accessed 8 September 2025).

[20] 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', 8 April 2020, COMP/OG – D (2020/04403).

[21] Commission, 'Feedback on the membership criteria and internal working rules of GAIA-X', 19 October 2021, COMP/C.6/SS/RI/vvd.

[22] L. HORNKOHL, A. JORNA, *Uncharted legal territory? – European Commission fines Volkswagen and BMW for colluding on technical development in the area of emission cleaning*, in *Kluwer Competition Law Blog*, 15 July 2021, legalblogs.wolterskluwer.com/competition-blog/uncharted-legal-territory-european-commission-fines-volkswagen-and-bmw-for-colluding-on-technical-development-in-the-area-of-emission-cleaning/ (accessed 8 September 2025).

[23] S. UNEKBAS, *The Resurrection of the Comfort Letter: Back to the Future?*, in *Yearbook of Antitrust and Regulatory Studies*, 2022, p. 37 ff.; R. WHISH, D. BAILEY, *op. cit.*, pp. 272 and 273.

[24] Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union

points out that undertakings typically have access to a substantial body of case-law, decisional practice, block exemptions regulations, guidelines, and other notices, enabling them to undertake a self-assessment of the legality of their commercial strategies.[25] However, it also acknowledges that there might be specific cases in which an individualised informal guidance letter would be appropriate.[26]

The Commission specifies that issuing an informal guidance letter would be considered only where the following cumulative criteria are satisfied: *a*) there is no existing case-law, guidance, or administrative precedent relating to the type of agreement or unilateral conduct; *b*) the matter is economically significant – taking into account factors such as consumer relevance, prevalence of the practice, scale of investment, and whether the practice relates to a structural operation (*e.g.*, the formation of a non-full-function joint venture); and finally, *c*) guidance can be given on the basis of the information already provided to the Commission, requiring no further fact-finding.[27] The Commission will not issue guidance letters in relation to purely hypothetical questions.[28]

A request for informal guidance must be accompanied by a detailed memorandum containing the information specified in the Notice.[29] The informal guidance letter sets out the relevant facts and the principal legal reasoning behind the Commission's interpretation.[30] The guidance letters are published on the Commission's website, subject to the deletion of any business secrets.[31] Crucially, guidance letters are not Commission decisions and do not legally bind national competition authorities or national courts.[32]

## 3. *Informal Guidance Letters on Sustainability and Digitalisation*

Two recent informal guidance letters illustrate the practical application and relevance of this instrument to address contemporary challenges related to

that arise in individual cases (guidance letters), 4 October 2022 (hereinafter, "Notice on informal guidance").
[25] Notice on informal guidance, *cit.*, para 3.
[26] *Ivi*, para. 4.
[27] *Ivi*, paras 7-8.
[28] *Ivi*, para. 9.
[29] *Ivi*, paras 10-14.
[30] *Ivi*, para. 20.
[31] *Ivi*, para. 22.
[32] *Ivi*, para. 27.

sustainability and digitalisation. These represent the first informal guidance letters issued under the revised Notice on informal guidance.

In July 2025, the Commission issued an informal guidance letter to two terminal operators in the port of Antwerp regarding a cooperation agreement aimed at significantly reducing CO2 emissions.[33] The agreement involved the joint development and deployment of a new technology for shore-side electricity supply to container vessels, specifically replacing diesel-powered generators. This initiative, directly addressing critical environmental sustainability objectives, presented a novel scenario for competition law analysis.

The Commission concluded that, based on the information provided, the agreement was unlikely to raise concerns under Article 101 TFEU. This assessment was primarily predicated on the clear environmental benefits, the limited impact on competition in the port services market, and the finding that the cooperation was genuinely necessary to achieve the stated environmental objectives. More precisely, the Commission considered that the agreement would not raise concerns under Article 101 TFEU, provided that specific safeguards were implemented. These safeguards include: *a*) ensuring that each participating terminal operator retains the ability to independently purchase straddle and shuttle carriers outside the scope of the agreement; *b*) capping the volume of demand pooled through the agreement so as to prevent anti-competitive foreclosure effects vis-à-vis equipment suppliers; and *c*) limiting the exchange of commercially sensitive information between participants strictly to what is necessary for the implementation of the cooperation. Moreover, the Commission's guidance is applicable for a period of five years and is confined to the territory of the European Economic Area (hereinafter, "EEA"). This specific guidance provides valuable insights into the Commission's current approach to assessing sustainability agreements, particularly those involving innovative technologies with clear positive externalities.

Furthermore, also in July 2025, the Commission issued a second informal guidance letter in response to a request concerning the creation of a licensing negotiation group in the automotive sector.[34] This group, comprising various

[33] Commission Press Release, 'Commission provides guidance on sustainability agreement to reduce CO2 emissions in European ports', 9 July 2025, ec.europa.eu/commission/presscorner/detail/en/ip_25_1769 (accessed 8 September 2025).
[34] Commission Press Release, 'Commission provides guidance on the creation of a licensing negotiation group in the automotive sector for the licensing of standard essential patents', 9 July 2025, ec.europa.eu/commission/presscorner/detail/en/ip_25_1768 (accessed 8 September 2025).

car manufacturers, seeks to collectively negotiate and obtain licences for standard essential patents (hereinafter, "SEPs") related to connected car technologies. This particular case exemplifies the inherent challenges posed by digitalisation, especially concerning intellectual property rights and competition law within innovation-driven markets.

The Commission's guidance acknowledged the potential efficiencies of such collective negotiation, notably in reducing transaction costs and promoting wider access to digital technologies. The proposed collective licensing arrangements were found not to raise concerns under Article 101 TFEU, subject to specific safeguards designed to mitigate anti-competitive risks. These safeguards include: *a*) that the group would negotiate licences only for standards that are not specific to the automotive sector, and solely where the combined market share of its members does not exceed 15% of the total demand for the relevant SEPs or standards; *b*) that the licensing negotiation group remains open to participation by other interested entities in the automotive sector, including both car manufacturers and component suppliers; *c*) that participation in negotiations with the group is voluntary for SEP holders, who remain free to join or exit negotiations at any time; and *d*) that exchanges of information among the group members are strictly limited to what is objectively necessary for the conduct of the joint licensing negotiations, with no disclosure of commercially sensitive information.

## 4. *Conclusion: the Distinct Benefits and Inherent Limitations of Informal Guidance Letters*

The issuance of these informal guidance letters represents a significant development in the Commission's nuanced approach to competition law enforcement, particularly as it navigates the substantive and procedural challenges posed by the green and digital transitions. Following the decentralisation of enforcement under Regulation (EC) 1/2003, undertakings have become primarily responsible for self-assessing the compatibility of their agreements and unilateral conduct with competition rules. This shift, while enhancing procedural efficiency, has simultaneously heightened the need for clarity and predictability, especially for novel or complex business practices, where the tension between rules and exceptions presents risks of fragmentation and legal uncertainty.

The informal guidance mechanism, as clearly illustrated by the aforementioned cases, offers several distinct benefits as a means of providing

dynamic substantive and procedural responses. Firstly, it enhances legal certainty: whilst not legally binding, the Commission's articulation of its preliminary enforcement stance provides undertakings with a valuable indication of the likely outcome of a competition law assessment. This is particularly salient for high-stakes investments in areas like sustainability and digitalisation, where significant resources are committed upfront. Secondly, it actively promotes compliance: by offering a structured pathway for proactive engagement, the mechanism encourages undertakings to seek guidance *before* implementing potentially problematic agreements, thereby pro-actively fostering compliance with EU competition law. Thirdly, it facilitates adaptation to new challenges: the informal guidance letters unequivocally demonstrate the Commission's agility in addressing emerging issues, such as environmental sustainability and the intricate complexities of digital technologies. This allows for a more dynamic and responsive interpretation of competition rules in areas where established precedents may be lacking. Finally, it contributes to transparency, albeit within clearly defined limits: whilst informal guidance letters remain confidential in certain parts, the systematic publication of press releases detailing their issuance and general subject matter significantly contributes to broader market transparency, enabling other undertakings facing similar situations to gain insights into the Commission's prevailing approach and thinking.

It is equally important to acknowledge the inherent limitations of informal guidance letters. Their non-binding nature inherently means that undertakings ultimately retain full responsibility for ensuring their conduct's compliance. Furthermore, given that the Commission's assessment is based on the information submitted by the requesting parties, the resulting evaluation reflects a specific factual matrix which may not necessarily encompass all relevant market dynamics. Accordingly, other market participants should exercise caution when extrapolating from such guidance.

## ABSTRACT (ita)

La comunicazione della Commissione «Una politica della concorrenza pronta a nuove sfide» incoraggia le imprese a favorire la sostenibilità e la digitalizzazione, valutando la conformità delle proprie pratiche al diritto della concorrenza dell'UE. Questo modello decentralizzato migliora l'efficienza procedurale, ma comporta al contempo rischi di frammentazione e incertezza giuridica. Il presente contributo analizza le lettere di orientamento informale della Commissione come strumento non vincolante volto ad attenuare tali rischi. Sebbene la Commissione abbia fatto ricorso a tale strumento durante la crisi da COVID-19, le due recenti lettere relative a un accordo in materia di sostenibilità e a un gruppo di negoziazione di licenze rappresentano i primi esempi di utilizzo in risposta alle sfide della sostenibilità e della digitalizzazione. Pur essendo limitate per natura non vincolante e per portata contestuale, tali lettere promuovono un dialogo tra imprese e autorità, rafforzando la trasparenza nell'evoluzione della prassi applicativa europea.

## ABSTRACT (eng)

The Commission's Communication, 'A competition policy fit for new challenges', encourages undertakings to self-assess the compatibility of their practices with EU competition law in the context of the green and digital transitions. While this decentralised model enhances procedural efficiency, it also entails inherent risks of fragmentation and legal uncertainty. This paper examines the Commission's informal guidance letters as a non-binding administrative instrument designed to mitigate these risks by providing orientation. While the Commission first resorted to this instrument during the COVID-19 crisis, the two recent guidance letters concerning a sustainability agreement and a licensing negotiation group are the first to address the challenges of sustainability and digitalisation. Although inherently limited by their non-binding nature and context-specific scope, informal guidance letters offer undertakings a structured pathway for engagement while contributing to transparency in the Commission's evolving enforcement practice.